Dissent and the American Story

An Introduction

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Will you fulfill the demands of the soul or will you yield yourself to the conventions of the world. – Ralph Waldo Emerson

If in the name of security or of loyalty we start hacking away at our freedoms . . . we will in the end forfeit security as well.
– Henry Steele Commager

Dissent has had, and continues to have, a central and important role in America's national story and in our cultural imagination.[1] "From the beginning," Henry Steele Commager notes, "our own history was rooted in dissent."[2] Whatever the realities on the ground, recognizing a right to speak truth to power is advertised as a peculiarly American achievement. Our freedoms, our cultural liveliness – these are the virtues that Americans most consistently use to explain what makes America distinct.[3]

[1] See, for example, David Bromwich, "Lincoln and Whitman as Representative Americans," 90 *Yale Review* (2002), 1–21. On the ways in which this proposition is contested, see James Davidson Hunter, *Culture Wars: The Struggle to Define America*. New York: Basic Books, 1991.

[2] Henry Steele Commager, *Freedom, Loyalty, Dissent*. New York: Oxford University Press, 1954, 39. See also Abe Fortas, *Concerning Dissent and Civil Disobedience*. New York: New American Library, 168, 24.

[3] Michael Kammen, "The Problem of American Exceptionalism: A Reconsideration," 45 *American Quarterly* (1993), 1. "America," Shiffrin contends, "has had a romance with the First Amendment." Steven Shiffrin, *The First Amendment, Democracy, and Romance*. Cambridge, MA: Harvard University Press, 1990, 5.

The political theorist George Kateb describes what he considers a uniquely American kind of individualism, what he calls "democratic individuality," an individualism deeply entangled with dissent.[4] The democratic individual becomes a dissenter as an expression of "negative individuality," "the disposition to disobey bad conventions and unjust laws, by oneself, and on the basis of a strict moral self-scrutiny, self-examination," but also out of a commitment to "take responsibility for oneself – One's self must become a project, one must become the architect of one's soul."[5] Steven Shiffrin similarly identifies dissent's centrality to America's self-concept. Dissent, he says, is a "crucial institution for challenging unjust hierarchies and for promoting progressive change. It is also an important part of our national identity that we protect dissent."[6]

In this American story, the dissenter is everyman moved to stand up against injustice. Thus, when we write history we often treat dissenters who were condemned in their own time as heroes who bravely confronted power and changed history. We inquire into the special psychology of the dissenter, even as we wonder whether we have the courage to stand up for what we believe. In the American story, the self of the dissenter is divided. It is desirous of the comfort that patriotism and loyalty provide but ill at ease if the price of such comfort is silence in the face of the unjust suffering of others. In the American story, dissent is both institutionalized and part of a cultural politics, a cultural practice of engaging the question of injustice.

The spirit of dissent, so the story goes, permeates democratic culture. It is also built into the fabric of our institutions, witness academic tenure, the legal protection of whistle-blowers, and the practice of dissenting on appellate courts. The institutionalized status of dissent suggests that it is affirmed, nurtured, fostered, rather than condemned. Whether in the streets or in

[4] George Kateb, *The Inner Ocean: Individualism and Democratic Culture*. Ithaca, NY: Cornell University Press, 1992.
[5] *Id.*, 89, 90.
[6] Steven Shiffrin, *Dissent, Injustice and the Meanings of America*. Princeton, NJ: Princeton University Press, 1999, xii.

our institutions, the call of dissent is, in Judith Butler's words, to hear "beyond what we are able to hear," to attend to an alterity whose presence is overwhelmed by events.[7] Or as Kenji Yoshino puts it in describing judicial dissents, "The dissenter's greatest permission is to imagine a better world, to be the prophet of eternities."[8]

Dissenters seek to define and occupy an in-between space, resistant to prevailing orthodoxy but engaged with it nonetheless. Even as she points out its flaws and demands redress, the dissenter affirms her continuing allegiance to the community she criticizes. She is at once within but outside of the institutions or the community in which she participates and their conventions.[9] In part because of her liminality, the dissenter is often accused of disloyalty and subject to sanction and stigma by state and society. Pulled from the one side by those who say that dissent does not go far enough and from the other by those who demand acquiescence as the sign of loyalty, maintaining the in-betweenness of dissent is very difficult. The dissenter insists, as Henry Louis Gates puts it, that "critique can also be a form of commitment, a means of laying a claim. It's the ultimate gesture of citizenship. A way of saying: I'm not just passing through, I *live* here."[10]

[7] Judith Butler, "Explanation and Exoneration, or What We Can Hear," 5 *Theory and Event* (2002), http://muse.jhu.edu/journals/theory_and_event/v005/5.4butler.html.

