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Fortas: Concerning Dissent and Civil Disobedience

Terrance Sandalow
University of Michigan Law School

Michael E. Tigar

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 I

Noah Chomsky has written of Justice Fortas' essay that it "is not serious enough for extended discussion."[1] It would be a mistake to dismiss the essay so lightly. The prestige of Justice Fortas' office almost inevitably will gain for the essay an audience it would not otherwise have had,[2] among whom will be those who will confuse the office with the argument. For some this confusion will insulate the argument from criticism.[3] For others it will tarnish the office.

I.

Concerning Dissent and Civil Disobedience is one of a series of essays published under the general heading "broadside," which, the publisher informs us, is defined by Webster as "a vigorous, effective attack . . . a political message." The question of effectiveness aside for the moment, the definition—and especially the latter portion of it—accurately characterizes what Justice Fortas has written. For the essay is, from one perspective, a political document, and not merely in the sense that it pertains to government. Recurrently, Justice Fortas addresses himself to issues which divide the nation. At a time when the responsiveness of our political processes has itself become a matter of widespread debate, he asserts that "our democratic processes do indeed function, and . . . they can bring about fundamental response to fundamental demands . . ." (p. 64). In the midst of a period of national anguish with few parallels in our history, he writes that "Negroes and the youth-generation . . . have triggered a social revolution which has projected this nation, and perhaps the world, to a new plateau in the human adventure" (p. 19).

The political aspect of the essay emerges most strikingly in an illuminating three-page passage in which, ostensibly as part of an argument against selective conscientious objection to military service, Justice Fortas briefly describes domestic opposition to nearly all the wars in which the United States has been engaged in terms calculated to suggest parallels to current opposition to our involvement in Vietnam (pp. 52-55). Some wars require no defense to a contemporary

1. Chomsky, Lauter, & Howe, *Reflections on a Political Trial,* The New York Review of Books, Aug. 22, 1968, at 28.

2. Within six months of publication, 750,000 paperback and 7,000 hard cover copies of the essay had been sold. N. Y. Times, Nov. 5, 1968, at 48, col. 6.

3. *See, e.g.,* the review by Eliot Fremont-Smith in N. Y. Times, May 27, 1968, at 45.

American audience and as to them Justice Fortas as an able advocate offers none, leaving the reader to infer for himself the unreasonableness of the opposition. But since not all our wars are so clearly understood, Justice Fortas is careful, where necessary, to convey the appropriate moral. Thus, we are told, after Jackson won the battle of New Orleans and the Treaty of Ghent was signed, "[t]here was an immediate reversal of public opinion. The Federalist party, which had opposed the war, soon disappeared" (p. 53). So also for the Mexican War. Opposition to it was intense and it was condemned both in Congress and the press, "[b]ut after the Battle of Buena Vista, the same Whig journals [which earlier had denounced the war] hailed the 'brilliant war' and General Taylor was chosen as the Whig candidate for President" (p. 54). The relevance of this history to the moral or legal validity of selective conscientious objection, though asserted, is never made clear. What emerges instead is the none-too-subtle suggestion that if only we persevere in Vietnam, our policies will be vindicated and our leaders rewarded, their popularity restored and their place in history secure.[4]

Although the suggestion is perhaps reassuring to former President Johnson, disquiet seems a more appropriate response from those who are less concerned with his popularity and place in history than with the institutional integrity of the Supreme Court and the maintenance of its role in American life. To be more specific: the thinly veiled defense of the former President's Vietnam policy—and in a larger sense the decision to publish this pamphlet at the time and in the terms in which it was written—create a sense of unease as to whether Justice Fortas put aside the representation of his former client when he assumed judicial office. Elaborate argument to establish the peril of such doubts is hardly necessary. Public acceptance of the Court's unique role depends in substantial measure upon a belief in the disinterestedness of the Justices. Even in normal times, effective discharge of the Court's responsibilities requires that its members at least strive to meet the standard set for Calpurnia. The demands upon the Justices are even greater when, as now, the Court is under siege and, even more ominously, all the institutions of government are held suspect by a significant minority of the popula-

4. Pete Seeger has made essentially the same point, though from a rather different perspective:

What did you learn in school today, dear little boy of mine?
What did you learn in school today, dear little boy of mine?
I learned our government must be strong.
It's always right and never wrong.
Our leaders are the finest men
And we elect them again and again.
And that's what I learned in school today,
That's what I learned in school.

