

## PROLOGUE

Dissent. It is a word we all know, and yet do not know.

We use the word with regularity in any variety of contexts. Judges dissent against a court majority. Political activists dissent against the establishment. Religious protesters dissent against orthodoxy. Students dissent against an administration. Newspaper editorialists dissent against politicians. Employees dissent against management. The list goes on.

In these ways and others, America values dissent, or so it seems. We often tolerate, encourage, and protect dissent. It is part of our Madisonian heritage. Some preach it, some practice it, others safeguard it, and still others endure it even when they oppose its message. Dissent is a salient feature of our modern society. It is a cultural and constitutional given.

Over the ages, dissent has been championed for assorted reasons. Dissent, it might be said, promotes self-realization and autonomy. It enables individual self-expression without fear of societal repression. The liberty of self is meaningless if one must always conform to majority will. Freedom for the outsider allows a unique brand of self-identity and self-expression.

Dissent, it might be said, advances religious freedom. When people of faith are permitted to question prevailing beliefs, they stand to redefine the relationship between

themselves and their Maker. This spirit of moderation extinguishes the fires of heresy.

Dissent, it might also be said, contributes to the marketplace of ideas. It does this by promoting competition among divergent viewpoints. The hope is that, in the battle of opinions, some form of truth will prevail over falsehood, and the struggle will produce a more enlightened citizenry.

Dissent, it might further be said, enables self-governance by civic participation. Such participation is a two-way street: it is the prerogative to agree or disagree with governmental action. When the governed rule, they must have the right to differ from their governors.

Dissent, it might be said, checks governmental abuses of power. When the whistle-blower exposes governmental corruption or malfeasance, political power then comes under public scrutiny. By raising citizen awareness, dissent might bring about institutional reforms.

Dissent might moreover cultivate a democratic culture of tolerance, where all views are suffered no matter how objectionable they may be. Democracy is diversity, and diversity of views is often born out of dissent. One measure of a thriving democracy is the extent to which it fosters vibrant dissent.

Finally, it might also be said that a culture of dissent secures a safe haven for the outsider. When individuals no longer fear censure simply for being different, they can give public voice to their private views. Thereby, dissenters are

afforded a chance to expand the behavioral boundaries of their society.

Whatever the objections to dissent, it is valued for all these reasons and others. But what is it we value? When we speak of dissent, what is it of which we speak? When we converse – in homes, schools, offices, court chambers, legislative arenas, and in public generally – how do we use this word? How is it understood? These and other questions are rarely, if ever, asked.

The word “dissent” is treated as a known. When we use it, we seldom quibble over what we mean or understand it to be. It can be good or bad, safe or dangerous, peaceful or violent, prophetic or blasphemous, laudatory or offensive, legal or illegal. But that “it” is an uncontested constant. “Dissent” does its linguistic work with few decipherable, conceptual traces. In this way, “dissent” is like air – we breathe it without noticing it, and its invisibility belies its importance.

This is a curious – indeed, unfortunate – state of affairs. For if we talk about dissent without giving it any ideational content or without appreciating how we actually use the word, we cannot really know what to value or what to safeguard.

Such mental quantum leaps are certainly not accepted elsewhere. Take the idea of justice, for instance. What is it? That question, recall, was the starting point for Plato’s classic, *The Republic*. The query continues into modernity with works such as Elizabeth Wolgast’s *The Grammar of Justice*.

What is equality? That concern was the focus of Rousseau's 1755 work, entitled *Second Discourse*. It finds contemporary expression in books such as Thomas Nagel's *Equality and Partiality*.

What is property? That inquiry inspired Pierre Proudhon's seminal 1840 book by that name. More recently, the inquiry continues in tracts such as Laura Underkuffler's *The Idea of Property: Its Meaning and Power*.

What is liberty? That issue focused Mills's attention in his 1859 masterpiece. Isaiah Berlin later reexamined the concept in his celebrated work, *Liberty*.

Or what is law? H. L. A. Hart's *The Concept of Law* was born out of that philosophical investigation. Subsequently, Ronald Dworkin explored the idea in *Law's Empire* and elsewhere.

Many other examples of writings on fundamental concepts abound.

Yet, for all that has been said about dissent – in books, articles, judicial opinions, and in the popular culture – it is remarkable that no one has devoted much, if any, attention to explaining what dissent is or what we intend to convey when we invoke it. No one has attempted to sketch its philosophical, linguistic, legal, or cultural meanings or usages. Again, as a concept, dissent is taken for granted, as if we should all recognize it immediately when we see or hear it.

By that measure, a dictionary definition of “dissent” should confirm what we purportedly know. Deriving from the Latin verb *dissentire* (“to differ in sentiment”), the term is defined as “opposition to a proposal or resolution” or “a difference of opinion,” or “a disagreement.” In light of the many contexts in which the word “dissent” may be used, the *Oxford English Dictionary* definition is overinclusive. For example, in familial disputes – a daughter says to her mother, “You’re wrong” – there is surely disagreement, but is there necessarily dissent? Or if after watching a performance of Luciano Pavarotti, an opera lover asserted that Pavarotti was the best singer in the world and his friend were to voice a different opinion – “Jose Carreras made a much better Rudolfo” – would we refer to this difference as an instance of dissent? On the one hand, if we examined the matter analytically, the answer to these questions might possibly be “yes.” On the other hand, if we thought of the matter linguistically, the answer would probably be “no.”

