Dissenting Authority

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ABSTRACT

This essay explicates J.B. White's rhetorical conception of authority as a potentially collaborative achievement and contrasts it with the conception of authority as surrender of judgment prevailing in legal philosophy. On White's view, authority is not an instrument held and deployed, but is conferred, like respect.

This conception of authority illuminates three puzzles concerning the relationship between dissent and legal authority. First, Legal Positivism's purportedly descriptive account of law insists it must claim an authority to govern independent of justice and assent. Yet law's language is replete with justice-based appeals for popular assent. White's reading of the practice of legal authority better explains this evidence. Second, liberal moral philosophers often take value dissensus as evidence that legal authority is necessarily illegitimate. Yet the language of radical dissenters often makes an appeal for legal authority rather than anarchy. White's conception of legal authority as a practice of public reason better accounts for radical aspirations to claim authority. Third, a conventional account of precedent implies dissents are pointless, because they can have no legal authority. Yet White's conception of authority as collaborative engagement explains how dissenting voices contribute authority to law. Law earns our allegiance by remaining open to contestation, and by inviting rather than repressing our critical judgment.

I. COLLABORATIVE AUTHORITY

For scholars of law and literature, J.B. White has the authority of priority. All our investigations have trod on, and often in, his footsteps.

Among the questions his work has illuminated is the nature of authority, particularly in the quartet of thematically related books that followed *The Legal Imagination*.[1] In the decades following the challenge by social

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1. JAMES B. WHITE, THE LEGAL IMAGINATION (1973); JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY (1984) [hereinafter WHEN WORDS LOSE THEIR MEANING]; JAMES B. WHITE, HERACLES'

movements to mid-century political consensus and cultural conformity, White examined law as a rhetorical art of constructing authority by identifying institutions and practices with a common good, even in the face of dissensus. In so doing, he treated law as continuous with other cultural practices of meaning-making, and he studied law as a humanist, with careful attention to textual evidence.

In that era of iconoclasm, White was a dissenter, insisting that disagreement does not preclude authority, but both presupposes and enriches it. Thus, authority informs our common idioms for expressing our differences, while the point of dissent is not to dissolve authority, but to claim it.

In the tradition of our dissenting authority, I want to consider the relationship of dissent and authority in such rhetorical practices as he describes, with particular attention to how these seeming antagonists collaborate. Translating White's always approachable voice into a more recondite argot, we might say dissent is enabled by a semiotic structure constituted by differences. That structure is always already a political relation, informed by authority.

Thus, White reasons, in *Acts of Hope*, "[O]ur very language is a system of authority," so that all discourse performs and thereby both accepts and claims authority.[2] "Every speech act is a way of being and acting in the world that makes a claim for its own rightness that we ask others to respect."[3] Accordingly, "continuity runs from our every remark, our every response . . . to the most serious decisions about whether to yield to or resist the power of the state."[4] This performance of authority is the very condition of understanding one another and even identifying ourselves. And confining as such negotiation with power must be, it's usually better than the alternative.

Deploying the tools of classical rhetoric, New Critical formalism and Reader-Response theory, White reads through voice, implied author, and implied reader to reconstruct the community "constituted" by each text,[5] its subjects and their relations, its institutions, and its conventions of persuasion—in short, how "character and community . . . are defined and made real in performances of language."[6]

Equally important to White's rhetorical conception of law, I think, is a

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BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985) [hereinafter HERACLES' BOW]; JAMES B. WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990) [hereinafter JUSTICE AS TRANSLATION]; JAMES B. WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW AND POLITICS (1994) [hereinafter ACTS OF HOPE].

2. ACTS OF HOPE, *supra* note 1, at 275.
3. *Id.*
4. *Id.*
5. HERACLES' BOW, *supra* note 1, at 37.
6. WHEN WORDS LOSE THEIR MEANING, *supra* note 1, at xi.

perspective so much the water in which lawyers of his generation swam, it may have seemed invisible, or at least unremarkable to him: an understanding of law as process, in which every decision is provisional, requiring interpretation and execution by someone else. We can recognize such a premise in White's view of law as "something lawyers themselves make all the time, whenever they act as lawyers, not as something that is made by a political sovereign."[7] That law is a collaborative process, White here treats as a plain fact, personally observed. The analogy of this process to literary reception seems the self-consciously theoretical point. I would add that law is also something law's subjects make, an idea captured in both the democratic rhetoric of popular sovereignty and the customary conception of law White attributes to Matthew Hale.[8]

Emboldened by White's example, we should recognize how much law and governance are practices of language, and resist the temptation to dismiss law's language of principle as euphemistic. And with White, we should read law's language as literature, resisting the similar impulse to dismiss its tropes, narratives, and credos as merely ornamental. No less than his colleagues in Critical Legal Studies (CLS),[9] White has portrayed law's persistent invocation of deeply opposed values as both structuring and generative.

Thus inspired, I will pose three puzzles about the place of dissent in political and legal authority. In each case, I want to contrast White's rhetorical conception of authority as a potentially collaborative achievement with an increasingly prevalent conception of authority as a power to command, entailing a correlative surrender of will and judgment. If authority preempts our judgment, it certainly seems incompatible with dissent. Yet this view of authority seems to presuppose an impoverished, even neoliberal view of judgment as simply inert preference, insulated from any social influence. On such premises authority is impossible and politics pointless, because there is no scope for collective decision.

By contrast, authority as White conceives it, is not an instrument that can be possessed and deployed, but a carefully cultivated relation of affiliation, something like trust or respect. Indeed, he urges us to resist the "habit of regarding law as the instrument by which 'we' . . . get what 'we' want" and to instead see law as a way to "constitute a 'we' and to establish a conversation . . . [to] determine what our 'wants' are and should be. Our motives and values are not on this view exogenous" to law.[10] This large claim, law and literature's most consequential, is that the contentious

7. HERACLES' BOW, *supra* note 1, at 40-41.

8. ACTS OF HOPE, *supra* note 1, at 124-152.

9. Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); Jack Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986).