Taken from the record album *We Shall Overcome* (Columbia, CL-2101, CS-8901, Jan. 1964).

tion, including many of those from whom leadership in future years would normally be anticipated. The withdrawal from active involvement in public affairs which traditionally has been assumed to follow appointment to the Court is rooted in wisdom, for it helps to inspire public confidence that the Justices are indeed disinterested, their deliberations unembarrassed by involvement with the men and events they are required to judge.

Potentially more is at stake than the Court's public image, however. There is also the reality of the essay's political undercurrent. We have lost the innocence of earlier generations. Judges do make law, and the law which they make is in no small part influenced by their personal philosophies and their loyalties. But it has been generally understood that this inevitably personal element of judicial decision is to be disciplined by detachment from the men and events potentially affected. Justice Fortas has himself underscored one element of this understanding by stressing an independent judiciary as a main support of his argument for adherence to law (pp. 23-24).[5] Surely, however, an "independent judiciary" connotes more than the protection of the Court from outside coercion. Independence may be threatened from within as well as from without.[6]

Justice Fortas' comments upon the war, his oblique but unmistakable commendation of the Johnson Administration for its toleration of opposition to the war (pp. 21-22), and his extravagant praise of the accomplishments of the recent past cannot be isolated from his earlier role as presidential confidant, advisor, and troubleshooter, or from the recent revelations concerning his continuing participation in the councils of the Administration. The mutually reinforcing tendency of the essay and these activities, one fears without ever being entirely certain, is to threaten that detachment from political decision upon which rests not only public confidence in the Court but an important justification for judicial review. Few would question the imperative responsibility of the members of the Court to disengage themselves, so far as humanly possible, from the loyalties of past association which may impinge upon their judicial responsibilities. That effort places enough strain upon human capacity without the added burden of a continuing relationship.[7]

5. For an even stronger statement, *see* Fortas, *Dangers to the Rule of Law*, 54 A.B.A.J. 957, 958-59 (1968).

6. To avoid any possibility of misunderstanding, let me make explicit that I am not suggesting Justice Fortas has been subject to outside influence in the decision of cases to come before the Court. The Justice testified during the recent confirmation hearings that he and the President had never discussed cases pending in the Court and I see no reason to doubt his word. My concern is with a subtler problem, the potential influence upon decision of continued identification with the Administration and its policies.

7. Justice Fortas is not, of course, the first member of the Court whose involvement in public and even political affairs has continued after the assumption of judicial

There is a possibility that I have misread the essay and that what seemed to me an undercurrent of defense of the Johnson Administration ought not, in fairness, to be so understood. Yet, the risk of such a reading is inherent in the undertaking. At the very least, Justice Fortas, by the publication of this essay, has become a participant in a highly significant and emotionally charged political struggle in which the former President is necessarily implicated. His identification with the Administration, and with President Johnson personally, inevitably colors the interpretation of what he has written, so that any argument which redounds to the benefit of the Administration is likely to be read as intended for that purpose.

II.

The decision to publish this essay seems to me a regrettable one even apart from its political tone. Its subject, the means by which our society shall engage in political debate, may well become, and perhaps already is, one of the most significant domestic issues of our time. Aspects of the issue are before the Court currently, and there is no doubt that others will engage its attention in the near future. Perhaps more than for any other issue of such consequence, the Court's decisions may be of decisive importance in assisting the nation to achieve a wise course in the years ahead. Any impairment of the Court's potential contribution is, therefore, an appropriate cause of public concern and much to be deplored. Publication of this essay by Justice Fortas, I believe, involves precisely such a risk.

The intertwining of legal and ethical principles involved in a discussion of the appropriate limits of dissent and the role of civil disobedience makes almost inescapable the anticipation of questions which will arise before the Court. An examination of the essay reveals that Justice Fortas has not avoided this difficulty. There are at least four such unresolved legal issues on which Justice Fortas has taken a position, and it may well be that I have missed some.

> (1) "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 or legality" (p. 16).[8]

office. *See, e.g.*, ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 18-21 (M. Freedman ed. 1968); A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 263-74 (1956). A book review does not provide adequate opportunity for consideration of the full range of issues which a more detailed investigation and analysis of past practice might suggest. The matters touched upon in the text, nevertheless, seem to me to strike very close to the heart of what most students of the Court would view as inappropriate extrajudicial activity by a member of the Court.

