

QUESTIONS FOR ANALYSIS & CLASS DISCUSSION OF
COLLINS & SKOVER, ON DISSENT

PROLOGUE

Query: Consider the normative values of dissent discussed on xi-xii. Relate these to the normative value theories for First Amendment protections generally.

Query: As the Prologue tells you, there are no scholarly treatments of the *meaning* of dissent, as opposed to the significance of dissent (xiv). Why do you think that this is the case?

Query: The Prologue distinguishes between a logical or analytical approach for defining dissent (i.e., a foundationalist or essentialist approach) and a linguistic approaching for deciphering dissent (i.e., a Wittgensteinian approach) (xv). Explain this distinction and what the significance of that approach is for identifying dissent.

Query: Consider the “So What?” question (xviii-xx). Explain in your own words the coauthors’ various responses to the question.

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CHAPTER I

Query: How is it that Chapter I can argue that *peaceful protest* is a paradigm of dissent similar to a dissenting judicial opinion? (3-5) If they are conceptual cousins, why don't we use the terms dissent and protest interchangeably?

Query: Intention: Collins & Skover ultimately dismiss the notion of accidental or unintentional dissent. Why is intentional conduct required? What is Steven Shiffrin's perspective on this issue and why do the coauthors distance themselves from that perspective? (8-12)

Query: Criticism: Why is this attribute key to the meaning of dissent? How is criticism to be distinguished from other states of mind, such as doubt and disbelief? (13-14) Discuss the shifting contexts for criticism along the majoritarian-minoritarian axes? (16-17)

Query: Public: Consider and discuss the hypotheticals on Page 20. (23-24) What are the reasons for holding that the public character of dissent is a *sine qua non*? (21-22) What is the special role of anonymous dissent, and why is that a limited exception to its ordinary public character? (22-23)

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CHAPTER II

Query: Chapter II explores multiple ways to conceive of “civil disobedience.” Recall the four distinct conceptions of civil disobedience described in the book. (29) How are they fundamentally distinct from one another? How might these distinctions make a substantial difference in considering civil disobedience to be a mode of dissent?

Query: Note the spectrum of views expressed on the distinction between *civil* and *uncivil* forms of disobedience in determining the parameters of dissent. (31-34) What rationales drive these different perspectives? Which do you find most convincing, and why?

Query: Consider the notion that civil disobedience, however defined, cannot claim the mantle of dissent. (34-35) What rationales drive this perspective? To the extent that you find any sympathy with that perspective, are there socio-political contexts in which the perspective is more or less likely to be convincing?

Query: Action: In what respects may action be deemed a significant attribute of dissent? (38-39) Although action is clearly a *sine qua non* characteristic of civil disobedience, why can it not be deemed an essential characteristic of dissent? What does this observation suggest as to the analytical nexus between the concept of dissent and various attributes typically associated with dissent?

Query: In-Group Opposition: This attribute for dissent is analogized to the legal notion of “standing.” In what sense is it true that “standing” within the group is characteristic of those whom we would identify as dissenters? (40) If “having skin in the game” is characteristic of dissenters, why is in-group opposition not treated as an essential attribute for dissent on the same level as the trifecta of intention / public / criticism? Is it likely that the inherent indeterminacy and malleability of this concept – what the text called the “conceptual sleight of hand” in defining the relevant group (42) – undermine its value as an essential or *sine qua non* attribute of dissent? (43)

Query: Transgression with a Risk of Sanction or Retribution: The text presents a correlation: “the greater the transgression, the greater the risk of consequences; and the greater the risk of consequences, the greater the likelihood of labeling something as dissent.” (46) Explore why this correlation may have great force in identifying a dissenting activity, both logically and linguistically. (48) Nonetheless, explain the workings of the following two statements: “[W]hile the transgression of a norm or law coupled with the risk of negative consequences is not essential to the definition of dissent, it is nonetheless a clear sign of its existence. By contrast, for the kinds of dissent explored in this chapter – civil and uncivil disobedience – transgression and risk of punishment are both formally and functionally essential.” (48)

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CHAPTER III

Query: Early on, Chapter III presents two factual scenarios – the Cantonsville Nine’s ceremonial burning of draft cards and the PETA advocate’s battery by pieing (52-53) – that introduce the element of violence into the consideration of the meaning of dissent. In that light, consider the perspective of Ralph Nader, who purports to draw a categorical distinction between violence and dissent. (53) What is his motivation for doing so? Are you persuaded by his reasoning and willing to exclude any violent act directed at person or property from the sphere of dissent?

Query: Moving to more extreme instances of violence, Chapter III presents two more factual scenarios – John Wilkes Booth’s assassination of President Abraham Lincoln and Theodore Kaczynski’s (“The Unabomber”) terrorist attacks against agents of the industrial-technological system (55-57) – to test our understanding of dissent. Consider the perspective of Steven Shiffrin, who argues that differences in degree of harm are of no conceptual significance to the meaning of dissent. (57-58) Why does Shiffrin’s evaluation of dissent take no account of any gradations of violence? Are you persuaded by his reasoning and willing to include any violent act directed at person or property within the umbrella of dissent, provided the trifecta of intentional / public / criticism is met?