10. HERACLES' BOW, *supra* note 1, at 42.

questions societies must resolve collectively through law are not primarily economic, but aesthetic.[11]

II. AUTHORITY AS SOCIAL FACT

The first puzzle I want to consider in light of this heterodox view of authority is a contradiction in the account of law proposed by many Legal Positivists. On the one hand, Legal Positivism purports to have an empirical conception of law as a social fact. Most obviously, if we observe that some legal systems are unjust, we should acknowledge that justice is not a necessary feature of law.

But then, it seems, we should go further and acknowledge that as a social fact, law can have no other necessary features. Nevertheless, many Legal Positivists *define* law as a normative system that necessarily demands compliance not conditioned on any evaluative judgment. Legal reasons for compliance must identify sources for, not merits of, legal prescriptions. Legal authority cannot, as a conceptual matter, depend on the content of its prescriptions.

Hans Kelsen introduced this claim of content-independence not as an empirical observation, but as a conceptual necessity for legal analysis.[12] H.L.A. Hart repurposed it as an empirical claim by narrowing it to a claim about the "internal viewpoint" of officials and lawyers.[13] The postwar Brit on the Clapham bus obeyed for many reasons, including a morality of fair play; but for lawyers, authority came only from authorizing decisions.[14] Yet this claim about legal reasoning was soon challenged by Ronald Dworkin's claim[15] and Neil McCormick's empirical demonstration[16] that judgments of morality, policy, and interpretive fit pervaded common law jurisprudence.

Joseph Raz then decided that content-independence was a conceptual truth after all, about the authority of legal systems.[17] Thus, he argued that the apparently evaluative standards invoked in legal reasoning were not genuine appeals to value, but merely self-flattering rhetoric, dressing up

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11. *See generally* Guyora Binder, *Aesthetic Judgment and Legal Justification*, 43 STUD. L., POL., & SOC. 79 (2008); IMMANUEL KANT, CRITIQUE OF JUDGMENT (J.H. Bernard trans.,1914); FRIEDRICH SCHILLER, ON THE AESTHETIC EDUCATION OF MAN (Reginald Snell trans., 2004); HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY (1992).

12. HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE 110-19 (1945).

13. H.L.A. Hart, *Legal and Moral Obligation*, *in* ESSAYS IN MORAL PHILOSOPHY 82, 91-92, 100-02 (A.I. Melden ed.,1958); H.L.A. HART, THE CONCEPT OF LAW 108-10 (2012 ed.).

14. Hart, *Legal and Moral Obligation*, *supra* note 13, at 103-05; Hart, THE CONCEPT OF LAW, *supra* note 13, at115-17.

15. Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-40 (1967) (making arguments of policy and principle).; RONALD DWORKIN, LAW'S EMPIRE 15-44, 87-113 (1986) (same).

16. NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 64-228 (1978) (identifying multiple sources of discretion in interpreting precedent).

17. JOSEPH RAZ, THE MORALITY OF FREEDOM 38-105 (1986); JOSEPH RAZ, PRACTICAL REASONS AND NORMS 149-77 (1990).

commands as appeals to conscience.[18] Leslie Green similarly insisted that modern states must demand unconditional obedience.[19]

Raz and Green acknowledged that many of law's subjects approve it and feel obligated to obey it, and called these attitudes, respectively, "respect for law"[20] and "civility."[21] Both referred to the sense of fair play and solidarity that motivates us to accept the disappointing choices of democratic majorities, and to share each other's burdens. Yet both distinguished these forms of attachment to law from authority, because they are elective. For such legal positivists, authority must be imposed uniformly from above, not conferred selectively from below: it can tolerate no reflection, negotiation or dissent.

By contrast, authority as White describes it, does not command us, but instead invites our judgment. Authority's contribution to social order is to not end the conversation, but to instill sufficient confidence for conversations to begin. Yet, in so far as we recognize and participate in authority, it offers us reasons for compliance of a particularly compelling kind: authority calls us to fulfill our defining commitments.

In supporting this conception, White turns to just those kinds of texts and tropes legal positivists tend dismiss as merely ornamental:[22] statements of purpose in the Declaration and Constitution deriving their authority from popular will and confining it to service of public welfare;[23] Lincoln's plea for reconciliation, solidarity, and national union in his Second Inaugural.[24] Nor are such revolutionary and aspirational foundations peculiarities of American law: historian Linda Colley has recently shown that similarly phrased republican constitutions spread around the globe during the nineteenth and early twentieth centuries.[25] Thus, what modern states actually say to their citizens about law's authority is often quite different from what some legal positivists say they must. It seems White's

18. JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 203-22 (2009).

19. LESLIE GREEN, THE AUTHORITY OF THE STATE 63-88 (1990). This appears to be a conceptual claim, as no empirical argument is given. See also JULES COLEMAN, THE PRACTICE OF PRINCIPLE (2001) 120 (defining the legal authority claimed by legal actors for propositions of law as a function of source and not content, and identifying this conception of legal authority as following from the thesis that law is a social fact). As interpreted by Coleman, the social fact thesis is not that authoritative legal reasons are those speakers in fact defer to on questions they regard as legal, but that, conceptually, legal reasons can only be source-based, not value-based.

20. JOSEPH RAZ, THE AUTHORITY OF LAW 250-61 (2009).

21. GREEN, *supra* note 19, at 248-67.

22. KELSEN, *supra* note 12, at 123 (characterizing statements of normative aspirations in constitutions and statutes as "legally irrelevant" rhetoric); GREEN, *supra* note 19, at 83 (concluding that normative limitations on the state's legal authority are necessarily self-imposed); RAZ, BETWEEN AUTHORITY AND INTERPRETATION, *supra* note 18, at 207 (distinguishing norms from values with the same content, because the norm excludes the value of the content from a decision).