8. *But see* Street v. New York, 20 N.Y.2d 231, 229 N.E.2d 187 282 N.Y.S.2d 491 (1967) in which, after publication of the essay, probable jurisdiction was noted, 392 U.S. 923 (1968), to consider the validity of a "flag desecration" statute as applied to

(2) Selective conscientious objection to military service "is hardly consistent with the basic theory of organized society" (pp. 51-52).[9]

(3) The Nuremberg principles afford no basis for refusal to participate in war and, at least so far as low-level military personnel are concerned, for refusal to carry out orders issued in the ordinary prosecution of war (pp. 55-57).[10]

(4) At several points and in varying contexts, Justice Fortas declares that motive "does not confer immunity for law violation" (p. 32; pp. 16, 34).[11]

My concern is not, at this point, with the wisdom of these views nor with their adequacy as legal principles. The more important issue, in my judgment, is the impact of their statement by a member of the Court upon his ability to contribute to the discharge of its responsibilities to the nation.

Justice Fortas is not, of course, the first member of the Court to use a vehicle other than a judicial opinion to announce his views on current legal questions. For a time, indeed, the Madison lectures seemed destined to replace the last Monday of the Supreme Court's term as the most frequent occasion for the announcement of new constitutional doctrines.[12] Yet, it seems fair to say that the weight of tradition is opposed to such extrajudicial pronouncements. The challenge to this tradition implicit in the recent breaches of it by some of our most distinguished judges raises the question whether its candid abandonment would be a useful step.

No lawyer who has sat through any substantial number of the seemingly interminable and in the end indistinguishable lectures and after-dinner speeches with which the profession is afflicted can fail to view sympathetically any break in tradition which promises to enliven these events. Discussion of concrete issues of contemporary significance would, in this perspective, be viewed by most as infinitely preferable to the endless paeans of praise to the rule of law, the

one who publicly burned an American flag as an expression of indignation at the attempted assassination of James Meredith. For a discussion of the legal issues, *see* Note, *Constitutional Law—Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 MICH. L. REV. 1040 (1968).

9. For a brief in support of a contrary view, *see* Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 1 (1967).

10. *But see*, Mora v. McNamara, 389 U.S. 934 (1967) (dissenting opinions); Mitchell v. United States, 386 U.S. 972 (1967) (dissenting opinion). *See also* O'Brien, *Selective Conscientious Objection and International Law*, 56 GEO. L.J. 1080 (1968).

11. *See* discussion at pp. 609-10 *infra*.

12. *See* Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961); Douglas, *The Bill of Rights Is Not Enough*, 38 N.Y.U. L. REV. 207 (1963); Fortas, *Equal Rights—For Whom?*, 42 N.Y.U. L. REV. 401 (1967); Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205 (1964); Wright, *Public School Desegregation*, 40 N.Y.U. L. REV. 285 (1963).

descriptions of how a particular court handles its case load, the expressions of alarm over crowded court dockets, and so on through the all too familiar list. Yet, much as any such contribution to the intellectual life of the profession is earnestly to be desired, the cost of achieving it in this way seems to me to be too great.

The traditional position with respect to extrajudicial discussion of legal questions by the Justices overlaps the policies underlying the Court's historic attitude toward advisory opinions. The considerations which counsel against issuance of such opinions by the Court are too familiar to the readers of this *Review* to require lengthy restatement here.[13] Extrajudicial pronouncements upon legal issues, even more than advisory opinions, are likely to suffer from the absence of an adversary process since the process from which they emerge is likely to lack even the adversarial component which inheres in a group effort. And, as with advisory opinions, the questions arise for discussion without concrete facts to aid in the definition of issues and to impart reality and significance to them.

Of course, it will not do for a law professor to press such criticisms too far, lest by doing so he discredit the academic role—and, much worse, his own efforts. Yet, neither will it do to defend the propriety of the trend toward extrajudicial consideration of unresolved legal questions on the ground that judges by their extracurricular writings might contribute to wise decision of these questions in much the same manner as academicians and other lawyers engaged in scholarly publication. To do so ignores the role of each in the ultimate enterprise. Although there is an understandable tendency on the part of those who have written on legal issues to view their own work as definitive, it seems more profitable to view the scholarly output as part of a continuing conversation. The attachment most of us feel toward what we have written leads to no embarrassment other than our own when, as is not infrequently true, the complexity of events or the deeper wisdom of others reveals the inadequacy of our theories. Ego involvement may blind an author to those inadequacies, but it does not impede continuation of the conversation by others.