Additionally, the *OED* definition suffers from underinclusiveness. “Opposition to a proposal or resolution” does not seem either extensive enough or strong enough to encompass various concepts that we might well understand as aspects of dissent, such as “provocation,” “defiance,” “civil disobedience,” “destruction,” or “rebellion.” Moreover, unless the phrase “proposal or resolution” is read quite broadly, in which case its linguistic purchase is diminished, the definition could not begin to capture more generalized instances of opposition to a societal way of life or a cultural attitude or aesthetic.

The gospel of the dictionary notwithstanding, we might wonder whether we have a real understanding of what dissent is or how we use it. We might wonder if we have an informed sense of what it means or how we speak of it in our modern culture of political pluralism, societal toleration, and corporate exploitation. And, should we pause to think seriously about dissent, we might also wonder whether we have a fully informed idea of how it relates to, and operates in, our system of freedom of expression, be it political, religious, or other.

This philosophical, linguistic, cultural, and jurisprudential problem becomes acute when we ask a simple question: Who qualifies as a dissenter? Some candidates are said to be obvious: Socrates, Jesus, Joan of Arc, Luther, Thoreau, Gandhi, Martin Luther King, Margaret Sanger, or Christopher Hitchins. Other candidates seem far less apparent: John Wilkes Booth, Lee Harvey Oswald, Huey P. Newton, Patty Hearst, “The Unabomber,” and the Columbine High School killers. Similarly, what about Zacarias Moussaoui, the 9/11 terrorist, or Jared Loughner, the man charged with the attempted assassination of Congresswoman Gabrielle Giffords? Can we label all of these people dissenters? If so, why? If not, why not? The dictionary definition does little to help us resolve such questions.

If some of those names seem anomalous as dissenters, this points to a related question: What qualifies as dissenting activity? To be clear, the issue is *not* the legality of an activity, but whether it may reasonably be labeled an act of dissent. When violence is added to the conceptual mix, the question becomes more complicated. Just consider a

sampling of views from some of our learned contributors to this book:

*Frederick Schauer*: “You can be a violent dissenter as well as a non-violent dissenter.”

*Michael Walzer*: “Violent action, I suppose, could be an expression of dissent, but it goes beyond dissent. Dissent is a form of political, intellectual engagement, and violence is something different. It can be motivated by dissent. [John Wilkes Booth’s crime was] an act of murder. I’m not sure how to draw the line.”

*Steven K. Green*: “I think Booth was expressing a form of dissent.”

*Ralph Nader*: “Violence cannot be called dissent. It has to be called violence.”

*Martha C. Nussbaum*: “If we took the anarchist who assassinated Garfield, I think that was a case of dissent, since he was clearly motivated by political opinions. And the assassination of Julius Caesar, that’s an absolutely crystal clear case of dissent.”

*Nadine Strossen*: “Violent confrontation? I think that goes beyond the pale” of dissent.

Again, asking if violent words and deeds can be categorized as dissent is quite different from asking whether those words or deeds should be protected under law. The first inquiry is a conceptual one, whereas the second is a legal one.

Importantly, the meanings and usages of dissent cannot be derived entirely from what the law permits. If dissent is explained in something other than very narrow ways, it

is possible for a culture to value it and yet proscribe it, at least at the outset. For example, only consider the civil rights demonstrations of the 1960s. Many of them began as breaches of state criminal and civil codes, but were later legitimated under the First Amendment. By comparison, other acts of civil disobedience, although clearly viewed as dissent, were not legitimated under our supreme law.

Moving from the criminal to the cultural, yet other questions surface. For example, can a commercial for-profit corporation ever be a dissenter? Does the profit motive change the analytical equation? If so, why? If not, why not? Here, too, the contrasting views of contemporary noted figures and respected scholars are instructive:

*Michael Walzer:* “I doubt it, but I don’t know. Given the character of corporate behavior in a capitalist society, it is a legitimate suspicion that it is only acting to profit-maximize. But that’s only a suspicion. It might not be true.”

*Kent Greenawalt:* “In theory it could happen, yes, but it seems very unlikely in our culture. Could their politically oriented speech be deemed dissent? Yes, if the company really took on a dominant policy.”

*Sue Curry Jansen:* “I’m really ambiguous here. I want to say ‘yes’ on some levels, but on other levels . . . one has to probe very deeply into what’s behind” corporate dissent.

Of course, still other nagging questions remain. Such matters are the focus of what follows in this book.

At this juncture, a skeptical pragmatist may well ask: “So what?” What is the significance of a *conceptual* exploration of



dissent? Unless notions of dissent and categories of legally protected acts are coextensive, why should we engage in “word games” or otherwise care about the meanings or usages of the word “dissent”?

This challenge must be taken seriously and answered. As a preliminary matter, our undertaking promotes several different interests:

*Intellectual Interests:* Probing the concept of dissent may be a worthy enterprise in and of itself. For, as the adage goes, knowledge can be valued for knowledge’s sake. Beyond the Platonic, however, there is the pragmatic. After all, how we conceptualize something influences how we react to or engage with it. That is, how we understand or use the term “dissent” will likely determine whether we value or devalue acts taken in its name. Our minds do not operate in a vacuum. To be clear about an idea is to be clear about its ramifications, philosophical and practical.

*Linguistic Interests:* Clarity in communication depends on some commonality of understanding. Effectual communication breaks down when the meanings and usages of words run rampant. Should propositions about dissent become unclear, several results could follow. If the notion of “dissent” were unduly limited, certain activities otherwise corresponding to it might be heedlessly devalued. Or if the term were used in too open-ended a fashion, the word might lose much conceptual or practical purchase. Or if “dissent” is irresponsibly ambiguous, that might prejudice how laws are applied to dissenting activities.

