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Zinn and Fortas: Fair Play and Civil Disobedience

ZINN AND FORTAS: FAIR PLAY AND CIVIL DISOBEDIENCE

Sara Ghadiri

Abe Fortas and Howard Zinn both present arguments defending civil disobedience, but Zinn has the more defensible position. Both of them argue within the framework of the fair play theory of obligation, where obligation is derived from the expectation that both parties will follow the rules of the game. Zinn, however, argues that the individual ought to be able to negotiate their side of the rules.

Fortas states that we owe a duty of obedience to law as a “moral and legal imperative.”¹⁵ Zinn counters, stating that the Fortas is inconsistent. According to Zinn, Fortas is actually arguing that obedience to the law supersedes obedience to morality. To that point, Zinn argues, “there can be no moral imperative to obey an immoral law, unless the very idea of obedience has an overriding moral value.”¹⁶ We cannot, therefore, obey immoral laws. The rule of law as described by Fortas is a necessary condition for justice. Without the rule of law, we would have no justice, and justice is paramount.

Zinn debunks the necessity of Fortas’ rule of law, however. He has four claims: that the idea that disobedience is wrong because it fosters a general disrespect for all laws, including good ones, is false; it is empirically false that disobedience of bad laws creates disrespect for all laws; while civil disobedience can have a proliferating effect, it does not lead to a general breakdown of order; and the idea that civil disobedience will not lead to “bad” groups using civil disobedience. These claims all entail that the rule of law is not necessary for justice.

It is from the rule of law, though, Fortas claims, that we derive order. The rule of law means that individuals must accept rulings of the court and serve what punishment they are dealt regardless of their immorality. We risk losing any semblance of that order and the stability of the law would be undermined if we do not accept the punishments given to us. Order, he argues, is just because it allows for change by the ballot box, or by peaceful means of protest. Fortas seems to place order before justice.

Zinn argues contrarily that order and justice ought to be on the same footing. Were that the case, he says, everything would be fine and no protest or civil disobedience would be necessary. It is actually because the rule of law hides injustices, that civil disobedience is necessary. The rule of law does not create order, but rather pretends to keep the peace in order to perpetuate a false social conception of order. Individuals protest because the rule of law does preserve justice. Thus, the rule of law should not be preserved by acquiescing to unjust punishment. It is to this point that Zinn argues that those who commit acts of civil disobedience should not be compelled to serve punishment for disobeying an immoral law. “When unjust decisions are accepted, injustice is sanctioned and perpetuated.”¹⁷ If we do not require the rule of law for a sense of order, and we do not wish to sanction injustice, it is best that we commit acts of civil disobedience. If justice and order are not held in equal esteem, justice ought to be above order.

¹⁵ Fortas 1968, 18.

¹⁶ Zinn 2002, 13.

¹⁷ Ibid., 29.

Conversely, Fortas states that the system and the structure thereof allow full opportunity for both the state and the individual to bring their claims before a court, thereby limiting the amount of injustice that should occur. He also claims that the system promotes lawfulness for all, and states, "just as we expect the government to be bound by all laws, so each individual is bound by all laws."¹⁸ Furthermore, Fortas argues that a citizen cannot demand that others obey a law while he does not follow it and is free of punishment.

Zinn rejoins that the language indicates that the government being bound by law is expected, while the citizen's being bound is a fact. Thus, Fortas' claim that the law seeks to equalize the citizen and the state in manners to present contention is inconsistent. Zinn argues that the government picks and chooses what laws it chooses to follow, citing the inconsistent adherence to the Fourteenth Amendment. He argues that if that is the case, citizens should be allowed to pick and choose what laws they follow based on their individual concept of morality? It is for this reason that Zinn argues that if there is to be obligation from the fair play conception, both sides ought to be able to decide the rules.

¹⁸ Fortas 1968, 33.