The matter stands rather differently with respect to judges, however; not because their egos are more likely than those of others to be involved in the defense of what they have written, but because they are not likely to be less so. Judges may, of course, change their minds, and it would be foolish not to recognize that under the pressure of events, of counsel's arguments, or of deliberation with colleagues, positions advanced at an earlier time may on occasion be modified or abandoned. The only point I make is that both consciously and subconsciously it is likely to be a good deal more difficult

13. For a discussion and references to the literature, *see* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 75-81 (1953).

for them to do so if the position has been taken publicly. It is not a criticism of judges, but an awareness that they are human, that leads to an appreciation of the danger that the uniqueness of cases is likely to be lost in an effort to fit them into the mold of pre-existing theories or to find a vehicle for writing such theories into law. As the exchange of several years ago among Professor Hart, Judge Arnold, and Dean Griswold[14] amply demonstrated, there are enough impediments to collective effort on the part of the members of the Court without the addition of new ones. The Justices are, as Judge Arnold wrote, men of deep conviction and wide experience. Extrajudicial discussion of issues likely to arise before the Court poses a risk of deepening their convictions without widening their experience,[15] thereby accentuating the obstacles to a collegial effort and minimizing the opportunities for the refinement of ideas through collective deliberation. It is not, after all, necessary to glorify unanimity or even composure of differences among the Justices as the prime value to recognize that a cacophony of individual performances is unlikely to bring forth the best efforts of the Court as an institution or its members as individuals.

Some will argue that the logic of my criticisms leads to a conclusion that men who have led active political lives or who have written on legal issues ought not to be appointed to the Supreme Court, an obviously absurd result. But here, as elsewhere, countervailing policies come into play and the argument *reductio ad absurdum* is not very compelling. Men appointed to the Court will have played many parts. Few would have it otherwise. The loyalties of earlier associations and the investment of self in prior writing no doubt exert a continuing pull on the Justices, but it cannot be otherwise if the Court is to continue, as it has in the past, to draw strength from the diverse professional backgrounds of its members. No similar necessity attends the performance of nonjudicial functions after appointment to the Court.

The passage of time also makes a difference. As the practices of the Justices with respect to recusal suggest, loyalties weaken when not reinforced by continuing relationships. Issues change. The identification with earlier work lessens. The past is not lost, but its hold, in these matters, is not likely to be as great as that of the present.

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14. Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1959); Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

15. The point needs to be qualified, of course, in recognition of differences in the extracurricular writings of judges. *See* Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633 (1962). Historical reviews, statements of philosophy, and even the careful examination of an issue, perhaps without committing the judge to a particular point of view, do not involve precisely the same risk as a "broadside."

III.

To canvass adequately all of the issues raised by Justice Fortas—and those he did not raise though they are inextricably a part of the problem with which he is concerned—would extend this Review beyond any tolerable limit. What follows, therefore, is a sketch of what seem to me the major deficiencies of the essay.

Justice Fortas' central thesis can be summed up in several propositions, hopefully without doing it injustice:

1. The constitutional guarantees of access to the ballot box and of freedom of speech and the press afford citizens an effective means of protesting governmental policies with which they disagree.

2. The rights guaranteed by the first amendment are to be generously construed to permit not only "speech" in its pure forms but picketing, peaceful demonstrations, and other forms of organized activity; they do not, however, extend to violent conduct, activities seriously disruptive of the rights of others, or actions which otherwise violate valid laws.

3. The deliberate violation of law to achieve political ends can be morally justified only if it is nonviolent, if the unlawful conduct is limited to violation of the specific law which is the target of the protest, and if the violator submits to prosecution and punishment by the state. Justice Fortas plainly intends one further qualification, but I am not entirely clear as to its content. At points he seems to be saying that civil disobedience can be morally justified only if the violation is based upon a claim of constitutional right (pp. 29-36, 63). Elsewhere, however, he appears to introduce the possibility that the violation may be predicated upon a judgment that the challenged law is "basically offensive to fundamental values of life . . ." (p. 63).

