Dancing in America … or not!

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May 30, 2011
Thanks to John Minear

May 28, 2011, Jefferson Memorial, Washington, D.C., U.S. Park Police arrested five people for dancing. This was not the first time for such arrests. Indeed, the group was protesting an appeals court ruling related to the 2008 arrest in the same Memorial of Mary Brooke Oberwetter on Mr. Jefferson's 265th birthday for silently dancing while listening to music on headphones. She was charged with the misdemeanor offence of demonstrating without a permit. She sued on the grounds of what she believed was the violation of her First Amendment right to free speech and she also believed that she was treated physically too harshly when arrested. The district court dismissed the case. It was appealed and the appellate court upheld the district court issuing its seventeen-page opinion on May 17, 2011.

This legal involvement of the federal government in dancing is such an interesting example reflecting the American attitude and understanding of dancing that I simply have to write a lecture on it for "Dancing Culture and Religion."

I have not located any videotape of the dancing or the arrest of Oberwetter in 2008, however, there is video of the May 28th 2011 arrests. Let me show a bit of that. You will hear the Park Police informing visitors to the Memorial that free expression and free speech are not allowed.

I've read the seventeen-page Court of Appeals opinion affirming the dismissal of Oberwetter's case by the district court. The case seems (I say "seems" because I'm certainly no attorney) to hinge on a couple critical matters. One is that the interior area of the Jefferson Memorial is understood by the court as a "nonpublic forum" which apparently is a space that permits the government to prohibit therein speech and expressive activity. Suing on the basis of violation of her First Amendment rights to freedom of expression, Oberwetter referred to her actions as "silent expressive dancing." The court apparently accepted Oberwetter's statement that this is both "expressive" and "dancing." Indeed, it would seem that such an identification of the action would have had to have been made by Park Police as motivation for arresting Oberwetter. In the opinion, the court frequently refers to the activity as "dancing" and to the group accompanying her as "the dancers." No one seems to have raised the issue of what actually defines dancing much less how as a non-verbal action it is "expressive" or what exactly it expressed. No one seems to have raised the issue of what training or competence the Park Police needed to be able to determine that the action was "dancing" or "expressive dancing" a condition necessary to make the arrest. It appears that both in the case of Oberwetter's actions of 2008 and the arrests made in May 2011, the Park Police were assumed to be fully competent to determine whether or not the actions of those they arrested was indeed "dancing." As I say I haven't found a video of Oberwetter's "silent expressive dancing," yet her description suggests that she was simply silently moving, perhaps rhythmically, about to music she heard through ear bud speakers. The video of the 2011 arrests which you have seen raises some interesting questions with respect to what is dancing. It is interesting that it seems clear to all the police that the guy with raised hands shuffling around is

"dancing" and thus was violating the Monument Regulations. It seems there is an inarguable point that the combination of upraised hands and shuffling feet constitute, without a question raised by anyone, dancing.

The next interesting aspect of this action is that no question or contestation was raised by any party involved in the suit related to the understanding that the so-called "dancing" was understood as "expression." This is despite the non-verbal and silent nature of the action. It is despite no statement of or inquiry into what specifically was being expressed. Yet, it is on the basis of this action being "expression" that the court focuses on the rights a citizen has in this particular space. The court determines that the interior area of the Jefferson Memorial is designated as a "nonpublic forum." As such, the court writes, the government can declare that "National memorials are places of public commemoration, not freewheeling forums for open expression, and thus the government may reserve them for purposes that preclude expressive activity." They continue by citing a most interesting precedent, a court ruling which established that "presumably, many national parks include areas—even large areas, such as a vast wilderness preserve—which never have been dedicated to free expression and public assembly, would be clearly incompatible with such use, and would therefore be classified as nonpublic forums." So, it would appear, that if it is illegal to dance in the Jefferson Memorial because it is a "nonpublic forum" where "open expression" is expressly prohibited, it would also be illegal to dance anywhere "in vast wilderness preserves" that are also classified as "nonpublic forums."

Now the other issue is that "nonpublic" spaces are designated areas where the US government may prescribe and limit citizen behavior. The court further notes that it is unlawful to attract attention in "nonpublic forums." The court includes attracting attention as a given aspect of "expressive dancing" and further concludes that thus it is legal for the regulations of the memorial to prohibit dancing since it is an action that "attracts attention," without the court's demonstration of this effect. Since silent vigils are also expressly not permitted, one wonders how the Park Police distinguish between someone sitting quietly in "solemn commemoration" which is the designated purpose of the space and someone practicing "silent vigil."

So basically, as I understand it, in a "nonpublic forum" one cannot express oneself, including a silent act of movement done to commemorate the birthday of the person honored by a memorial, or in any way attract attention. All parties in this suit apparently agree without question that dancing is both expressive and attracts attention.