23. WHEN WORDS LOSE THEIR MEANING, *supra* note 1, at 231-47.

24. ACTS OF HOPE, *supra* note 1, at 294-302.

25. LINDA COLLEY, THE GUN, THE SHIP AND THE PEN: WARFARE, CONSTITUTIONS, AND THE MAKING OF THE MODERN WORLD (2021).

aspirational account of legal authority as a collaborative artifact, as a commitment to sociability, is the one better rooted in social fact.

III. DISSENT AS A CLAIM TO AUTHORITY

If we have aptly conceived authority as a kind of confidence in our institutions and fellow citizens, enabling difficult conversation, it should provide a hospitable home for dissent. Yet that is not how political and moral philosophers came to see political authority in the late twentieth century. John Rawls joined Hart in formulating a fair play account of law's authority during the era of postwar consensus, and proceeded to develop this ideal of fair cooperation into his influential account of justice as a liberal welfare state.[26] Yet by the time his *Theory of Justice*—and White's *Legal Imagination*—were published, the persistent racism and gratuitous militarism of the American state had eroded consensus and discredited the very idea of authority.

Among intellectual elites, it seemed that postwar liberalism fragmented into neo-Marxist and libertarian currents before easing into a comfortable but resigned neoliberalism that cedes governance to the sovereign market. The problem of pluralism preoccupied Rawls for the rest of his working life,[27] while philosophical anarchism became the consensus position on political obligation among philosophers. For Robert Paul Wolff "the defining mark of the state is authority, the right to rule" whereas "the primary obligation of man is autonomy, the refusal to be ruled."[28] Wolff's neo-Marxist anarchism was followed by the complacently Lockean arguments of Robert Nozick and John Simmons.[29] Their arguments invite us to enjoy entitlement without obligation to the polity that protects it. In short, radical dissent seemed to provoke some perverse consequences in both politics and political philosophy.

Yet even radical dissent rarely rejects the possibility of authority. Here we may take White as our guide in re-reading some iconic expressions of radical dissent. We can begin with White's readings of Plato's *Crito*[30] and of Nelson Mandela's "I am prepared to die" speech in the dock.[31]

Like others, White reads Plato's Crito, "between the lines,"[32] dismissing

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26. JOHN RAWLS, LEGAL OBLIGATION AND THE DUTY OF FAIR PLAY, LAW AND PHILOSOPHY 3-18 (Hook ed., 1964); JOHN RAWLS, A THEORY OF JUSTICE 93-109 (1999); Hart, *Legal and Moral Obligation*, *supra* note 13, at 103-05.

27. JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, THE LAW OF PEOPLES (1999)

28. ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 18 (1998).

29. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 90-95, 175-82 (1974); JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 72-190 (1979).

30. ACTS OF HOPE, *supra* note 1, at 3-43.

31. *Id.* 278-294; *see also* Nelson Mandela, "I am prepared to die" (Pretoria Supreme Court, April 20, 1964), https://www.famous-trials.com/nelsonmandela/709-preparedtodie.

32. Leo Strauss, *Persecution and the Art of Writing*, 8 Soc. Rsch. 488, 490 (1941); for another such reader, see Frances Olsen's Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience.

its authoritarian arguments as Socratic irony, dialectical in function. Socrates' resolve to remain and suffer his death sentence shows not his acceptance of unjust authority, but his determination to force Athenians to face their own injustice.[33] As in the *Apology*, he insists that thus exposing injustice showed loyalty to Athens by improving it.[34] White offers dialogue as Plato's model of not only genuine friendship, but also just politics.[35] Thus, Plato's purpose in both dialogues is to establish a model of genuine authority.[36] While paying sardonic deference to institutionalized law, Socrates embodies the virtues to which institutionalized law pretends.[37]

Mandela's apology is similarly insubordinate, justifying his participation in sabotage as a measured response to the unrestrained brutality of Apartheid. Here, Mandela indicts the regime's violation of every accepted principle of legitimate governance, and contrasts its racism with the egalitarian and democratic commitments of the African National Congress (ANC). Far from rejecting the authority of law, Mandela—a lawyer—argues to a global audience, that revolutionary change is necessary to establish a rule of law in South Africa capable of exercising genuine authority.[38] In this respect, Mandela's appeal resembles those in the Declaration of Independence, and many republican constitutions worldwide. Given the atrocity and inherent illegality of the South African regime, humanitarian intervention would be justified, Mandela implies. To deny Black South Africans the right to use force that Western governments could legally use on their behalf, would, like Apartheid itself, perpetuate the colonial project.

Yet in addressing an international audience in the idiom of rights and the rule of law, Mandela also addresses a double-edged argument to white South Africans. He reminds them they are a demographic minority, destined for international revulsion. Their own enduring interests will be best secured in the form of rights in an internationally respected, constitutionally egalitarian, rule of law democracy. In short, they share a common interest with the ANC in an orderly transition to a legitimate legal order. Rather than denying the authority of law, Mandela denies the legality of the Apartheid regime, by identifying law with virtues that regime cannot aspire to.

We will see a similar rhetorical strategies in two iconic American defenses of resistance to unjust law. King's *Letter from the Birmingham Jail* defends his movement's peaceful defiance of an injunction against

33. ACTS OF HOPE, *supra* note 1, at 19-33.

34. Plato, *Apology*, *in* THE REPUBLIC AND OTHER WORKS 447, 460 (B. Jowett trans., 1973); ACTS OF HOPE, *supra* note 1, at 37.

35. ACTS OF HOPE, *supra* note 1, at 34-35, 39.

36. *Id.* at 36.

37. *Id.* at 37-38.