These propositions are, plainly, closely interrelated. An ethical obligation to stay within the law in protesting governmental policies depends in large measure upon the existence of meaningful opportunities for altering those policies within the framework of the law. Conversely, the existence of such opportunities imposes an ethical obligation of obedience to law, at least for those committed to democratic ideals.

One difficulty with this argument, it seems to me, is that it reads as though it were written a decade ago, before the civil rights demonstrations, Vietnam, and Berkeley. Although Justice Fortas recurrently draws upon contemporary events to illustrate his argument, he seems in the end to have been uninfluenced by them. The consequence is a failure to cope with the complexity of events and thus

to shed light upon the enormously difficult issues they have produced.

Consider, for example, the set of ethical precepts laid down in discussing the deliberate violation of law to achieve political ends. The paradox with which Justice Fortas opens his essay provides a useful starting point for analysis:

> I fully accept the principle that each of us is subject to law; that each of us is bound to obey the law enacted by his government.
>
> But if I had lived in Germany in Hitler's days, I hope I would have refused to wear an armband, to *Heil Hitler,* to submit to genocide. This I hope, although Hitler's edicts were law. . . .
>
> If I had been a Negro living in Birmingham or Little Rock or Plaquemines Parish, Louisiana, I hope I would have disobeyed the state law that said I might not enter the public waiting room reserved for "Whites."
>
> I hope I would have insisted upon going into the parks and swimming pools and schools which state or city law reserved for "Whites."
>
> I hope I would have had the courage to disobey, although the segregation ordinances were presumably law until they were declared unconstitutional.
>
> How, then, can I reconcile my profound belief in obedience to law and my equally basic need to disobey *these* laws? [Pp. 9-10.]

The resolution of this paradox, for Justice Fortas, is to be found in a willingness to submit to punishment if after exhaustion of all available legal remedies the validity of the law has been sustained (pp. 29-30). But surely so easy an answer does not do justice to the difficulty of the ethical problem. One who failed to submit to genocide in Hitler's Germany, or to accept punishment for a refusal to participate in it, can hardly be viewed as morally blameworthy. Ethical behavior there lay in precisely the opposite direction; not submission, but active, violent resistance directed not only at the specific law but at disruption of the system. The point is no doubt somewhat unfair since, after his initial illustration, Justice Fortas directs his attention solely to the United States and premises his arguments upon the existence of our constitutional guarantees of access to government. But, even with such guarantees, surely it makes a difference whether the governmental policy in question is the social security program, the systematic degradation of a racial group, or genocide.

Five years ago, one might have argued—I seem to recall that I did argue—that the latter possibility was too unrealistic to be taken into account, that genocide could not be carried out by a democratic society. Yet among those who in the past several years have urged or committed acts of civil disobedience are undoubtedly sincere men and women who view the nation's course in Vietnam as genocidal or, at the very least, morally equivalent thereto. That view of the war

is neither so uncommon nor so lacking in foundation that it can be ignored in any discussion of the appropriate modes of public debate which lays claim to contemporary relevance. To those who hold such views, homilies concerning the meaning of the rule of law are not likely to be very helpful.

Is it really more ethical simply to refuse to participate in a war which one views as genocidal, accepting the punishment meted out by the authorities, than to seek out other, more dramatic—though unlawful—means by which to influence governmental policy? Does the answer to that question depend upon the nature of the unlawful conduct? Are there, more generally, relationships between the gravity of the evil believed to be wrought by a governmental policy and the means of protest which may justifiably be employed? How, when faced with the necessity of choice, does one go about deciding these questions without committing the sin of *hubris*? Other questions will doubtless occur to the reader. The point is that the difficult questions, but also the relevant ones, arise only at the point at which Justice Fortas ends his analysis. The failure of Justice Fortas to address himself to these questions—to recognize the differences among the various forms of protest which have been employed in recent years—has important consequences for his argument. It leads him to treat as raising similar moral issues conduct as dissimilar as draft card burning, mutilation of flags, occupation of academic buildings, and ghetto riots, notwithstanding the differences in the interests which each threatens. It causes him to lose sight of the varying significance of the interests sought to be advanced by those activities and of the impediments to use of more traditional forms of political activity as a means of advancing those interests. Yet, it is hard to see how ethical analysis can avoid such questions.