*Societal Interests:* There is sociological significance in deciphering whether and when the idea of dissent shapes community norms. Some notions of dissent – from property destruction in the name of anarchy, to cross burning in the name of bigotry,

to corporate appropriation in the name of profiteering – might fit awkwardly, if at all, with the cultural values commonly associated with dissent.

*Legal Interests:* Answers to the question “What is dissent?” may have implications for legal determinations running the gamut from criminality to constitutionality. Whether there is an exculpatory defense to criminal charges or civil liabilities, whether there is a reduction of a criminal penalty or a civil fine, or whether an otherwise prohibited activity becomes constitutionally protected may well hinge on the understanding and appreciation of dissent by a police officer, prosecutor, judge, jury, governor, or even the president. In a sense, branding something as dissent increases the chances that it might be legitimated.

Hence, the need to be more clear-minded about this phenomenon we call dissent cannot be gainsaid. For not every disagreement or disbelief, purposeful protest or unintentional transgression, symbolic or aesthetic expression, corporate or commercial contestation, criminal wrong or politically violent conduct, or religious action taken in God’s name ought to be tagged dissent. We trust most would agree. And yet, there can be no significant agreement if there is not some real measure of meaning or regularity of usage.

It is just that conceptual yardstick that this work proffers. In that sense, *On Dissent* is a book like no other. It brings into bold relief what has heretofore been unseen.

# CHAPTER I

## FROM JUDICIAL DISSENT TO PEACEFUL PROTEST

“Holmes, J., dissenting.” That phrase is known by every student of the law. Among other things, it refers to a 1919 opinion that Justice Oliver Wendell Holmes penned in a famous First Amendment case – *Abrams v. United States*. The “best test of truth,” the jurist opined therein, “is the power of thought to get itself accepted in the competition of the market.” This celebrated paean to free speech liberty arose in the context of a dissent Holmes wrote on behalf of several Russian dissidents charged with violating the Sedition Act of 1918. He strongly opposed the Court’s affirmation of a twenty-year sentence for the dissidents, who had distributed leaflets calling for a general strike to prevent shipment of arms to Russia. In this and other matters, Holmes “wholly disagree[d] with the argument of the government” and the majority of the Justices.

Notably, judicial dissent is a case of institutionalized opposition. That is, dissent is a vital part of the tradition of appellate decision making. In that sense, it may not operate in the same conceptual quarters as other far riskier acts that might be labeled as dissent. Still, whatever one makes of this phenomenon, few would contest that it is a paradigmatic

example of dissent, if only because it is expressly labeled so. However the word “dissent” is used, then, it must at least include an expression of judicial divergence from the majority opinion of a court.

But what if we push the conceptual envelope somewhat beyond the obvious? How far can we go and retain an unquestionable nexus to a judicial dissent? Let us look at two more examples.

In 1962, sixty or so members of the Students for a Democratic Society (SDS) met at a labor camp outside of Port Huron, Michigan, to finalize a provocative “agenda for a generation.” Active in civil rights, campus reform, and peace movements, these students debated a fifty-page, single-spaced draft of a manifesto that would come to be known as *The Port Huron Statement*. This document addressed the major issues facing the youth of their time – everything from the Vietnam War and the atom bomb to racial justice and poverty, the tyranny of technology, and apathy and administrative paternalism on college campuses. “We are the People of this Generation,” they wrote, “looking uncomfortably to the world we inherit.” They offered their “appeal” as “an effort in understanding and changing the conditions of humanity in the late twentieth century, an effort rooted in the ancient, still unfulfilled conception of man attaining determining influence over his circumstances of life.” Calling on America to adopt a number of domestic and international reforms, the Statement concluded: “If we appear to seek the unattainable . . . then let it be known that we do so to avoid the unimaginable.” So far as the notion of dissent is concerned, does this

idealized student activist manifesto fall within the same or similar conceptual parameters as institutionalized judicial dissent?

Moving to more contemporary times, consider the following. In 2011, a woman stood in a crowd assembled in front of the White House. Along with other members of the Tea Party, she opposed the evils of big government. She held up a placard depicting Uncle Sam, his finger extended as if to command the sign's directive: "Stop Shredding Our Constitution." A passerby might characterize the woman as engaging in a case of peaceful protest. Have we here another clear example of dissent?

To begin to answer these questions, it is necessary to do some preliminary analytical and linguistic spadework. That is, how do we *conceptualize* the issues raised by such questions and how do we *speak* of them?

Returning to our judicial example, we ask what attributes are essential to it that permit us to postulate that it is a paradigm of dissent. This claim derives from three key characteristics: that the expression is *intentional*; that it is *critical*; and that it is *public*. In abbreviated form, these attributes can be understood as follows:

1. *Intention*: a knowing determination or resolve to think, believe, speak, or act in a certain way, with a reasonable awareness and understanding of the probable significance, import, or consequences of that expression or action; a subjective understanding that one is purposefully communicating.

2. *Criticism*: an unfavorable evaluation, adverse judgment, or disapproving opinion of a law, policy, practice, or position established by an authority structure, whether legal, religious, scientific, social, or cultural.
3. *Public*: not confined to the private realm, but instead meaningfully exposed to an authority structure, to members of a group or community, or in a venue open to others.

By these measures, the Port Huron and Tea Party examples constitute dissent analogous to the judicial example. The SDS members unquestionably intended to openly disseminate their highly critical views of the then-prevailing laws and norms of the American “establishment.” Similarly, the Tea Party protestor acted purposefully in a public forum to communicate her disapproval of the national government’s disregard of her constitutional rights, as she understood them. Hence, the conceptual fit works analytically. The fit with language usage, however, is not as apparent.