38. Mandela, "I am prepared to die," *supra* note 31 ("We believe that South Africa belongs to all the people who live in it, and not to one group, be it black or white.").

assembly and an ordinance criminalizing unpermitted parades (as well as trespassing in segregated public accommodations), against a call by white clergy for Blacks to confine their protests to legal means, and to refrain from provoking violence.[39] First, King identifies provocative protest with the example of Socrates, improving his country by exposing its faults,[40] and likens civil disobedience to early Christian martyrdom.[41] King observes that white supremacists were committing far more serious crimes, including lynchings, and would not desist unless forced to.[42] Conceding that he demands that others obey law in the form of federal desegregation injunctions, King argues that such obligations of obedience extend only to just laws, while law could not authorize Nazi atrocities.[43] King reconciles this tension by propounding a conception of natural law requiring equal sharing of civic burdens, treatment of people as equal in dignity, universal participation in lawmaking, and equal application of law.[44] As segregation violates these principles, it should not be regarded as lawful. Similarly, as selective suppression of assembly and speech based on the identity of the speaker and the content of the speech violates these principles, they should not be regarded as law.[45] King's principles of natural law are of course all carefully selected to accord with constitutional language. His argument about freedom of speech and assembly would later be vindicated in *Shuttlesworth v. Birmingham*.[46] Coverage of the Birmingham protest, the violent response, and King's measured rhetoric in captivity, are generally credited with responsibility for enactment of the Civil Rights Act of 1964.[47] Thus, King marshalled both legal sources and principles regularly invoked in legal reasoning to perform, achieve, and ultimately redeem authority.

We will find similar aspirations to a higher justice and more legitimate law in Frederick Douglass's 1852 "4th of July Address."[48] As King cited Socrates and Jesus as predecessors in dissent, so Douglass cites the revolutionary founders as dissenting authorities, and their Declaration as authority for claims to equality and liberty.[49] He then calls on his audience to deserve their own freedom by showing like insubordination in the cause

39. Martin Luther King Jr., *Letter from the Birmingham Jail*, LEGAL & POLITICAL OBLIGATION (R. George Wright ed., 1992).

40. *Id.* at 43.

41. *Id.* at 46.

42. *Id.* at 44.

43. *Id.* at 46.

44. *Id.* at 45-46.

45. *Id.*

46. 394 U.S. 147 (1969).

47. *Javits Denounces Birmingham Police*, N.Y. TIMES 82 (May 5, 1963); *Birmingham's Use of Dogs Assailed*, N.Y. TIMES 32 (May 7, 1963).

48. Frederick Douglass*, Oration delivered in Corinthian Hall, Rochester July 5th 1852* (Lee, Mann & C. 1852).

49. *Id.* at 5-7, 10-11.

of freedom. He disdains to argue against slavery, pointing to revolutionary hyperbole likening trivial burdens to enslavement,[50] and finally condemns Independence Day as a celebration of "revolting barbarity and shameless hypocrisy."[51] He next points to the fugitive slave act to preclude his Rochester audience from denying their own complicity in slavery,[52] and condemns the collaboration of established churches.[53] By turns, he implicates every American source of authority in enslavement, leaving no legitimate basis for law until slavery is abolished. However, this is not an anarchist argument against authority, but a summons to earn and deserve authority. Indeed, he concludes by proposing an anti-slavery construction of the Constitution as the sole path to redemption of the American revolutionary project.[54] In so doing, he presents the anti-slavery movement as an indispensable source of authority.

These dissenters to regimes of racial hierarchy did not idealize anarchy—they aspired to justice, a virtue of law. To be sure, civil resistance can be defended on anarchist grounds. Anticipating Wolff's arguments, Thoreau's "On the Duty of Civil Disobedience" invokes American slavery and aggressive war to argue for the immorality of accepting the authority of even benign law.[55] Yet movements for racial justice have generally not adopted a rhetoric of anarchism.

We can understand this choice to present liberation as a requisite for legal authority both strategically and phenomenologically. Strategically, dissident movements are more likely to win participants by lowering the price of participation and the visibility of disloyalty for officials. Thus, nonviolent resistance can initiate a rapid cascade of popular mobilization, the now-familiar phenomenon of "People Power."[56] As a result, such movements have been surprisingly successful at achieving regime change or fundamental reform.[57] Practically, an attitude of devotion to the rule of law is compatible with even very fundamental dissent and can enhance its success.

For a phenomenological account of the appeal of such rhetoric, we can turn to a classic of Critical Race Theory, Patricia Williams' *The Alchemy of Race and Rights*.[58] Here, she explores her ambivalence in claiming a voice within discourses of power that inevitably define their participants. She

50. *Id.* at 15-19.
51. *Id.* at 21.
52. *Id.* at 21-27.
53. *Id.* at 27-35.
54. *Id.* at 35-39.
55. R. GEORGE WRIGHT, LEGAL AND POLITICAL OBLIGATION 25-40 (1992).
56. KURT SHOCK, UNARMED INSURRECTIONS: PEOPLE POWER MOVEMENTS IN NON-DEMOCRACIES (Univ. Minn. Press 2005).
57. ERICA CHENOWETH & MARIA J. STEPHAN, WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT (2011); GENE SHARP, WAGING NONVIOLENT STRUGGLE (2005).
58. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

recalls that law's language of entitlements was used by some of her forbears to enslave others,[59] and she recounts throughout the book how cultural stereotypes about disempowered groups make their own self-representations invisible.[60] Despite the impossibility of fully authentic self-representation, Williams does not reject rights discourse as confining. In her essay *The Pain of Word-Bondage*, she describes the very different experiences she and the CLS leader Peter Gabel have in renting apartments for their respective teaching gigs in New York. Gabel, the white radical, sought and achieved an informal understanding, which he experienced as an affirming respite from the alienating self-commodification of the bourgeois marketplace. Williams, by contrast, was relieved by the formality of her rental transaction, feeling that for once she was accepted as reliably bourgeois in spite of her identity as a Black woman, and that her tenancy was a legal entitlement on which she could rely.[61]

This contrast brings into focus Williams' objection to the CLS critique of rights as a discourse of the privileged, who do not need the protection of rights against precarity, invisibility, and violent repression.[62] Williams argues that bitter experience has taught Black Americans that a rhetoric of need and suffering will likely elicit discomfort and anger rather than empathy. Altruistic concern presupposes recognition as a fellow member of society, and that possibility, Williams argues, is what rights discourse represents for the oppressed.