[8] Kenji Yoshino, "Of Stranger Spaces," in *Law and the Stranger*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey. Stanford, CA: Stanford University Press, 2010, 221.

[9] For a discussion of this tension, see Charles Euchner, *Extraordinary Politics: How Protest and Dissent Are Changing American Democracy*. Boulder, CO: Westview Press, 1996.

[10] Henry Louis Gates Jr., "Patriotism," *Nation* (July 15–22, 1991), 91. Shiffrin makes a similar point when he argues that "the dissent model would hope that dialogue would ultimately be spurred by the presence of dissent." Steven Shiffrin, *Dissent, Injustice, and the Meanings of America*. Princeton, NJ: Princeton University Press, 1999, 17. Also Wendy Kaminer, "Patriotic Dissent," 12 *American Prospect* (2001), 32.

Yet dissent is always dangerous to those who practice it and vexatious to those against whom it is directed. For both the dissenter and the target, dissent stirs up strong emotions and often calls forth strident reactions. Majorities or powerful people seldom appreciate challenge or embrace those who do not profess allegiance to their policies or practices. As Justice Oliver Wendell Holmes once wrote, "Persecution for the expression of opinions seems to me to be perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition."[11] Writing fifty years after Holmes, Justice William O. Douglas noted that government's "eternal temptation . . . has been to arrest the speaker rather than to correct the conditions about which he complains."[12]

Although responses to dissent in state and society are contingent and historically specific, the general tendency is toward the containment, if not outright repression, of dissent. When the physical security of the community of which the dissenter is a member seems jeopardized, these tendencies and temptations intensify.[13] In more normal times, the critic, the naysayer, the resister, is not welcomed warmly and comes under intense pressure to evacuate the space of dissent, to take sides, to choose allegiance over authenticity. Thus, Chief Justice John Marshall

[11] See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See also Henry Schofield, "Freedom of the Press in the United States," in *Essays on Constitutional Law and Equity* (1914), 11. "Men," Schofield wrote, "will be fined and imprisoned, under the guise of being punished for their bad motives, or bad intent and ends, simply because the powers that be do not agree with their opinions." As Shiffrin puts it, "Persons in power also have the all-too-human tendency to believe in good faith that the 'right' answers to moral and political issues just happen to be ones that consolidate and enhance their own power." See Steven Shiffrin, *Dissent, Injustice, and the Meanings of America*, 92.

[12] *Younger v. Harris*, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting).

[13] See Jeb Rubenfeld, "The First Amendment's Purpose," 53 *Stanford Law Review* (2001), 767, 782. "[T]he right to engage in political dissent must surely yield when compelling governmental interests are implicated."

abolished the practice of seriatim opinions in the earliest history of the U.S. Supreme Court.[14]

Moreover, Koffler and Gershman note, "The history of the first amendment has been the history of intolerance of political dissent, a story of dark shadows of fear and orthodoxy illuminated periodically by brilliant rays of enlightenment."[15] Susan Ross argues that "despite nods to the vital role uninhibited debate plays in democratic self-governance, the Court has not consistently advanced a broad presumption against government action that encourages orthodoxy or discourages open discussion."[16]

In the practices of our social and political institutions, dissent is seldom celebrated and embraced. Most often dissent is accommodated into a defense of rights, in particular the right to freedom of expression. In this accommodation, the emphasis is not on the dissenter, but on dissent, not on the dissenter's heroic quality, but on the value of tolerating dissent for our society. As a result, we are enjoined not to admire and imitate the dissenter but only to put up with dissent. Dissent is an annoyance, maybe even an offense, but we respect the right to dissent even if we do not respect the dissenter. The best that the dissenter can expect is toleration,[17] a toleration that reassures those who express it of their own virtue while, at the same time, allowing them to condemn both those who dissent and the message they seek to communicate.

[14] See Bernard Schwartz, *A History of the Supreme Court*. New York: Oxford University Press, 1993, 39.

[15] Judith Koffler and Bennett Gershman, "The New Seditious Libel," 69 *Cornell Law Review* (1984), 858. See also Michael Vitello, "The Nuremberg Files: Testing the Outer Limits of the First Amendment," 61 *Ohio State Law Journal* (2000), 1175.

[16] Susan Ross, "An Apologia to Radical Dissent and a Supreme Court Test to Protect It," 7 *Communication Law & Policy* (2002), 401, 402. See also Zechariah Chafee, *Free Speech in the United States* (2nd ed., 1942).