Nor is it easy to see how ethical analysis is advanced by framing issues in terms of the stark alternatives with which Justice Fortas confronts his readers. The deliberate violation of a law which "is not itself the focus or target of the protest," he writes, "constitutes an act of rebellion not merely of dissent" (p. 63). Precisely why this is so is never explained. Read literally, the argument treats a group of angry mothers who obstruct traffic or sit in at the mayors' office because of their inability to obtain a traffic light for a busy intersection as engaged in an "act of rebellion." Yet, as the illustration suggests, one may violate a concededly just law, even as a deliberate device of protest, without intending or creating that threat to the entire system of governmental authority which rebellion is ordinarily understood to imply. A more realistic analysis would recognize that the issues posed by recent events are too complex to be captured by the labels "dissent" and "rebellion" and would provide a framework for distinguishing between those who seek to undermine the

governmental structure and those, like the mothers, who seek only to alter a specific governmental policy. Even on Justice Fortas' analysis, the moral obligation not to violate just laws as a device for protesting what are thought to be unjust ones depends upon the existence of lawful means for effective expression of opposition to governmental policy. The question whether such means exist is, however, rarely one that can be answered with a simple yes or no. Rejection of the current absurdity of some on the "New Left," that the United States is a "proto-fascist society," need not blind us to the fact that there are important clogs in the channels of communication between government and large segments of our population and that these represent a significant impediment to governmental responsiveness to public need. Justice Fortas' readers would have been better served if, instead of burying these problems, he had undertaken to deal candidly with them and to explore their relevance to the issues posed by civil disobedience.

The failure of analysis which characterizes Justice Fortas' treatment of ethical questions also infects his discussion of legal issues, a rather more alarming matter since on such issues he writes with a large share of the power required to create constitutional law. At several points, as noted earlier, Justice Fortas invokes the principle that motive "does not confer immunity for law violation." Thus, after stating that the pendency of a case[16] precludes comment by him upon the issues presented by the recent statute prohibiting the mutilation or burning of draft cards, he effectively decides the case by writing that "if the law forbidding the burning of a draft card is held to be constitutional and valid, the fact that the card is burned as a result of noble and constitutionally protected motives is no help to the offender" (p. 16). And again, "The motive of civil disobedience . . . does not confer immunity for law violation" (p. 32). And finally, it is "nonsense" to suppose that various forms of violent conduct (such as assaults upon the police, breaking windows in the Pentagon, looting, and arson) are protected by the first amendment merely because they have protest as their purpose (pp. 33-34).

With due deference, it seems to me that the Justice is either playing a word game with his unsuspecting readers or announcing a new and regrettable constitutional doctrine which sharply departs from prior decisions by the Court. The quoted statements may, to consider the first alternative, be simply tautological. They may mean only that unlawful conduct is unlawful, whatever its underlying motive. So understood, the statements are not objectionable, but neither are they very helpful in assisting the reader to understand the issues. A more disturbing possibility is that Justice Fortas means, or will be understood as saying, that the question whether conduct can con-

16. United States v. O'Brien, 391 U.S. 367 (1968).

stitutionally be proscribed is to be determined without reference to the fact that its purpose is political expression. Prior decisions rather clearly establish a contrary doctrine. The Court has frequently held that the fact that conduct has as its aim the expression of ideas is a relevant circumstance in determining whether the conduct can be proscribed consistently with the first amendment. Thus, in the "handbill" cases the Court held that a municipality's interest in preventing litter of its streets justified prohibition of the distribution of commercial handbills[17] but not a similar proscription of political handbills.[18] In *New York Times Co. v. Sullivan*, similarly, the law of defamation was reshaped to require that adequate weight be given to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[19] More recently, *Ginzburg v. United States*[20] extends essentially the same analysis to obscenity prosecutions.