Because a system of authority is a language, it cannot be ours alone. To claim a right is therefore not to reveal one's authentic self. But to dissent is not necessarily to seek intimacy with one's opponents, and to claim a right does not require that one expose one's essential self. This is not the kind of recognition justice demands. Williams argues that the rights critique merely "unmasks the sorcerer." But to assert a right is to also "don the mask" and "put [it] to good ends."[63] It is to claim and perform a civic self, an office, clothed with authority and responsibility. Thus, effective dissent is something different from authentic self-expression. A measure of alienation inheres in being seen and heard by others, but that is often better than the alternative.

IV. THE AUTHORITY OF DISSENTING OPINIONS

Our third puzzle concerns dissenting opinions. Why bother to write and publish them, in a system where precedential authority is confined to the holding of the court and its supporting reasons? Dissents are cited in

59. *Id.* at 17-19, 153-156, 216-217.
60. *Id.* at 5, 21-22, 46-51, 98-130, 150-153.
61. *Id.* at 146-149.
62. *Id.* at 150-56.
63. *Id.* at 164.

American judicial opinions, but how can they contribute any authority to these opinions? Not only do they lack standing as precedent, their views have also been expressly rejected by the court.

Yet the problem of dissents can be traced to a deeper difficulty: we also lack a cogent account of the authority of precedent. In his two volumes on precedential authority in English law, Neil Duxbury argues that the judicial practice of stare decisis—of seeing themselves bound to conform to decisions in prior cases—is a surprisingly modern doctrine, not firmly established until the second half of the nineteenth century.[64] Thus, the medieval common law was conceived not as the product of courts, but as ancient principles of right. Judges developed and transmitted among themselves an oral lore of such principles, perhaps illustrated with fanciful hypotheticals, deployed during the pleading stage, and so not producing an articulate judgment.[65] Only as sixteenth century judges had increasing occasion to invoke bits of such lore in legal judgments following verdicts on the facts, did such articulate judgments become available as evidence of the law.[66]

Yet much received lore might never have been applied as law.[67] Indeed, since custom was commonly defined in terms of the *absence* of contrary memory,[68] it was most secure when least tested. Thus, caution was appropriate in applying such possibly fictitious custom. In the seventeenth century, we find judges dismissing some statements in such judgments as either unfounded in prior authority, or as not contributing to the decision.[69] This already resembles an idea in vogue among jurists in the late nineteenth century, that precedential authority was confined to reasons necessary to justify a decision on the narrow legal issue remaining in dispute after pleading and fact-finding. The new academic enterprise of training students and digesting the law for practitioners focused on extracting reasons for decision from opinions that could then be used to decide other cases.[70] Yet, the doctrine of the irrelevance of dicta was already in retreat by the twentieth century.[71]

This situation raised a number of related difficulties. In what sense (if

64. NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 17-18 (2008).

65. *Id.* at 32-33; NEIL DUXBURY, THE INTRICACIES OF DICTA AND DISSENT 15, 21 (2021); A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 77-99, 77 (1973).

66. DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT, *supra* note 64, at 33-35; DUXBURY, THE INTRICACIES OF DICTA AND DISSENT, *supra* note 65, at 16-18.

67. In criminal law, for example, the "common law" rules requiring mens rea and imposing felony and depraved heart murder were mythic. GUYORA BINDER, THE MEANING OF KILLING, MODERN HISTORIES OF CRIME AND PUNISHMENT 88-93, 98-101(Dubber & Farmer eds., 2007); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM L. REV. 1, 15-23 (2002)

68. DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT, *supra* note 64, at 8-9.

69. DUXBURY, THE INTRICACIES OF DICTA AND DISSENT, *supra* note 65, at 20-23, 30.

70. *Id.* at 60-67.

71. *Id.* 24-26.

any) were such ostensibly decisive reasons law? Why must they be narrow? And could such narrow reasons for decision be determinately identified?

Decisions of superior courts of course ruled inferior courts, foretelling invalidation of noncompliant decisions. But whether prior decisions similarly controlled subsequent decisions of the same or a peer court remained controversial. The Law Lords sometimes denied a duty to follow their own precedents while 19th century judges usually denied that their decisions made law, espousing a declaratory rather than constitutive account of the authority of their judgments.[72] This claim of deference to extrajudicial law probably best explains the emergent practice of deference to judicial precedent, and the custom of characterizing precedent as narrowly as possible. Coke, who asserted that the common law bound the king[73] and Parliament,[74] had explained the common law as an unchanging body of ancient principle.[75] In the face of claims that exclusive judicial power to decide the law elevated judicial above royal authority,[76] Coke needed to portray precedent as declaring existing rather than enacting new law. But if so, the narrowness of precedential innovation did not entail the narrowness of the already authoritative principles of law they applied.

Hart would later characterize judicial pronouncement of new rules as exercises of a legislative power.[77] Recognizing the absence of any official with power to invalidate or sanction the decision of an apex court, Hart viewed judicial adherence to precedent as elective, a self-imposed discipline. Hart developed his account of legal authority as an "internal" critical attitude to explain such restraint. Yet, the persistent invocation of policy and principle noted by Dworkin and McCormick suggest that some other source of authority for judicial innovation is still seen as necessary.

