

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 Hitchens. 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 Green: “I think Booth was expressing a form of dissent.”

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

Martha 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 than 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.