When we think of the Port Huron and Tea Party examples and how we speak of them, the word most likely to be used to describe them is “protest.” That is, assume someone were to ask, “What is the *Port Huron Statement*?” or “What is the SDS doing?” The answer would, in one way or another, probably refer to protest. So, too, with our earlier allusion to the passerby who inquired about what the Tea Party woman was doing in front of the White House. The expected reply would be: “She’s protesting.” By contrast, we would not speak of the judicial example in the same way. We would not call it an act of protest; or if we did, we would do so awkwardly. How strange it would be to state: “Holmes, J.,

protesting.” Why is this so? One primary reason is that judicial dissent is an institutionalized form of disagreement, in the sense that it is expected, accepted, and normalized.

These clues from ordinary language prompt us to examine the relationship between dissent and protest. Are they synonymous? Are they similar? Are there important differences between them? Without venturing into an extended exegesis on the meanings and usages of “protest,” it is evident that there is a deep connection between the two terms, at least under certain conditions.

While it would be odd to refer to judicial dissents as protests, it would be equally odd to cabin the concept of dissent to the judicial realm. For example, if someone were to ask, “What has happened to dissent in America?,” would anyone reasonably assume that the query was directed to the business of appellate judges? Or if someone were to declare, “Proposed antiterrorism legislation will criminalize dissent,” would we imagine that the declarant was not addressing public protest? In the same regard, consider what we would make of a book with the following title: *Dissent in America: The Voices That Shaped a Nation – 400 Years of Speeches, Sermons, Arguments, Articles, Letters, and Songs That Made a Difference*. The audience for this book would immediately understand the connection implied between dissent and protest.

We can now breathe more easily that the Port Huron and Tea Party examples of protest can fall readily under both the logical and linguistic umbrella of dissent. That said, there is something regarding the word “dissent” that has a more dignified appreciation about it. While “dissent” and

“protest” may be seen as conceptual cousins, the former strikes us as the nobler cousin. The reader need only recall our Prologue’s discussion of the elevated values equated with “dissent.” Although the same ideals might arguably be logically aligned with “protest,” they are much less likely to be associated linguistically with it. In that sense, “dissent” may generally be perceived as indicating “protest-plus” – that is, a “plus” that suggests societal toleration. As we will see in later chapters, the more the notion of dissent moves away from normative acceptance, the more we are likely to devalue the term and even forsake it.



Our abbreviated presentation of the three key attributes of dissent was adequate for our general inquiry into the subject. Now, however, we need to take a more particularized and nuanced look at those attributes. To get a better sense of things, let us tease out the subtler aspects of our investigation.

## INTENTION

It would be peculiar to think that someone could dissent without some meaningful intent to do so. Can there be unknowing dissent or accidental dissent? In other words, must dissent be rooted in the mind? To help us along, let us call on some expert witnesses.

For many, intention is a categorical imperative for dissent:

*Hans Linde*: “To be dissent, an action must have communicative intent, or it’s just something that is a non-conforming act.”



*Jon O. Newman:* “Intention is key to dissent. If an act or expression is accidental or inadvertent, it doesn’t register on the scale of dissent at all.”

*Martha Nussbaum:* “I think intention is an essential characteristic. . . . Dissent involves a willingness to take responsibility for what you say and do, and therefore it does require that you know what you’re doing or that you have some view of what you’re doing. There is no unaware dissenter.”

To others, intention is also a key attribute of dissent, even though that intent may not be as apparent or robust as one might think. Take, for example, the following point:

*Howard Zinn:* “I believe a dissenter has a reasonable awareness and understanding of the significance and consequences of his actions. . . . There are different degrees of consciousness about the importance of your dissenting action. There are experienced dissenters who know, understand, and have thought about it. And there are people who act without thinking too much about it. . . . But dissent would have to have some element of social consciousness, even if it were very limited.”

The clear consensus, therefore, is that intention is vital to any meaningful notion of dissent. But to probe this point even further, consider a few examples. Imagine a group of people brandishing pro-union signs in front of an anti-union shop in a town largely hostile to the union cause. Among other things, the signs read: “Don’t support this union buster!” and “Help close this anti-union shop down!” Passersby would assume that those carrying the placards are union sympathizers and, therefore, dissenters. But what if the sign-carriers were homeless people hired by the union? What if it were entirely irrelevant to these hired hands what the signs said? What if, so long as they were paid, they

would be happy to carry anti-union signs? In the eyes of the passersby, the actual intent of the “protesters” is of no moment because their audience has no knowledge of it. But let us not stop there. What if a television reporter were to interview our “protesters,” and in the process learn of their true intent? When that report is later aired on television or YouTube, the viewers would see the same acts through entirely different lenses and might well refuse to label such actions as dissent.

Consider another telling example offered by Justice William Brennan in *Texas v. Johnson*, the 1989 flag desecration case. The jurist hypothesized a situation in which a tired person might drag a flag in the mud, but with no intention of making any kind of political statement. Would this lackadaisical action amount to dissent? Would it be enough if such unintentional desecration was perceived as a form of dissent by onlookers or even only by government regulators? Put differently, what is the conceptual touchstone for dissent – the intent of the speaker, the perception of the audience, or the regulatory purpose of the government? For if the understanding of either the audience or government controls, then one might conclude that unintentional dissent is, indeed, possible.