Hart's account implied that judicial legislation was tolerable because exceptional, while legislation and precedent controlled the bulk of cases. But others have doubted that precedent constrains. Such Skeptics as Llewellyn, Dworkin, and Duxbury have doubted that a narrowest reason for decision can often be identified.[78] English Appellate panels originally delivered seriatim judgments that might not agree on any rationale.[79] A

72. DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT, *supra* note 64, at 40-42.

73. The Case of Prohibitions (1607) EWHC J23 (KB).

74. Dr. Bonham's Case (1610) 77 Eng. Rep. 638.

75. ACTS OF HOPE, supra note 1, at 129 (citing Matthew Hale, The History of the Common Law of England xxvi (Charles M. Gray ed., 2002).

76. IAN LOVELAND, CONSTITUTIONAL LAW ADMINISTRATIVE LAW AND HUMAN RIGHTS 87 (2009).

77. Hart, THE CONCEPT OF LAW, *supra* note 13, at 11, 105.

78. Karl N. Llewellyn, *How Appellate Courts Decide Cases*, 16 PA. BAR ASS'N Q. 220 (1945); DUXBURY, THE INTRICACIES OF DICTA AND DISSENT, *supra* note 65, at 60-73; DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT, *supra* note 64, at 67-92; Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

79. PAUL KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION 2 (2016).

single opinion may balance interests without specifying any fact or factor as essential, or marshal overdetermining reasons of precedent, principle and policy. Application of precedent often employs considerations of policy or principle in fitting shoe to foot. Fidelity to precedent may be valued for reasons of policy (creating a stable legal environment to enable long-term planning) or principle (like treatment across like cases) and these virtues may be balanced against competing normative considerations.

We can illuminate White's response to this problem by comparing it with Lawrence Solum's. Best known as an apostle of public meaning originalism, [80] Solum has defended that thesis against the charge that it invites reactionary rollback of egalitarian social change, by combining it with a commitment to precedential authority. Readers may well feel that these two views sit oddly together, especially after *Dobbs* and *Bruen*.[81] But my quibble is not with Solum's originalism. What interests me about Solum's position is that originalism's reactionary potential gives this committed originalist a strong rhetorical interest in demonstrating the constraining force of precedent, if he can.

Solum presents both textual originalism and precedent as "neoformalist" strategies for cabining judicial will. While objecting to the "instrumentalism" of legal realists, Solum defends *stare decisis* on largely instrumental grounds, as a prophylactic against highly partisan resolution of divisive issues.[82] But since past precedents like *Plessy* may entrench such partisan choices, the moderating function of precedent requires the possibility of incremental change. Thus, Solum would confine precedent to narrow holdings, and disapproves prospective pronouncement of broadly applicable rules. To achieve this narrowing, he would restrict precedential authority to reasons necessary to resolve the dispute before the court.

But, as Duxbury argues, there can be no guarantee that a court will find narrow reasons adequate to justify or explain its resolution of the case. To strip courts of the power to justify results on the basis of broad reasons, Solum must confine precedential authority to the combination of facts and result, unadorned by reasoning. This substitution of facts for reasons is the venerable fudge offered by Arthur Goodhart, who defined the ratio as the facts deemed material by the judge,[83] as if there were not an infinity of rules connecting fact and result.[84] This bare decision account of precedent shifts

80. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1955 (2021).

81. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022); NYSRPA, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

82. Lawrence Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CON. L. 155 (2006).

83. Arthur Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

84. *See* Julius Stone, *The* Ratio *of the* Ratio Decidendi, 22 MODERN L. REV. 597, 603-07 (1959); WITTGENSTEIN, TO FOLLOW A RULE (Steven H. Holtzmann & Christopher M. Leich eds., 1981).

all power to future courts to assign rationales to results—and replicates the Legal Realist judicial method of Llewellyn that is Solum supposes is his target.[85]

White shares Solum's prudential aims of incremental change and reconciliation of fundamental disagreement, and he agrees that a practice of deference to precedent advances these aims. By contrast, however, he acknowledges that the significance and authority of precedent must be constructed. Here he draws on Hale's "Consideration's Touching the Amendment or Alteration of Lawes."[86] On White's reading, Hale conditioned the authority of established law on the wisdom of experience, which teaches us that reforms will disrupt plans, cause unintended consequences, and attract venal support; but also assures us that social conditions will change and require new arrangements. Thus, maintaining the authority of tradition requires the exercise of discriminating judgment, not following a mechanical rule: "Law has its . . . continued life and authority, indeed its continued shape, through our understanding and acquiescence, and through the texts we make as well."[87]

White finds this conception of precedential authority exemplified by the opinion for the court drafted by three Republican appointees in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[88] In reaffirming *Roe v. Wade*,[89] the *Casey* opinion invoked 70 years of precedent establishing substantive due process rights to family autonomy and bodily integrity.[90] It also argued that the legitimacy of the court required adherence to decisions resolving highly contentious political disputes, unless new facts, as in *West Coast Hotel v. Parrish*,[91] or newly acknowledged facts, as in *Brown v. Board of Education,*[92] invalidate the Court's prior reasoning.

As White explains, two important dissents figure prominently in the lineage of *Roe* and *Casey*, identifying reasons both to innovate, and to conserve.[93] On White's view, precedent matters not as evidence of a rule, but in so far as it offers persuasive reasons for perpetuating a tradition. Precedent persuades when it shows us that an area of law has preserved values or practices that are now embedded in social life. Sometimes reasons

85. Llewellyn, *supra* note 78.

86. ACTS OF HOPE, *supra* note 1, at 124-152 (reading Matthew Hale*, Considerations Touching the Alteration or Amendment of Lawes*, *in* FRANCIS HARGRAVE, A COLLECTION OF LEGAL TRACTS RELATED TO THE LAW OF ENGLAND 253-89 (1787)..

87. ACTS OF HOPE, *supra* note 1, at 147.

88. 505 U.S. 833 (1992).

89. 410 U.S. 113 (1973).

