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Uncivil Obedience

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ARTICLES

UNCIVIL OBEDIENCE

Jessica Bulman-Pozen & David E. Pozen***

Scholars and activists have long been interested in conscientious law-breaking as a means of dissent. The civil disobedient violates the law in a bid to highlight its illegitimacy and motivate reform. A less heralded form of social action, however, involves nearly the opposite approach. As a wide range of examples attest, dissenters may also seek to disrupt legal regimes through hyperbolic, literalistic, or otherwise unanticipated adherence to their formal rules.

This Article asks how to make sense of these more paradoxical protests, involving not explicit law-breaking but rather extreme law-following. We seek to identify, elucidate, and call attention to the phenomenon of uncivil obedience. After defining uncivil obedience and describing its basic varieties and mechanisms, we explore tools that have emerged to limit its use. We explain that private law has developed more robust defenses against uncivil obedience than has public law, especially in civil-law jurisdictions. We argue that the challenges uncivil obedience poses to public law values are as substantial as those posed by civil disobedience. And we suggest that uncivil obedience may be a particularly attractive tactic for ideologically conservative individuals and the contemporary Republican Party. For these reasons and others, the Article aims to show, uncivil obedience deserves much more of the sort of critical attention that has been afforded to civil disobedience.

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INTRODUCTION

In April 1993, a group of California motorists hit the road to challenge the fifty-five-miles-per-hour freeway speed limit. The motorists did not violate any laws, or even test any legal bounds. But their actions caused significant disruption and enraged people around them. What did they do? “[J]ust about the worst thing you can do to your fellow freeway drivers: They stayed within the speed limit.”¹ To subvert the fifty-five-miles-per-hour rule and encourage its repeal, the National Motorists Association members devised a peculiar form of protest: meticulous compliance with the very law they opposed.

Scholars and activists have long been interested in conscientious and communicative breaches of law as an instrument of dissent. The civil disobedient violates a legal command in a bid to register opposition and motivate reform. Yet as the freeway protest underscores, people may also seek to disrupt an existing legal regime by *adhering*—in a hyperbolic, literalistic, or otherwise unanticipated manner—to its formal rules.

This Article begins to theorize these more paradoxical challenges to legal authority. We seek to identify, define, and elucidate the phenomenon of *uncivil obedience*.² In important respects, uncivil obedience is the mirror image of civil disobedience. On most accounts, civil disobedience consists of an open violation of law and a willingness to submit to

1. Josh Meyer, *Slowpokes Make Point at 55 M.P.H.*, L.A. Times (Apr. 26, 1993), http://articles.latimes.com/1993-04-26/local/me-27445_1_speed-limit (on file with the *Columbia Law Review*).

2. See *infra* notes 59–60 and accompanying text (explaining “uncivil obedience” label).

punishment. Uncivil obedience inverts these terms. Instead of explicit law-breaking, it involves subversive law-following.³ If civil disobedience is unusually deferential to legal protocol, relative to ordinary unlawful conduct, uncivil obedience is unusually defiant of established social practice, relative to ordinary lawful conduct. And it carries no clear legal consequences. As the California Highway Patrol spokesman said of the speed-limit protesters, "If they're going on the freeway at 55, there's not much we can do to them."⁴

Uncivil obedience is a recurring feature of public and private law contestation. Unlike civil disobedience, however, it is an obscure feature, a neglected category.⁵ An appreciation of its workings, this Article aims to show, offers conceptual and practical rewards for scholars, protesters, and policymakers alike. Investigating this phenomenon can help us to think through not only relatively minor examples such as the speed-limit demonstration but also more significant institutional conflicts, ranging from Senate obstructionism to state anti-abortion measures to employee work-to-rule actions. Moreover, it can refract some light back on debates over civil disobedience.

Part I sets the stage by reviewing the concept of civil disobedience. Part II introduces civil disobedience's legalistic counterpart, uncivil obedience. After developing a working definition, we explore a range of examples, variations, and complications. Part III considers how legal systems respond to uncivil obedience. Private law, we explain, is better equipped to curtail uncivil obedience than is public law, especially in civil-law jurisdictions. Regardless of whether uncivil obedience is a frequent—or even a viable—practice in any given setting, this analysis illustrates that the topic warrants serious academic and policy consideration. Part IV brings civil disobedience back into the picture to organize

3. That is, it involves subversive modes of behaving in conformity with law. An important terminological clarification: In saying that uncivil obedient "obey," "follow," or "comply with" the law, we do not mean to suggest that they necessarily or even normally conform their behavior to the law because that is what the law directs them to do. We thus use "obedience" and related terms in a looser sense than some jurists would allow. See, e.g., Donald H. Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 *Can. J.L. & Jurisprudence* 3, 16 (1990) ("[A]n agent 'obeys' authority, in the strict sense, only if she regards the authority's directives . . . as intrinsic reasons for action.").