Query: Explain Collin and Skover's reaction to Steven Shiffrin's highly inclusive position as to violent dissent: "Clearly, Professor Shiffrin does not believe that the concept of dissent needs to do much conceptual spadework; that is to be left to statutory and constitutional law. But the law, as legal realists know all too well, does not operate in a vacuum; it is both a mirror and a mold of how Americans think, speak, and act. As our Prologue explained at some length, there is much cultural spadework to be done in the field of dissent before the law comes onto the scene to grant or deny its protection." (58-59)

Query: Michael Walzer, Nadine Strossen, and Howard Zinn are loath to dignify extremely violent action with the badge of dissent. (60-61) Why are they reluctant to do so? In contrast, Geoffrey Stone and Steven Green might identify an extremely violent actor as a dissenter depending on his or her open intent to express criticism. (62-63) Why are they willing to do so? With whom do Collins and Skover cast their lot, and why? With whom do you cast your lot, and why?

Query: Frederick Schauer employs the attribute of in-group opposition as a conceptual tool to explain why extreme forms of violence – such as the most militant acts of a revolutionary, assassin, or terrorist – might not constitute dissent. (67) What is Schauer's rationale, and do you find it persuasive, both as a logical and a linguistic matter?

Query: Relative Powerlessness: In what sense is the concept of powerlessness inherent in the phenomenon of dissent? In what sense, however, may the concept of powerlessness be irrelevant to the phenomenon of dissent? Why may it be that the most effective and ennobling dissent is that performed by the relatively powerful? How important, then is the attribute of relative powerlessness to an understanding of dissent?

Query: Acknowledgement of the Rule of Law and the Acceptance of Punishment: While this characteristic is obviously not a *sine qua non* attribute of dissent, how might it nevertheless influence our appreciation of certain illegal and even violent conduct as dissent? Why should we consider the “spirit of Socratic honor” a material factor at all in the calculus of dissent? (78) In that light, why hold to the view that this attribute can only be considered significant to the meaning of dissent, but not essential?

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CHAPTER IV

Query: In analyzing “Dissent, Inc.,” Collins and Skover assert: “The character of dissent is sometimes buttressed by its associational nature.” (83) How is it evident that collective action, including corporate action, may be vital to amplification of the individual voice of dissent?

Query: Given that dissent in its collective form certainly has advantages, does it also have disadvantages? Does the collective form – particularly the for-profit corporate form – devalue the currency of dissent? If so, why? If not, why not?

Query: The text identifies two looming issues regarding for-profit corporate dissent – *the collective intent problem* (85) and the *collective legitimacy requirement* (88). Do you consider either of these issues to seriously undermine the possibility for and operation of for-profit corporate dissent?

Query: Collins and Skover inquire: “Can dissent endure when collective intent and purpose appear to be tied to profit making?” (90) Elaborating on the inquiry, they identify the most relevant issue as *the primary profit problem* – that is, the disinclination to find dissent “if the primary purpose behind a message is profit making.” (90-91) How do you respond to this inquiry and the primary profit problem?

Query: Considering the corporate commercial exploitation of aesthetic dissent, Collins and Skover distinguish “the instrumental use of a product to express dissent and its aesthetic use to express one’s unconventionality or aberrational preferences.” (99) And they ask several probing questions: “Does dissent have to be instrumental, or can it be merely self-expressive? Put differently, can dissent ever meaningfully be an aesthetic or stylistic choice of self-expression?” (100) How would you approach these questions and answer them for yourself? Are you more (a) in the camp of Todd Gitlin, Kent Greenawalt, and Fred Schauer (100), (b) in the camp of Howard Zinn and Geoffrey Stone (101), or (c) in the camp of Steven Shiffrin? (101) What explains your choice, and how do you, nonetheless, preserve an operative and meaningful notion of dissent?

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CHAPTER V

Query: Collins and Skover claim that “it is important to recognize that the relationship between dissent and the First Amendment is more opaque than one might first perceive.” (108) Why might this be so? Of what significance is this observation?

Query: Collins and Skover argue that there is a “functional relationship” between dissent and the First Amendment. Describe that phenomenon and explain, at a general level of abstraction, how it appears to work. Why might it be fairly claimed that “this is the work that philosophy does (how we define or speak of dissent) when acting in tandem with the First Amendment (how legislatures and courts go about protecting dissent).” (116)

Query: Consider the examples that Collins and Skover provide to clarify the functional relationship between dissent and the First Amendment: (1) student dissent (e.g., *Tinker v. Des Moines Independent Community School District*); (2) dissenting defamation (e.g., *New York Times v. Sullivan*); (3) dissenting advocacy of illegal action (e.g., *Brandenburg v. Ohio*); (4) dissenting flag desecration (e.g., *Texas v. Johnson*); (5) dissenting economic boycotts (e.g., *NAACP v. Claiborne Hardware Company*). How are these examples illustrative of the “functional relationship” between dissent and the First Amendment addressed in the previous question? Are there other examples that similarly demonstrate that phenomenon? Considering the observation of Nadine Strossen (123-124), are there examples of today’s criminalized speech activities that may well be tomorrow’s First Amendment rights?

Query: Collins and Skover posit: “Beyond the First Amendment and its state counterparts, two other legal doctrines have occasionally succeeded in legitimizing dissent that originally was the focus of criminal or civil constraints” (124) – the void-for-vagueness doctrine and the necessity defense. Explain how these two jurisprudential devices may assist in moving dissent across the line from lawlessness to lawfulness.

Query: Not only might “crimes of dissent” be sheltered by constitutional and ordinary law doctrines, but they may effectively be protected by the practices of a range of executive and judicial officials. Explain how and why the various links along the criminal enforcement chain may buttress the causes of dissent.

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EPILOGUE

Query: Consider the narrative on Thomas Paine, the Great Dissenter. In what respects might you conclude that this account is a paradigm of the shifting fortunes of a dissenter?

Query: “Sedition can be the best test of loyalty. Heresy can be the truest expression of faith. And dissent can be the highest form of patriotism.” (132) How might such claims fairly be laid?