[17] See David Heyd, ed., *Toleration: An Elusive Virtue*. Princeton, NJ: Princeton University Press, 1996. Also Susan Mendus, *Toleration and the Limits of Liberalism*. Atlantic Highlands, NJ: Humanities Press International, 1989. Shiffrin argues that, given the danger of dissent, "It is not enough to tolerate dissent; dissent needs to be institutionally encouraged." *Dissent, Injustice, and the Meanings of America*, xiii.

Others argue that the picture is more complicated and that even as they discourage and domesticate dissent, our institutions protect it as well. As Shiffrin puts it:

> The First Amendment serves to undermine dissent even as it protects it. Of course, the First Amendment protects dissent. It offers a legal claim for dissenters, and it functions as a cultural symbol encouraging dissenters to speak out. Nonetheless, the symbolism of the First Amendment perpetuates a cultural myth. It functions as a form of cultural ideology through which the society secures allegiance. It leads us to believe that America is the land of free speech, but it blinks at the "tyranny of the prevailing opinion and feeling," and it masks the extent to which free speech is marginalized, discouraged, and repressed. Even as it promotes dissent, it falsifies the willingness of the society to receive it, and it tolerates rules of place and property that make it difficult for people of modest means to address a mass audience.[18]

Where dissent is regularized as a practice in legal or political institutions, the strains that dissent produces and the repression that dissent may otherwise evoke are reduced, but they may not be eliminated. Moreover, dissent may play a significant role in legitimating our legal and political forms. As Lawrence Douglas notes about dissenting opinions on the Supreme Court, "The genius of the phenomenon is that it . . . is . . . a critical constituent of the rhetoric of legitimation that empowers the Court's project of constitutional exposition."[19]

Dissenting Voices in American Society: The Role of Judges, Lawyers, and Citizens explores the status of dissent in our institutions and culture. It brings together under the lens of critical examination dissenting voices that are usually treated separately:

[18] Shiffrin, *Dissent, Injustice, and the Meanings of America*, 27.

[19] Lawrence Douglas, "Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review," in *The Rhetoric of Law*, ed. Austin Sarat and Thomas R. Kearns. Ann Arbor: University of Michigan Press, 258.

the protester, the academic critic, the intellectual, the dissenting judge. It examines the forms of dissent that institutions make possible and those that are discouraged or domesticated.

This book also describes the kinds of stories that dissenting voices try to tell and the narrative tropes on which those stories depend. In what voices and tones do dissenting voices speak? What worlds does dissent try to imagine and what in the end is the value of dissent? Where does dissent speak without actually speaking? Where do dissenting voices most often go unheard or unrecognized? Do we find dissent wherever we find discontent? Wherever we find expression? It is these questions that the work collected in this book addresses.

Dissenting Voices in American Society is the product of an integrated series of symposia at the University of Alabama School of Law. These symposia bring leading scholars into colloquy with faculty at the law school on subjects at the cutting edge of interdisciplinary inquiry in law. One of the products of that colloquy is the commentary provided after each chapter.

The first chapter, by Ravit Reichman, suggests that dissent emerges from and exemplifies the counterfactual imagination, that is, a willingness to think against the grain and to conjure conditions that do not yet exist. The counterfactual has force as an internalized dissenting voice. It is instrumental, a tool of logical reasoning. "What such counterfactual resistance creates," Reichman explains, "constitutes the very conditions of ethical life." It constructs an ethical framework around an internal, unsettled objection to anything static. Yet it also calls us to account for the past, for what might have been, and as such, it lives in each of us as a "darker and more ambivalent undercurrent."

Although the counterfactual imagination is a "salient political and historical undertaking," Reichman begins with fiction. She argues that E. M. Forster's *A Passage to India* is essentially the story of a friendship that might have been. In her reading of Forster's novel, Reichman returns to the notion of ethical framing. The ethical qualities of Forster's characters are "driven home when individuals recognize that other decisions have been made, that other courses had once been available." The noblest human

character is counterfactually imaginative. Those who admit no alternative are unyielding, arrogant, and disturbingly blinded. Moreover, each counterfactual moment in the novel carries with it a "sharp tug of dissent" that becomes an even sharper conviction.

Reichman argues that the overlying counterfactual narrative establishes not plot, but tone. She claims that "if the novel's plot asserts that this is how things have to be, its tone – simultaneously resigned and indignant – refuses to let this plot lie still." The counterfactual resists the stationary.

Reichman then moves on to offer an example of a counterfactual narrative in the legal context. She looks specifically at the 1979 opinion *Rusk v. State*, a case of an alleged rape. Reichman argues that the plaintiff's story of what might have been largely influences the court's judgment against her. In fact, the deciding points of the case are counterfactual moments.