In this regard, one authority, while conceding the importance of a dissenter’s intentionality, contests its categorical status:

*Steven Shiffrin*: “I do not believe that intention is a necessary condition for dissent, because somebody can engage in an action that is perceived as criticizing existing customs, habits,

institutions, traditions, or authorities, even though that is not intended. . . . To the extent that [dragging the flag in the mud] is penalized because of the message that is communicated, it is an attempt to stifle dissent, even though a criticism was not intended. . . . I do think that there are greater qualities of dissent when it is intended to be dissent. But there are circumstances in which there is no intent, but there is regulation of the communication, and I believe that can be a regulation of dissent.”

Among other things, what is intriguing about Shiffrin’s view is that, when he characterizes the flag-dragging hypothetical as a regulation of dissent, he puts far less importance on the flag-bearer’s intention to dissent or the onlookers’ perception of dissent than on the government’s purpose to stifle dissent. Hence, the presence of dissent is not primarily to be determined by either the intent of the speaker or that of the audience, but rather by the intent of the government (insofar as that intent is inferred from the government’s regulatory purposes or practices). Ostensibly, Shiffrin’s shift away from a focus on speaker intent to a focus on government intent presumably aims to prevent any “chilling effects” of flag desecration laws on the future actions of dissenters who knowingly use the flag as a symbol in their political protests. Even so, what is notable in Shiffrin’s position is that *intention* remains a key attribute for dissent; *whose* intention is the debatable point.\*

\* Couched another way, Professor Shiffrin’s captivating commentary has less to do with a purported dissenter and his expressive actions than with the government and its purported unlawful actions. Thus, if one were to apply the same logic to Justice Brennan’s flag hypothetical, we assume that Professor Shiffrin would likewise argue that it is of no moment that the flag-bearer’s conduct might not be defined as speech within the

Distancing our understanding of dissent from a dissenter's intentionality can prove problematic, however, and for several sound reasons. First, without an intentional decision to break away from the status quo enough to object to it in some meaningful fashion, a dissenter becomes indistinguishable from someone who is merely uncomfortable with the existing ethos and weakly expresses some dissatisfaction with it.

Second, assume that an individual is intuitively repelled by some establishment policy or practice, but cannot immediately explain fleshed-out reasons for that reaction. Nonetheless, as Professor Zinn suggested, eventually there would need to be some more developed intention before he or she acted in a way that would be understood as dissent. As the example of the pro-union "protesters" reveals, what we later learn about the real purposes behind any action determines how we characterize it.

Third, it is possible, as in the flag desecration illustration, that a person may unwillingly "criticize" an authority's position, and it might have communicative impact on an audience that understands the expression or action as dissent. But any public misimpression could be corrected – either directly, if questioned, by the person's persuasive denial of

meaning of the First Amendment. For Brennan, by contrast, it was of decisive moment, insofar as unintentional conduct would not rise to the level of speech. In sum, the problem with Shiffrin's argument is that it goes too far. It does this because its focus is less definitional than normative; it would trade virtually all definitional concerns for parameters on government power.

any intentional dissent, or indirectly by the person's compliance with the law.

Fourth, without the intent to communicate a message and an appreciation of how that message will be likely be understood, it is not clear that an action can be billed as expressive conduct at all; in other words, the actor intends to convey no message. In this light, it seems curious to call an individual a dissenter if he or she acts without any intent to express a view that challenges or contests conventional positions.

Fifth, the way we use our language confirms much of this. For example, if we knew that the sign-carriers were entirely indifferent to the union cause, it would be odd to claim that they were pro-union dissenters. And if we knew that our flag-dragger did not intend to desecrate the flag, it would be strange to say: "Though he didn't realize it, Joe dissented when he accidentally dragged the flag in the mud." Or if someone were to say, "It was a case of accidental dissent," the chances are high that such a remark would be understood as flip or comical. Or to belabor the point, consider the oddity of asserting: "Justice Holmes dissented without intending to do so."

Finally, it is well to remember that analyzing such issues is not necessarily synonymous with how we might think of them in a court of law, among other places. Undoubtedly, there will be a category of instances where individual intention differs from public perception, as when passersby attribute dissenting status to the pro-union sign-carriers and the flag-desecrator. Here, perception would be buttressed

by the way we commonly refer to such actions. Functionally speaking, the acts would fairly be classified as dissent, unless evidence of a contrary intent emerged to trump the original perception. In short, there may be circumstances in which true intent would yield to its functional equivalent. Either way, intention matters.

Important as we think intention is to any concept of dissent, it must work in tandem with the two other attributes we have identified, namely criticism that is made public. We now turn to the next attribute.

## CRITICISM

Recall that the *Oxford English Dictionary* definition of dissent considers the term to be synonymous with “opposition,” “disagreement,” or “a difference of opinion.” Such an adverse perspective, while in need of elaboration, is obvious to the meaning of dissent. For, to remove adversity from the concept of dissent would be to defang it. There must be something confrontational in a dissenting expression or act, even if the character and degree of that something remain to be discussed. Where there is pure consensus, there is no room for dissent; where there is approving compliance with orthodoxy or conventionality, there is no dissent.

It should not be surprising, then, to find a strong consensus among those who have thought through the issue that criticism is a *sine qua non* of dissent, as exemplified by the following commentaries:

*Catharine MacKinnon*: “The essence of dissent is about standing up to, confronting power. Dissent carries with it a critical stance toward existing structures of domination.”

*Steven Green*: “Criticism is the heart of what dissent is all about. You can’t be in agreement with something you disagree with. There can be degrees of agreement. But there needs to be a critique of what you find offensive or wrong as essential to dissent.”

*Ralph Nader*: “Dissent involves expressions that challenge the status quo, entrenched power, the conventional wisdom. . . . Usually it’s a challenge or opposition to a prevailing view or a prevailing power structure.”