4. Tony Knight, *Group to Protest Speed Limit by Driving 55 MPH*, *L.A. Daily News*, Apr. 25, 1993, at N3.

5. The phrase "uncivil obedience" makes an appearance in several memoirs by former activists, see, e.g., A. Alan Borovoy, *Uncivil Obedience: The Tactics and Tales of a Democratic Agitator* 15 (1991) ("The approach I advocate is a form of uncivil obedience. By this, I mean we should obey the law but stick it to the government anyway."); Jim Corbett, *Goatwalking: A Guide to Wildland Living* 98 (1991) (discussing "Uncivil Obedience, Disobedience, and Civil Initiative"), and in a smattering of academic articles. We are not aware of any work that has considered the phrase or the phenomenon, however labeled, in depth.

and inform critique. The basic dilemma that uncivil obedience poses for public law values, we argue, is no less substantial than the dilemma posed by civil disobedience. At the same time, uncivil obedience plays a distinct role within the operations of government that demands critical engagement on its own terms.

I. CIVIL DISOBEDIENCE

Because civil disobedience is a touchstone for understanding uncivil obedience, we begin with a brief discussion of the former. Our aim in this discussion is not to break any new ground. This Part frames our inquiry into uncivil obedience by highlighting key aspects of civil disobedience recognized in the literature, along with some attendant complications and controversies.

A pared-down definition of civil disobedience, limited to elements that have attained near-universal agreement among theorists, might be the following: “a conscientious and communicative breach of law designed to demonstrate condemnation of a law or policy and to contribute to a change in that law or policy.”⁶ Beyond these elements, one might further require that the breach be nonviolent and undertaken with a willingness to accept the legal consequences. These narrowing features are disputed; for some, they characterize the phenomenon more precisely, while for others they smuggle a normative defense of civil disobedience into a purportedly neutral definition.⁷

6. Kimberley Brownlee, *Civil Disobedience*, Stanford Encyclopedia of Philosophy (Dec. 20, 2013), <http://plato.stanford.edu/entries/civil-disobedience> [hereinafter Brownlee, *Civil Disobedience*] (on file with the *Columbia Law Review*). We draw in particular in this discussion on the influential formulations of John Rawls, Joseph Raz, Kimberley Brownlee, and Hugo Bedau. See generally Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* 18 (2012) [hereinafter Brownlee, *Conscience and Conviction*] (“[C]ivil disobedience must include a deliberate breach of law taken on the basis of steadfast personal commitment in order to communicate [one’s] condemnation of a law or policy to a relevantly placed audience.”); John Rawls, *A Theory of Justice* 364 (1971) (defining civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government”); Joseph Raz, *The Authority of Law* 263 (1979) (“*Civil Disobedience* is a politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one’s protest against, and [dissociation] from, a law or a public policy.”); Hugo A. Bedau, *On Civil Disobedience*, 58 *J. Phil.* 653, 661 (1961) [hereinafter Bedau, *On Civil Disobedience*] (“Anyone commits an act of civil disobedience if and only if he acts illegally, publicly, nonviolently, and conscientiously with the intent to frustrate (one of) the laws, policies, or decisions of his government.”).

7. Compare, e.g., Rawls, *supra* note 6, at 364–68 (defining civil disobedience narrowly), with Raz, *supra* note 6, at 269 (arguing features proposed “in an attempt to articulate and justify a doctrine of the permissible forms of civil disobedience” are “arbitrary restrictions”).

On all accounts, civil disobedience is marked by a breach of positive law. The civil disobedient does not simply speak out, march, or otherwise lawfully raise objections. Instead, she distinguishes her protest by violating an official legal norm. Even this seemingly straightforward proposition gives rise to complications, two of which merit attention here. First, must the civil disobedient violate the same law she is protesting? Although a few commentators have suggested limiting the category to such *direct* action,⁸ the weight of authority recognizes *indirect* civil disobedience as well.⁹ People may violate a law they do not oppose (such as a traffic or trespass law) in order to challenge another law or policy (such as military policy). Indeed, in many instances, civil disobedients will be able to register their dissent only by violating a law or policy distinct from the one they are challenging.¹⁰ And the conceptual line between direct and indirect civil disobedience can itself be a blurry one.¹¹

8. See, e.g., Abe Fortas, Concerning Dissent and Civil Disobedience 63 (1968) (“[T]he disobedience of laws which are not themselves the target of the protest . . . constitutes an act of rebellion, not merely of dissent.”).

