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Ronald K. L. Collins & David M. Skover

Excerpt

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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

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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

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Excerpt

[More information](#)

From Judicial Dissent to Peaceful Protest

3

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.

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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.,

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[More information](#)

From Judicial Dissent to Peaceful Protest

5

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

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“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.”

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Excerpt

[More information](#)

From Judicial Dissent to Peaceful Protest

7

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

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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,

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Excerpt

[More information](#)

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9

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

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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.