*Michael Walzer*: “I think dissent and criticism are virtually synonymous. If you are challenging, questioning . . . some conventional opinion, some standard doctrine of your society, you are also, in effect, criticizing it.”

Given that criticism lies at the core of dissent, why is that so? Among other reasons, the attribute of criticism is vital because it serves to distinguish dissent from two other intellectual states of disagreement – doubt and disbelief. Surely, there is a relationship among doubt, disbelief, and dissent, but they ought not be viewed as simply interchangeable. Rather, they appear to fall on a conceptual and linguistic continuum, with doubt and disbelief quite often being antecedent stages to dissent.

One who doubts or disbelieves a proposition may merely question it or refuse to place stock in it; he or she need not expend more energy, engagement, or commitment on the point, and may suffer little, if any, risk of retribution. By contrast, one who dissents has arrived at a more significant

critical engagement or conflict with the prevailing ethos, and may suffer real risk of retribution. Dissent adds fuel to the fire; it tends to be more active, vibrant, and confrontational than its two counterparts.

It was one thing for Martin Luther to doubt or disbelieve that the pope was the Vicar of Christ, but it was quite another thing for him to openly criticize in writing the pope's authority and the Church's abuses. Moreover, Luther's refusal to retract his *95 Theses* (1517) at the demand of Pope Leo X further exemplified his critical posture. His stance against religious and secular authorities resulted in his excommunication and his condemnation by Emperor Charles V as an outlaw. When Luther, the monk, moved from personal doubt and disbelief to public criticism, he became Luther, the Reformer. In the process, he traveled the road from doubt to dissent.

For our present purposes, what is crucial about Martin Luther's action is not only that it diverged from the prevailing religious norms, but also that he intended to criticize those norms openly. Mere divergence ought not be sufficient for dissent. Consider the following examples that address this point:

- A man walks down Hollywood Boulevard wearing an exceptionally gaudy green tie that features a scantily clad hula dancer. He intends to make no political or aesthetic statement; he simply prefers bizarre ties, in much the same way that he likes to put hot sauce on pancakes when breakfasting in a restaurant. Assuredly, the tie diverges from even the Hollywood norm of style; but because he intends no public criticism of conventional fashion



norms, we would not bill his choice in clothing an act of dissent. Ironically, his eccentric lifestyle benefits from the social toleration fostered by a culture of dissent, which suits him just fine.

- Assume the year is 1975, and John Doe is in the Navy where he has served with distinction for fifteen years. In order to secure a promotion and pay upgrade, he must obtain a security clearance, for which he first must answer a series of questions. In the course of the interview, he is asked if he is homosexual, and he responds honestly in the affirmative. (If it had been decades later, he would have willingly abided by the “Don’t Ask, Don’t Tell” policy and kept his sexual orientation a secret.) John has no desire to buck the system or to make a public political statement; neither is he concerned whether other homosexuals are able to obtain security clearances; he simply wants to comply in the hope that he might be promoted. As a result of his integrity, John is summarily dismissed, but is nonetheless honorably discharged. Obviously, he is quite distressed by this, but takes the bitter pill rather than making a spectacle of himself. Here, John’s sexuality diverged from the norm, and he communicated that to his superiors. While he came close to the door of dissent, he did not cross the threshold because he lacked any specific intention to be critical of the status quo.
- Until June 1967, the “mixing of the races” in interracial or interethnic couplings and marriages was considered to be socially abhorrent and was legally prohibited in many American states. Before that date, such couples made more than a political statement – they put their very lives in jeopardy. In *Loving v. Virginia* (1967), the U.S. Supreme Court held that the state’s antimiscegenation law was unconstitutional. With the passage of time after

the decision, general attitudes toward such mixed marriages eased, by and large. Assume, then, that a contemporary Black Power group openly rails against the “evils of miscegenation,” arguing that mixed-race relationships dilute the purity and splendor of the black race. Such a view would be seen in many places as offensive to prevailing racial attitudes; indeed, harkening back to *Loving*, some might view such admonitions as racist. Nonetheless, there can be no serious question that the group’s criticism amounts to dissent. Among other matters, the point here is that the concept of dissent has no ideological favorites. To drive that point home even further, imagine that a “free love” group protests against the prosecution of a forty-year-old woman who had non-forcible sex with a twelve-year-old boy. At a press conference, the group openly lauds pedophilia and calls for its decriminalization. Far from devaluing the protest’s status as dissent, the highly offensive character of the expression only enhances its credentials.

All of these examples, in one way or another, pit individuals with divergent views against dominant forms of majoritarian will. And it is true that typically the criticism that feeds dissent targets majoritarian norms or power structures. But this need not always be the case. For context very much defines the character of the activity in question. Just as we commonly witness dissent playing out along a minority-majority axis, so it may play out in a similar way entirely within a minority community. That is, there may be dissension within the ranks of a minority group itself. What is interesting is that the opposition of an individual within such a group might actually align with the prevailing orthodoxy

of the dominant majority that alienates that group. In other words, in the minority community he or she is a dissenter, while in the majority community he or she is a conformist as to that particular issue.

Reconsider the former example of the Black Power organization that abhors mixed-race couplings and marriages. Assume that a member of that group holds firmly to all of its other tenets, but believes that its pure-race creed is bigoted. At a series of meetings, the individual berates his colleagues for their misguided opinions and insists on the rectification of their insupportable public stance. Such fervent criticism of the Black Power organization's ideology is clearly dissent within that community, notwithstanding the minority status of the group within the national polity. It might be said that this scenario does nothing other than transport the minority-majority axis from a macro-context into a micro-context. There is great merit in this observation, and it highlights the significant, albeit contextualized, role of criticism as an attribute of dissent.