9. See, e.g., Brownlee, Conscience and Conviction, *supra* note 6, at 19 (recognizing both subcategories of civil disobedience); Rawls, *supra* note 6, at 364–65 (same); Hannah Arendt, Civil Disobedience, *in* Crises of the Republic 49, 55–56 (1969) (same); Marshall Cohen, Civil Disobedience in a Constitutional Democracy, 10 Mass. Rev. 211, 225 (1969) (same). In Daniel Markovits’s terms, the civil disobedient may “*disobey* one law . . . in *defiance* of another” law or legal regime. Daniel Markovits, Democratic Disobedience, 114 Yale L.J. 1897, 1936 n.85 (2005) (emphases added).

10. See H.A. Bedau, Civil Disobedience and Personal Responsibility for Injustice, *in* Civil Disobedience in Focus 49, 52 (Hugo Adam Bedau ed., 1991) [hereinafter Bedau, Personal Responsibility] (noting “undeniable fact that some injustices are inaccessible to direct resistance by some who would protest them” (emphasis omitted)); see also Rawls, *supra* note 6, at 365 (“[I]f the government enacts a vague and harsh statute against treason, it would not be appropriate to commit treason as a way of objecting to it In other cases there is no way to violate the government’s policy directly, as when it concerns foreign affairs . . .”). Some would also exclude from the category of civil disobedience breaches of law that target nongovernmental entities, see Raz, *supra* note 6, at 264 (bracketing protests against “actions or policies of private agents (trade unions, banks, private universities, etc.)”), while others insist it is arbitrary to exclude such protests insofar as they necessarily challenge “the legal framework that accepts [the condemned] policies and practices as lawful,” Brownlee, Conscience and Conviction, *supra* note 6, at 19 n.8; see also Kent Greenawalt, Conflicts of Law and Morality 234 (1987) (“As long as it does not seriously threaten the legal order, disobedience to correct private injustice cannot be ruled out on principle.”); Michael Walzer, Civil Disobedience and Corporate Authority, *in* Obligations: Essays on Disobedience, War, and Citizenship 24, 43 (1970) [hereinafter Walzer, Civil Disobedience] (describing type of civil disobedience that “takes place simultaneously in two different social arenas, the corporation and the state”).

11. For instance, is refusing to pay taxes to the extent that one expects them to benefit the military an act of direct or indirect civil disobedience regarding military policy? See Kimberley Brownlee, The Communicative Aspects of Civil Disobedience and Lawful Punishment, 1 Crim. L. & Phil. 179, 184 n.9 (2007) [hereinafter Brownlee, Communicative Aspects] (presenting this example).

A second complication arises in legal orders with multiple sources of law. In the United States, challenges to state policies are routinely framed as attempts to vindicate federal statutory or constitutional guarantees, which enjoy the status of “the supreme Law of the Land.”¹² The iconic examples of civil disobedience in recent American history—actions taken by Martin Luther King, Jr., Rosa Parks, and many others as part of the civil rights movement—arose in response to state laws now understood to be incompatible with the federal Constitution. As Charles Black noted at the time, one might therefore deny that any law-breaking occurred, even without recourse to natural law arguments: “The fact that we are a federal union changes much that would be civil disobedience into a mere claim of legal right, asserted against what only seems to be law.”¹³ Does this mean that our paradigm cases of civil disobedience actually involved no disobedience? Theorists have largely resisted this conclusion on the logic that the civil disobedient is “not simply presenting a test case for a constitutional decision,” but also or instead seeks to communicate her condemnation to an extrajudicial audience and is “prepared to oppose” the condemned measure “even if it should be upheld.”¹⁴

While breach of law is a necessary aspect of civil disobedience, so too is a constraining commitment to state authority. Civil disobedience is more preservative than revolutionary. It demonstrates respect for the legal system as a whole even as it defies one piece of the system. In John Rawls’s formulation, civil disobedience “expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof.”¹⁵ At the heart of most every conception of civil disobedience, then, is the paradox of law-breaking that is, at the same time, law-respecting. The law-respecting aspect of civil disobedience is indicated by several inter-related features.

