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Book Review

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BOOK REVIEWS

CONCERNING DISSENT AND CIVIL DISOBEDIENCE. Abe Fortas. New American Library, Box 2310, Grand Central Station, New York, New York 10017. Pp. 127 (Paperback), 50 cents. 1968.

This short book by Mr. Justice Fortas is in the best traditions of American publicists since the penning of the Federalist papers. Whatever the precedent for such writings, Justice Fortas' remarks show the difficulties encountered by judges who have spoken extra-judicially. Publishing in May 1968, Justice Fortas remarks that: "laws forbidding the burning or desecration of the national flag have existed for many years, and it is hardly likely that anyone would seriously contest their constitutionality." In June 1968, the Supreme Court noted probable jurisdiction in *Street v. New York*[1] presenting this very question.

The justice may have undertaken an impossible task—a "simple statement" of "the basic principles governing dissent and civil disobedience in our democracy." But whether his error was in the undertaking or in the implementation, his over-simplification of a complex problem has the unfortunate effect of placing the imprimatur of a Supreme Court justice upon charges that those who disagree with this simplified account are either inexcusable morons or incorrigible evildoers. Justice Fortas' occasional caveats do not convincingly convey the possibility that the problems are more profound than his brief treatment of the problem can point out.

The book presents its topic as a triumvirate of legal and moral perplexities: "What is the law of dissent?"; "Civil disobedience"; and "The revolt of youth"—The solutions reinforce one's innate suspicions of a troika.

As the paradigm for his discussion of civil disobedience, Justice Fortas chooses *Brown v. Louisiana*,[2] involving a civil rights sit-in at a public library. He says: "The law violation is excused only if the law which is violated (such as a law segregating a public library)—only if *that law itself* is unconstitutional or invalid." (Emphasis in original). But the statute involved in Brown did not segregate a library; it was a run-of-the-mill, garden variety breach of the peace statute.[3] It was never contended that the law segregated the

1. 392 U.S. 923 (1968), opinion below at 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).
2. 383 U.S. 131 (1966). Judgment announced by Fortas, J. with opinion in which Chief Justice Warren and Mr. Justice Douglas joined.
3. LA. REV. STAT. ANN. § 14:103.1 (Supp. 1967).

library, merely that it barred anti-segregation demonstrations in the library. That law is invalid only when and if applied in situations protected by first amendment guarantees, or if it be so broad that it unreasonably discourages the exercise of first amendment rights. Justice Fortas recognizes this but hides it from his readers by referring to "valid laws reasonably designed and administered to avoid interference with others," as if one need only glance upward (or downward or inward) to find such a label on each section of the code annotated.

Civil disobedience is seen as "a person's refusal to obey a law which the person believes to be immoral or unconstitutional." This statement of the issue is unfortunate since the refusal to obey an unconstitutional law is not civil disobedience; rather it is the embodiment of lawfulness. Fortas, obviously in sympathy with some acts of civil disobedience, attempts to distinguish disobedience of a law to protest another. "We confront instances of riots, sporadic violence, and trespass," he states, implying that trespass and physical violence are of the same order of evil. It is this priority of property rights over personal rights that has been the subject of dispute. The test of whether one is violating the objectionable law, vel non, can hardly be taken seriously as one reviews the scores of trespass, disorderly conduct and similar laws allegedly broken during peaceful civil rights protests.

Finally, Justice Fortas sees in the revolt of youth the moral idealism behind dissent and civil disobedience. He points out, as if it were relevant, that objection to participation in a particular war is not within the legal theory of conscientious objection. Thus he reflects the general American consensus that moral issues are important while political issues cannot be a matter of conscience.

As to the legal implications of selective conscientious objection, he can only say, "it's stretching the point to say that the Nuremberg principle supports the individual's refusal to submit to induction for service in a war which he considers immoral and unjustified." His authority for this is his divination of the thoughts in the minds of the drafters of the Nuremberg charter. Would he require the same prescience of James Madison in cases raising an issue of federal constitutional law?

Concluding his optimistic presentation, Justice Fortas proudly points out that the use of the ballot box, not "sporadic incidents of violence . . . have effected the current social revolution." Does Justice Fortas wonder at the strange coincidence of sudden ballot box effectiveness and events at Selma, Detroit, Watts and Columbia?

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North Dakota Supreme Court

In Memoriam

Mr. J. H. Newton

Bismarck, North Dakota

November 22, 1968