Only recall the strong consensus that we earlier identified as to the essential connection between criticism and dissent. That there should be such a consensus ought not be surprising. After all, there is nothing particularly controversial about the idea of criticism in the abstract. Indeed, up to this point, the concept of criticism seems a rather tame one, suggesting little more, if anything, than an adverse mental act or verbal expression. Such a tame concept of criticism might, nevertheless, be synonymous with dissent. For example, think of a religiously inspired protestor in front of the New York statehouse who condemns same-sex marriage as

sinful and perverse. Or imagine a citizen at a New England town hall meeting who stands up to deliver a diverging opinion on municipal zoning policies. Or consider a citizen group that petitions the Congress for a redress of environmental grievances. Although such practices could produce harsh punitive results in totalitarian countries and cultures, in modern democratic societies such criticism typically is socially tolerated and legally protected.

Even in the contemporary United States, however, criticism has its limits. There is no blank check to be critical in all places at all times and in all manners. Criticism that is mental, verbal, peaceful, and performed in certain settings is easy to defend as a vital criterion of dissent. But what if that criticism manifests itself in more robust ways, in ways that move beyond words to action, beyond peaceful protest to civil unrest? Would that criticism also be billed as dissent? And would that dissent also be socially tolerated and legally protected? These are questions that deserve consideration, and such examination will be given in due course. At this juncture, it suffices merely to flag the issue that the meaning and value of dissent are connected to and influenced by its manifestations. Nonetheless, it cannot be gainsaid that the attribute of criticism lies at the core of any expression or action worthy of the name of dissent.

## **PUBLIC**

Beyond intention and criticism, what does the public character of expression add to the mix, such that we might deem it an essential attribute of dissent? After all, when

we think of historically significant expressions of dissent in America, we would come quickly to Martin Luther King's "I Have a Dream" speech, delivered against the backdrop of the Lincoln Memorial. That August 23, 1963 address and many others by Dr. King are canonical instances of dissent. His declarations were quintessential illustrations of publicly speaking truth to power. In that regard, consider the following example of Martin Luther King's thought expressed in his own words:

[There is,] particularly in the young generation, a spirit of dissent that raged from superficial disapproval of the old values to total commitment to wholesale, drastic and immediate social reform. Yet all of it was dissent. Their voice is still a minority; but united with millions of black protesting voices, it has become a sound of distant thunder increasing in volume with the gathering of storm clouds. This dissent is America's hope . . . America has not yet changed because so many think it need not change, but this is the illusion of the damned. America must change because twenty-three million black citizens will no longer live supinely in a wretched past. They have left the valley of despair; they have found strength in the struggle; and whether they live or die, they shall never crawl nor retreat again. Joined by white allies, they will shake the prison walls until they fall. America must change.

It would be most curious to ask if such a forceful call to action should be considered dissent. Nonetheless, there may be conceptual warrant to do so. Dr. King's statement was clearly intentional and obviously critical. But does it matter that his remarks, found among his personal papers, were published posthumously? In this regard, consider the following possibilities:

- What if King never planned to deliver or publish his statement? For example, what if the statement and the longer essay from which it was drawn were intended to be no more than an extended private diary entry?
- Or what if, in the days before the Presidential Records Act (1978) and the Freedom of Information Act (1966), King had sent his statement to then-President Lyndon B. Johnson with the admonition that it be shared with no one else?
- Alternatively, what if King had planned to make it public during his lifetime, but only anonymously?

To align these considerations with our earlier example of judicial dissent, what about Justice Louis Brandeis's dissent in the 1926 case of *Ruthenberg v. Michigan*, an opinion that was, for jurisdictional reasons, published for the first time nearly seven decades after the jurist's death?

These and other inquiries prompt us to analyze in a nuanced manner the connection between the character of dissent and its public footprint. How essential is it that critical remarks made intentionally be also conveyed in some public fashion? Many who have seriously considered the issue hold that public status is a core attribute of dissent. Among them are the following:

*Todd Gitlin*: "Public is clearly fundamental."

*Hans Linde*: "We can begin by referring only to an expressed or visible disagreement and not a silent disagreement."

*Jon O. Newman:* “The public character is essential. Otherwise, like the proverbial tree that falls in the forest, dissent won’t make a noise.”

*Sut Jhally:* “Dissent, without it being public, is something else. . . . The public nature of it – and being able to stand behind it and to think about it as an intentional act – are key aspects of dissent. Otherwise, it’s a private, conscious objection, and you can wrestle with those things in your mind, but to the extent that dissent is worth thinking about in philosophical or legal terms, it has to make its way into the public realm.”

Dissent is correlated with public manifestation of some sort for several reasons. First, without a certain degree of public recognition, intentional criticism is likely to be completely ineffective. Solitary dissent is more akin to a cerebral act than to a political or social one. To have any political or social valence, dissent requires some public exposure; otherwise, there is no real potential to convey opposition to power structures or to facilitate social or cultural change.

Second, dissent, at least in its more vibrant forms, entails some degree of risk of adverse consequences. That risk might run the gamut from public condemnation and social ostracism to personal injury and imprisonment. Speaking truth to power, after all, can have its price. But such dissent is valued precisely because one steps up and assumes the risk. If expression or action is entirely immune from any public scrutiny, there is little, if any, risk incurred. Speaking privately to friends or to ideological cohorts, then, lacks both the edge and the peril of dissent.