90. *Casey*, 505 U.S. at 849 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 269 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Rochin v. California*, 342 U.S. 165 (1952); *Griswold v. Connecticut*, 381 U.S. 479 (1965*); Loving v. Virginia*, 388 U.S. 1 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

91. *Casey*, 505 U.S. at 861 (discussing *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)).

92. *Id.* at 862 (discussing *Brown v. Bd. Of Ed*., 347 U.S. 483 (1954)).

93. ACTS OF HOPE, *supra* note 1, at 158, 172, 175, 181.

of this kind can be invoked in a dissent. In *Poe v. Ullman*, Justice Harlan's dissent supported granting a declaratory judgement that a prohibition on contraception violated due process.[94] Harlan argued that marital contraception was protected by a due process right of family and marital privacy reflected in a long line of precedent,[95] a position soon vindicated in *Griswold v. Connecticut*.[96] Harlan's opinion in *Poe v. Ullman*, emphasizing social custom, was quoted at length in Justice Stewart's concurrence in *Roe*[97] , and in *Casey*.[98] Harlan, in turn, featured a lengthy quote from Brandeis's 1928 dissent in the wiretapping case of *Olmstead v. United States*, urging Fourth and Fifth Amendment protection of privacy. Brandeis described such privacy as a sphere for "the pursuit of happiness," including the exercise of our "spiritual nature . . . feelings, and intellect."[99] Brandeis argued that preserving this conception of liberty in new social and technological circumstances required new protections.[100] The opinion for the Court in *Roe* cited the Brandies dissent.[101] The joint opinion in *Casey* echoed the rhetoric of Brandeis in its affirmation that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[102]

The Brandeis dissent features prominently in another of White's books, as an attractive model of living constitutionalist interpretation that acknowledges the authority of tradition.[103] Thus, Brandeis presents living constitutionalism as the method of John Marshall, practiced throughout the Court's history, and on this basis analogizes 20th century electronic eavesdropping to 18th century seizure of papers, as intrusions that similarly threaten autonomous self-definition.[104] This interpretation of the Fourth Amendment would of course triumph in *Katz v. United States*.[105]

While Brandeis is famous for dissents later invoked by the Warren court, Harlan is known for concurrences on the Warren court, including in

94. Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

95. *Id.* at 545-55 (citing not only Fourth Amendment cases about privacy such as *Boyd v. U.S.*, 116 U.S. 616 (1886), but also cases about parental rights, reproductive freedom, and bodily integrity, such as *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 269 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and *Rochin v. California*, 342 U.S. 165 (1952)).

96. *Griswold*, 381 U.S. at 484 (Douglas, J.) (citing *Poe*, 367 U.S. at 522 (Harlan, J., dissenting)); *Griswold*, 381 U.S. at 494-95 (Goldberg, J., concurring) (citing *Poe*, 367 U.S. at 522 (Harlan, J., dissenting) and *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)); *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (citing *Poe*, 367 U.S. at 522 (Harlan, J., dissenting)).

97. Roe v. Wade, 410 U.S. 113 (1973) (Stewart, J., concurring).

98. *Casey*, 505 U.S. at 848.

99. *Poe*, 367 U.S. at 550 (Harlan, J., dissenting) (citing *United States v. Olmstead*, 277 U.S. 438, 478)(Brandeis, J., dissenting).

100. *Olmstead*, 277 U.S. at 473-79 (Brandeis, J., dissenting).

101. *Roe*, 410 U.S. at 152 (citing *Olmstead*, 277 U.S. at 473-79 (Brandeis, J., dissenting)).

102. *Casey*, 505 U.S. at 851.

103. JUSTICE AS TRANSLATION, *supra* note 1, at 149-57.

104. *Olmstead*, 277 U.S. at 472-74 (Brandeis, J., dissenting).

105. Katz v. United States, 389 U.S. 347 (1967).

Griswold[106] and in *Katz*, where he coined the "reasonable expectation of privacy" test for which the case is known.[107] Harlan typically reached his result by applying due process as a fact-focused standard, reflected in social practice and precedent, rather than formulating a new rule or borrowing one from the Bill of Rights. However, to represent the virtues of precedential reasoning, White uses Harlan's dissent in *United States v. White*.[108] Here, on the authority of *Katz* and other precedent, Harlan judged the warrantless recording of a suspect's conversation with an informant as a violation of the Fourth Amendment. He explained reasonable expectations of privacy as shaped by laws reflecting "the customs and values of the past and the present."[109] Harlan rejected the third-party doctrine that views any information shared with another person as no longer private. He reasoned this doctrine had already ceased to cohere with advancing case law. With the advance of technology, we now have all come to depend on third-party service providers to store and manage our private data. In this respect, Harlan anticipated the 2018 decision in *Carpenter v. United States*, which greatly limited the third-party doctrine.[110] Remarkably, White chose a dissent as his model of reasoning from precedent.

The title of White's book, *Justice as Translation*, captures the connections among three of his themes: subjectivity as a kind of language; justice as dialogic, as the mutual recognition of distinct subjectivities achieved in conversation; and the conservation of authority in the face of change by remaking language. The Brandeis and Harlan dissents show how a dissent can advance that conversation dialectically, contributing to the authority of that process, if not of its particular decisions.

Dissents are part of the design of the American appellate process. Dissent is a prospect inherent in decision by panels, where a plurality of views are expected. Because the fact of dissent can reduce the authority of a particular judgment, its prospect exerts pressure on the majority. Justice Ginsburg has reported that draft dissents often persuade authors of majority opinions to narrow their arguments. A dissent—or the threat of one—forces the majority to address or defer to arguments it might have otherwise ignored.[111]

Even if a dissent undermines the authority of an opinion of the court, it can contribute to the authority of the court and the law. Some decisions are so "morally repugnant"[112] as to endanger that authority: *Dred Scott*, *Plessy*,

106. *Griswold*, 381 U.S. at 499 (Harlan, J., concurring).

107. *Id.* at 360 (Harlan, J., concurring).