What I find also rather interesting reading the opinion is the clear prejudice, in my reading, the court shows toward dancing as reflected in their choice of language. Here is an example: "Having thus created and maintained the Memorial as a commemorative site, the government is under no obligation to open it up as a stage for the roving dance troupes of the world—even those celebrating Mr. Jefferson." The court takes a rather large leap from the silent swaying dance of Oberwetter to "roving dance troupes of the world." I don't know, but the term "roving dance troupes" seems rather charged. I find particularly charged the court's choice of the term "roving" which suggests wandering aimlessly about and calls to mind the pejorative image associated with gypsies. Here is another statement from the opinion, "Outside the Jefferson Memorial, of course, Oberwetter and her friends have always been free to dance

to their hearts' content." Sounds like the pursuit of happiness to me. Didn't Mr. Jefferson say something about that?

Throughout the opinion a central argument is developed based on a distinction that is relevant to discussions of civil religion. The opinion focuses on the key point that the government can legally designate spaces where it can dictate with the force of law how citizens comport themselves when in the space and that individual rights of expression do not apply. The opinion takes this up explicitly when Oberwetter holds that since the government offers its own ceremonies celebrating Mr. Jefferson's birthday in the space that she should have the same right. The court explicitly addresses this matter writing, "the government is free to establish venues for the exclusive expression of its own viewpoint. . . . It would be strange indeed to hold that the government may not favor its own expression inside the Jefferson Memorial, which was built by the government for the precise purpose of promoting a particular viewpoint about Jefferson." It is interesting that Oberwetter seems not to be suggesting a limit on the government's free expression, as this court statement suggests, but simply that she should have equal rights to expression. The demeanor the government demands of those who enter closely resemble that expected in traditional American Christian sacred spaces. One is to comport oneself consistent with "a tranquil mood," to maintain a "solemn atmosphere," where the viewpoint of the authority can be freely expressed, but other forms of "expression" are expressly forbidden. Certainly such spaces as the Jefferson Memorial are spaces for the practice of civil religion and this civil religion is quite consistent with American Christianity in the expressed attitude towards dancing.

One last little observation before I say a bit about the American view of dancing particularly in the context of dancing as it occurs throughout the world. The appellate court included a bit of a history lesson for those reading the opinion, one would imagine expressly Ms. Oberwetter, by stating in a footnote that "For his part, Mr. Jefferson is on record discouraging celebration of his birthday." The opinion supports this claim with a quote from Jefferson in which he indicated that "the only birthday I ever commemorate is that of our Independence, the Fourth of July." It is slightly humorous that the opinion does not acknowledge that this statement is at odds with the fact, described in two places in the opinion that there is an "official annual commemorative Jefferson birthday ceremony." This incongruity between citizen and government rights seems consistent with the position held in the opinion that "the government" built the memorial as a means of expressing its own view of Mr. Jefferson and would therefore have no obligation to attend even to his own statements. One wonders, well I do anyway, who indeed is "the government" and I seem to recall some of Mr. Jefferson's other words, hmm, what was that now … "we the people?" I also wonder why the court did not also take into account another rather well-known statement written by Jefferson, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." I wonder what Mr. Jefferson would have thought about these rights seeming not to apply in the very space that serves as his memorial.

I now move beyond this particular situation to reflect a bit on what it reveals about American attitudes related to dancing. First, I find it fascinating that no one involved in the suit contests that the actions performed are dancing. While dance scholars can't seem to agree at all on how we might define or

delimit dancing, the Park Police at the Jefferson Memorial can do so apparently without training or guidelines. This identity of an action as dancing is not an issue in this whole process. Second, it is assumed that dance is expressive reflecting perhaps the most common folk theory of dancing persisting since early in the twentieth century; dance is self-expression. In this court case it is important that the "expression" is understood as the expression of the individual dancer. There is no awareness or consideration that dancing could possibly be the expression of a culture, a religion, even a government. Third, it seems clear that the court understands dancing as inappropriate to the most fundamental behavioral demands appropriate to the civil "sacred spaces" the government has designated as "nonpublic forums." The sense of inappropriateness is hinted at by such phrases as "roving dance troupes." The inappropriateness is based, as gleaned from the opinion, from the expressiveness of dancing and that dancing attracts attention. Forth, it is interesting that the illegality of dancing is considered "demonstrating without a permit."

What is fascinating to me about all this is what it reveals about America, American civil religion, and about American understandings of dancing. One suspects that the 2011 arrests were newsworthy because the government's legal opinion on this matter perhaps seems to many citizens somewhat incongruent both with their understanding of dancing and with their understandings of what Mr. Jefferson stands for.

Placed in the context of cultures throughout the world, it is important to see that the views expressed by the court are far from representative of religious cultures throughout the world where dancing often occupies the most sacred and protected of areas and is considered the most appropriate way to honor even deities.