Third, implicit in the idea of speaking truth to power is the notion of personal integrity – that is, assuming ownership of one's views. Whether it be Sophocles' Antigone challenging King Creon's edict or Muhammad Ali refusing military induction during the Vietnam War, the public character of dissent can buttress the righteousness of claims. Only consider Norman Rockwell's 1943 painting, *Freedom of Speech*, which illustrates a courageous figure standing up among his fellow citizens to express his opinions; this iconic image is so powerful because the man takes public ownership of his ideas, and thereby affirms the strength of his convictions.

The last point notwithstanding, there are instances in which we might find dissent even if one declines to "own" it, as in the case of anonymous dissent. As long as the criticism itself is public, there will be times when the identity of the critic need not be revealed. The history of early dissent in America, as described by Justice Hugo Black in *Talley v. California* (1960), illustrates the point. "Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to [anonymously] criticize oppressive practices and laws," Black wrote for the majority. "The obnoxious press licensing law of England, which was also enforced on the colonies," he added, "was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. . . . Even the *Federalist Papers*, written in favor of the adoption of our Constitution, were published under fictitious names." Thus, Black concluded, "[i]t



is plain that anonymity has been assumed for the most constructive purposes.” Because of this tradition, anonymous oppositional expression continues to be constitutionally protected, even in non-repressive times.

While we see anonymity as an understandable, albeit limited, qualification of the public character of dissent, should we so qualify criticism that is not intended to be shared with others, or that is shared with a single or a small number of private recipients? In the first instance, recall our example of Dr. King’s private diary entries. For Professor Nadine Strossen, the secret character of diary writing disqualifies it as dissent: “Writing in your own diary would not count for me. Talking to yourself would not count for me.” This is an entirely plausible position, because all of the foregoing explanations rationalizing the public character of dissent are undermined.

That said, if one pauses for a moment to reflect on the possible purposes for diary entries, the matter becomes more complicated. Although a diary may be no more than a record of personal history and may forever remain private, sometimes a diary accidentally becomes public or is intended to become public after death – the author “speaks from the grave,” as it were. In the latter cases, what was heretofore private becomes public. When this occurs, “that might get much closer to, if not arrive into, the area of dissent,” Judge Jon Newman reasons. “Almost everyone understands that once you write something down, there’s a risk it will become public. . . . So, unless you go to extraordinary lengths to safeguard the secrecy of your criticism, there is a risk.” Such a risk, of course, was entirely foreseeable

to Dr. King, who had every reason to believe that his private papers, especially searing criticism of the established order, would be published after his death. By contrast, the same would not necessarily hold true for nonpublic figures who could not reasonably expect that their private musings would have public value. In short, although perhaps we can imagine diary entries by public figures being characterized as dissent, it is far more difficult to do so for private figures who engage in such practices.

In the second instance, remember Dr. King's hypothetical letter to President Johnson. Here the fly in the conceptual ointment is the meaning of "public" – that is, how public must criticism be to count as dissent? Can exposure to a single person or to a small group of persons be sufficient for the public character of dissent? If by "public" we understand criticism that is open to general observation, then King's letter to Johnson would not constitute dissent. Analytically and linguistically, it is difficult to stretch this meaning of "public" to fit private criticism intended to remain so. The same would likely hold for a critical communication conveyed to a small group.

Even so, for the Johnson letter hypothetical, we might see the need for a narrow exception to the public character of dissent. In that scenario, Dr. King purposefully directs his criticism to a politically powerful authority figure, and thereby exposes his expression to possible public awareness and subjects himself to a potential risk of retribution. The case should be no different if King's private letter were addressed to a small number of Johnson's cabinet, since this group would be perceived as one that King intends to

criticize. (Indeed, such “dissent,” if it can rightfully be called that, is the mainstay of diplomatic envoys.) Of course, the same cannot be said if King’s letter were sent, instead, to a sympathetic fellow clergyman.

Because our conceptual enterprise is often context-dependent, it should be noted that there are other situations in which expression would likely be deemed dissent, even if it is not otherwise public. This is most likely to be the case where opposition occurs in a totalitarian or otherwise highly repressive regime – that is, where an open act of dissent could well be tantamount to suicide. Just consider the practical impossibility of public dissent in the contexts of Athens in the fifth and fourth centuries BC, or in Muslim countries in the early Middle Ages, or in fifteenth-century Spain, or in seventeenth-century Holland or England, or in eighteenth-century France, or in twentieth-century Stalinist Russia or Nazi Germany, or in modern-day Iran. In any of these or other such contexts, an underground oppositional culture, so fraught with danger that it is not publicized, might nonetheless be labeled a dissenting one. By stark contrast, where a society is free and democratic, such private acts stand to lose their currency as dissent.

There is a related possibility, one especially known to philosophers, literary figures, and religious writers alike. In repressive periods, the need to express critical opinion might most safely be done by writing esoterically – that is, between the lines. On the one hand, Leo Strauss tells us, “it is a safe venture to tell the truth one knows to benevolent and trustworthy acquaintances.” On the other hand, the possibility of persecution will prompt “a man of independent thought

[to] utter his views in public . . . provided he moves with circumspection. He can utter them in print without incurring any danger, provided he is capable of writing between the lines.” Interestingly, with such esoteric expression, a message might be, at one and the same time, a public act and private dissent.



The three attributes – intention, criticism, and public – lie at the conceptual and linguistic core of dissent. If one or more of these characteristics were not found in an expression or action, it would be improbable, if not impossible, to name it dissent. Additionally, the more the expression or action moves away from these characteristics in their most pristine form, the less likely it is to be labeled dissent. Of course, when these three attributes are combined with others, an activity could still qualify as dissent; indeed, in certain instances, it will be an even stronger candidate for dissent. It is to just such matters that we turn next.