108. 401 U.S. 745, 768 (1971); JUSTICE AS TRANSLATION, *supra* note 1, at 167-75.

109. JUSTICE AS TRANSLATION, *supra* note 1, at 170.

110. 138 S. Ct. 2206 (2018) (holding the third-party doctrine inapplicable to the whole of movement in public and to information unavoidably shared with communication service providers).

111. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3-4 (2010).

112. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (discussing Korematsu v. United States, 323 U.S. 214 (1944)).

Korematsu and *Bowers v. Hardwick* have been viewed this way.[113] In each of these cases, passionate dissents preserved the honor of the Court and lit the path to redemption of the constitutional project. Justice Curtis's dissent in *Dred Scott* dismantled Chief Justice Taney's historical claims and anticipated some of Lincoln's constitutional arguments during his presidential campaign.[114] Justice Murphy's dissent in *Korematsu* was the first explicit condemnation of "racism" in the court's history,[115] while Justice Jackson also characterized the detention orders as imprisonment for race.[116] While *Brown v. Board of Education* purported to distinguish *Plessy* as inapplicable to education,[117] the plurality opinion in *Casey* later condemned *Plessy* as "wrong the day it was decided"[118]—vindicating the first Justice Harlan's prediction in dissent that *Plessy* would "in time prove quite as pernicious" as *Dred Scott* .[119] Stevens' dissent in *Bowers* was adopted in Kennedy's majority opinion in *Lawrence v. Texas*.[120] Kennedy declared *Bowers*—like *Plessy*—"not correct when it was decided."[121] That judgment was also applied to *Korematsu* in *Trump v. Hawaii*, quoting the Jackson dissent. [122] A recent literature has recognized that repudiated decisions form a cautionary "Anti-Canon" of constitutional error, while dissents in such cases often achieve canonical status.[123] But even before vindication and canonization, such dissents contribute to systemic legitimacy.

Finally, decisions "decide" more than one question, including the applicable "test" as well as how it applies to the facts. Recently, Nina Varsava has observed that dissents on the result can form part of a majority on the applicable test.[124] For example, in *Montana v. Egelhoff*, four

113. Scott v. Sandford, 60 U.S. 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896); *Korematsu*, 323 U.S. 214; Bowers v. Hardwick, 478 U.S. 186 (1986).

114. *Dred Scott*, 60 U.S. at 564 (Curtis, J., dissenting).

115. *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

116. *Id.* at 242-48 (Jackson, J., dissenting).

117. Brown v. Bd. Of Educ., 347 U.S. 483, 492-95 (1954).

118. *Casey*, 505 U.S. at 863.

119. *Plessy*, 163 U.S. at 552, 559 (Harlan, J., dissenting).

120. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

121. *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting).

122. Trump v. Hawaii, 138 S. Ct. at 2423 (Roberts, C.J.) (quoting *Korematsu*, 323 U.S. at 248); *see also id.* at 2447 (Sotomayor, J., dissenting) (quoting *Korematsu*, 323 U.S. at 236-40 (Murphy, J., dissenting)).

123. Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998); Jack Balkin, *Wrong the Day it was Decided:* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005); Jamal Greene, *The Anti-Canon*, 125 HARV. L. REV. 379 (2011). As Greene notes, dissenting authority is a double-edged sword: an expectation of futility can invite hyperbolic and ill-judged rhetoric—so that Harlan's "colorblind" constitution is most invoked against race-conscious integration. *Id.* at 444-46.

124. Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CON. L & PUB. POL'Y 285 (2019); *cf.* Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1988-93 (2019) (identifying this position as the "all opinions" interpretation of the rule identifying the ratio decidendi as the "narrowest" rationale agreed to by the majority).

dissenting Justices joined with Justice Ginsburg to preserve the authority of *Sandstrom v. Montana*'s guarantee of the right of criminal defendants to introduce evidence disproving offense elements.[125] In *Powell v. Texas*, four dissenting justices joined with Justice White to preserve the authority of *Robinson v. California*'s holding that punishment of involuntary conduct is inherently cruel and unusual.[126] On this view, the holding of the case exceeds the resolution of the dispute between the parties. If so, dissents can be cited in a future case as controlling rather than merely persuasive authority.[127] Paradoxically, a dissenting opinion can participate in the precedential authority of the very case it judges.

V. RECONSTITUTING AUTHORITY

Recent legal theory defines law as a system of norms widely obeyed on the basis of authority, defined in turn as unreasoned submission that nevertheless is not motivated by coercion. Thus conceived, authority effaces its subjects' judgments and silences their voices, and law must be fundamentally heteronomous. It is hard to see how law, thus conceived, could be democratic. Indeed, it is hard to see how such law could exist.

Alternatively, observing that legal decision characteristically proceeds dialectically, we can reconceive authority as a collaborative social practice. Such authority mobilizes our judgment rather than suppressing it. It recruits us to identify with and participate in law. Thus conceived, authority involves a kind of alienation: to confer authority is, to that extent, to reconstitute ourselves, to alter our commitments. Yet it is not, for all that, heteronomous. To recognize authority is to make its norms ours.

125. *Compare* Montana v. Egelhoff, 518 U.S. 37, 58 (1996) (Ginsburg, J., concurring), *with id.* at 61 (O'Connor, J., et al., dissenting).

126. *Compare* Powell v. Texas, 392 U.S. 514, 548 (White, J., concurring), *with id.* at 554 (Fortas, J., et al., dissenting).

127. Lower court decisions citing *Powell* as conditioning punishment on voluntary conduct included *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992) and *Manning v. Caldwell*, 930 F.3d 264, 280 (4th Cir. 2019). The latter court cited as further authority "[t]he Rule Set Forth in *Marks v. United States*, 430 U.S. 188, 193 (1978) . . . teach[ing] that '[w]hen a fragmented Court decides a case and no single rationale . . . enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"