First, the plaintiff's statement, in hindsight, about what she might have done instead of following Rusk upstairs leads the court to be skeptical about her claim that she was coerced. The majority, Reichman argues, ignores the "sense of temporality" intrinsic to the counterfactual frame. The counterfactual becomes factual. Second, the court questions the plaintiff's hesitancy to report the alleged rape directly to the police. Again, the opinion ignores the issue of time and takes this counterfactual account as an exercise in critical thought.

Justice Wilner, in his dissent, treats the plaintiff's statements as honestly counterfactual. His opinion recognizes the counterfactual as "an intrusion that ruptures the fabric of reasoning rather than a counterpart to this reasoning." The plaintiff's narrative is an "internal voice of dissent," a representation of "emotional logic," not critical reasoning.

Reichman argues that the court's treatment of the plaintiff's testimony is itself a counterfactual. Rape becomes consensual, desired sex. In this way, ambivalence, indecision, and regret motivate the court's own unwillingness to trust the plaintiff's story of trauma. Reichman claims that the counterfactual must be understood for what it is – "a tone rather than a claim." It is a

"fundamental mechanism for the evolution of an ethical comprehension of one's evolving self." These "embedded forms of dissent" are at once "common," "persistent," and "unwieldy." They illuminate what may be an irreconcilable tension between an ethical self and a normative world.

Although Reichman is concerned with the psychic life of dissent, Susanna Lee focuses on its institutionalized expression in Supreme Court decisions. Through an examination of *Bowers v. Hardwick*, *Romer v. Evans*, and *Lawrence v. Texas*, Lee explores different tonalities of dissent in judicial opinions. She distinguishes between animus, the expression of disapproval based on antagonism, and disapproval based on a feeling of harm or disenfranchisement. Lee compares justice and subject to author and character. Dissents, she notes, reflect both "the humanity of the legal subject and the power of the author over the legal subject as character."

Lee defines dissent "in the literal sense" as a "difference in feeling" – feeling "about when and in what cases feeling can become judgment." She notes that animus typically emerges in conservative dissents, whereas a sense of hurt and disenfranchisement characterizes liberal dissents. The opinions in the three cases come to represent "dueling visions" of disapproval and dissent, that is, "one version that prepares to morph into judgment and action, and the other that contemplates, critiques, and regrets."

Starting with *Bowers v. Hardwick*, Lee suggests that both the majority and the concurring opinions cast moral disapproval as a natural foundation for law. Proscriptions against sodomy, according to Justices White and Burger, are at once "ahistoric" (natural) and "transhistoric" (continuously reiterated). The *Bowers* majority opinion prefigures Scalia's dissent in *Lawrence* in its persistent focus on legislative authority as opposed to individuals as authors or characters.

In contrast, dissents written by Blackmun and Stevens "focus on the ruling as an action upon individuals." The right at hand is a right to "privacy," "to be let alone" – a right "not to be authored" by law. Justice Blackmun explicitly warns against rulings based

on disapproval; upset must be mediated with sensitivity to prevent a "fusion" of disapproval and legal judgment.

As Lee sees it, *Romer v. Evans* is even more "explicitly about disapproval" and "about the right of disapprovers to see animus-based judgment enforced in law." Justice Kennedy's majority opinion invalidates animus toward a specific class of persons as a legitimate state interest. In his view, animus-made law amounts to only an infliction of harm. Scalia's dissent, however, argues specifically for the "power and judicial legitimacy of animus."

On the basis of the contrasting tones of the opinions (harm versus animus), Lee claims that conservative dissents tend to set themselves up as articulations of incipient majority opinions, whereas liberal majority opinions tend to cast themselves merely as dissents. Both sides, however, claim grievance and express opposition – "one side speaks about harm to the individual, whereas the other side emphasizes harm to the law." Somewhat ironically, Lee describes opinions that cast law "as the principal character" as more "viscerally personal in nature."

Lee notes that animus is an "effective instrument for dulling opposing voices. Animus has a cumulative and historical force." Moreover, she claims that law permeated with animus is "intended to act on public sentiment and not just to reflect it." Therefore, we must ask the question: what is the opposite of animus? Or, more important, What sort of dissent or defense can be mounted against animus?

Lee responds by asserting that the most frequently cited opposite of animus is not endorsement or inclusion of the disapproved class but a "conscious separation of emotion and morality, or emotion and judgment – the division of animus from law." She argues that those who attempt to dissent against conservative disapproval (animus) can "always be read as marginal by association with the marginalized." She writes, "To contribute to powerlessness is an act of animus and also an act of power."

In *Lawrence v. Texas* animus reappears as both a discursive and a judicial weapon. And, again, in the dissents of Justices Scalia and Thomas, we see how animus-based dissents cast themselves as majority opinions. Like his opinion in *Romer*, Kennedy's opinion