The teaching of these cases is that Justice Fortas posed the wrong question in approaching the issues to which his essay is addressed. The appropriate question is not whether a statute proscribing specified conduct is valid apart from the political purpose of the conduct, but whether as applied it is valid in light of that purpose. No doubt he is quite correct in asserting that the first amendment does not insulate from illegality every kind of activity which has political expression as its aim. The assertion that arson, vandalism, and assault are not constitutionally protected has not, to my knowledge, been seriously disputed. But the fact that the social interest in curbing such activities has generally been thought more significant than the interests advanced by permitting political expression by such means does not answer the question whether a different assessment of the competing interests is appropriate with respect to political expression which takes the form of burning draft cards or mutilating flags. To identify a legitimate governmental interest, in other words, is merely to pose the problem, not to resolve it. I see no reason to doubt, for example, that desecration of the national flag by its commercial exploitation can validly be proscribed, but unless the teaching of the "handbill" cases is to be abandoned, the fact that communication is involved must be weighed heavily in determining whether such a ban can constitutionally be imposed when mutilation serves as a vehicle of political expression.

It is not, I think, an adequate answer to these criticisms of Justice Fortas' ethical and legal analysis that the essay was written for popular consumption or that limitations of space imposed restric-

17. Valentine v. Chrestensen, 316 U.S. 52 (1942).

18. Schneider v. State, 308 U.S. 147 (1939). *See* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 15-21, 27.

19. 376 U.S. 254, 270 (1964).

20. 383 U.S. 463 (1966).

tions upon the argument. A member of the Supreme Court, if he is to write at all about matters of contemporary political significance, has a special obligation to do so in a responsible manner, particularly if the subject is one so intimately related to the legal system. On such issues, he will be regarded by many as speaking with special competence and authority. His views count. A simplistic presentation of so complex a problem is likely to mislead rather than to enlighten, reinforcing the tendency of one segment of the population to view all unorthodox means of expressing dissent as breakdowns in "law and order" and of another to conclude that modes of protest appropriate to the struggle for racial justice are equally appropriate in every dispute with a college administration over parietal rules or curricular reform.

IV.

The events of the last half-decade burst upon a nation unprepared for them. In retrospect, the years immediately prior to this turbulent period were, if not an "era of good feeling," at least years of hopeful mood. Signs of an emerging detente in East-West relations appeared. Dramatic progress was made, or so it appeared to most of us, in righting three centuries of wrong toward America's Negroes, progress which for many was especially euphoric because of direct or vicarious participation in the events which produced it. The forces of oppression could, it seemed, be made to yield to idealism.

Suddenly, everything changed. Vietnam became the concern not only of the government and those few on the political left who from the beginning had warned against our involvement, but of everyone, including a significant and articulate minority for whom our role was not only unwise but profoundly immoral. The problems of race proved to be more intractable than they had appeared; atonement was not as painless a process as those concerned with it had hoped it might be. The rush of events led to a change of mood. The means of political expression celebrated by Justice Fortas—participation in the electoral process, speech, publication, and peaceable assembly—seemed to many incapable of effecting change. The "system" seemed impervious to rational argument; no one was listening. Some concluded that more dramatic means were necessary to bring about change, or at least to capture the attention of government and a majority sufficiently content to be unaware of the injustice around it. And so draft cards and flags were burned, sit-ins were staged at draft boards and welfare offices, blood was poured upon selective service files, and efforts were made to block troop trains and to prevent personnel recruitment on college campuses by those who manufacture napalm.

It is tempting to conclude, as Justice Fortas apparently does, that

those who have adopted such tactics do not appreciate the democratic process. Some among them, no doubt, have not fully understood that the right to be heard—to participate in the decision of public issues—does not include a right to win. Yet, their response has in many ways been a measured one. To equate it with the destruction of property which has occurred during ghetto riots or the guerilla warfare which some have urged—as at points Justice Fortas leads his readers to do (pp. 33-35)—is to forsake analysis and understanding for rhetoric. With rare and so far as one can tell generally unplanned exception, there has neither been violence directed against individuals nor significant destruction of property. The demonstrators have sought and usually found techniques by which, without harm to others, they might dramatically convey the intensity of their beliefs or the desperation of their plight. Justice Fortas correctly points out that such tactics are risky nevertheless, for violence may ensue even though unplanned. But were such tactics to be employed by a dissident group in another country, most Americans would not wish to end analysis with a recognition of that risk. Questions would also be raised concerning the wisdom of governmental policies which called forth such a response from a portion of the public and the adequacy of political processes which led them to believe that such tactics were necessary to effect change. The refusal of Justice Fortas seriously to contemplate those questions marks the ultimate failure of his essay.

Terrance Sandalow,
Professor of Law,
University of Michigan

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.

Michael E. Tigar,
Editor-in Chief,
Selective Service Law Reporter