As an initial matter, civil disobedience must be conscientious—it must be serious, sincere, and based on conviction.¹⁶ An unscrupulous or impulsive act does not merit the label. While the civil disobedient need not be correct in her judgments, she must have an earnest belief both

12. U.S. Const. art. VI, cl. 2; see also Arendt, *supra* note 9, at 53 (“[B]ecause of its dual system[,] American law, in distinction from other legal systems, has found a nonfictitious, visible place for that higher law on which in one form or another jurisprudence keeps insisting.” (internal quotation marks omitted)).

13. Charles L. Black, Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 *Tex. L. Rev.* 492, 506 (1965).

14. Rawls, *supra* note 6, at 365.

15. *Id.* at 366; see also, e.g., Walzer, *Civil Disobedience*, *supra* note 10, at 24 (“A man breaks the law [when engaging in civil disobedience], but does so in ways which do not challenge the legitimacy of the legal or political systems.”).

16. See, e.g., Rawls, *supra* note 6, at 364 (invoking conscientiousness); Bedau, *Personal Responsibility*, *supra* note 10, at 51 (same); Kimberley Brownlee, *Features of a Paradigm Case of Civil Disobedience*, 10 *Res Publica* 337, 338 (2004) (same).

that the measure she is targeting ought to be changed and that the need for change is sufficiently weighty, as a matter of justice or morality,¹⁷ to require her to break the law.

She must also communicate that sentiment to an audience. Her audience will almost certainly include government officials, and it will likely include victims of the targeted law, other dissenters, or society as a whole. As Kimberley Brownlee observes, the civil disobedient typically has both backward-looking and forward-looking communicative aims. In expressing her “disavowal of, and dissociation from, the protested law or policy,” she simultaneously seeks “to draw attention to the reasons for the protest so as to persuade the relevant audience to accept [her] position.”¹⁸

Because an open breach of law may itself be powerfully expressive, the communicative element of civil disobedience will often be satisfied by the very act of law-breaking. Canonical examples have transpired in plain view and with advance notice to authorities, and some theorists have ascribed definitional significance to these attributes.¹⁹ “[T]here is nothing evasive about civil disobedience,” Michael Walzer asserts; “a public claim against the state is publicly acted out.”²⁰ Yet contemporaneous openness and advance notice may not be strictly necessary. In some cases—for instance, the release of animals from research laboratories or the vandalizing of nuclear power plants—such publicity would furnish legal enforcers the opportunity to thwart the endeavor. In these cases, subsequent acknowledgement and explanation of the act may fulfill the

17. Rawls maintains that civil disobedience must be guided and justified by fundamental principles of justice. A civil disobedient may not base her protest on morality or religion, let alone on self-interest (although these may coincide with and support her claims); instead, she must appeal to “the commonly shared conception of justice that underlies the political order” and locate her protest within the majority’s contemporary understanding of justice. Rawls, *supra* note 6, at 365; see also Cohen, *supra* note 9, at 212 (stating principles invoked by civil disobedient “are principles that he takes to be generally acknowledged”). Against Rawls, many commentators contend that the civil disobedient may seek to alter or expand the majority’s conception of justice, rather than appeal to its existing conception, and that moral or religious principles can equally motivate her dissent. See, e.g., Greenawalt, *supra* note 10, at 230–35 (challenging narrowness of Rawls’s formulation); Peter Singer, *Democracy and Disobedience* 88–90 (1973) (same).

18. Brownlee, *Conscience and Conviction*, *supra* note 6, at 18; see also Rawls, *supra* note 6, at 366 (characterizing civil disobedience as “form of address”); Raz, *supra* note 6, at 264–65 (noting expressive character of civil disobedience).

19. See, e.g., Rawls, *supra* note 6, at 366 (“[Civil disobedience] is engaged in openly with fair notice; it is not covert or secretive.”); Bedau, *On Civil Disobedience*, *supra* note 6, at 655 (“Usually, though not always, it is essential to the purpose of the dissenter that both the public and the government should know what he intends to do.”); Cohen, *supra* note 9, at 212 (“[I]t is essential that [the civil disobedient’s actions] be performed in public, or called to the public’s attention.”).

20. Michael Walzer, *The Obligation to Disobey*, in *Obligations: Essays on Disobedience, War, and Citizenship* 3, 20 (1970) [hereinafter Walzer, *Obligation*].

requirement of communicativeness, along with many of the social values this requirement is thought to serve.²¹

In breaking the law, furthermore, the civil disobedient must aim to advance a reform agenda of some sort.²² It is, in substantial part, this reformist intent that distinguishes civil disobedience from conscientious objection as each has been traditionally understood. The latter is “essentially a private action by a person who wishes to avoid committing moral wrong by obeying a . . . morally bad law.”²³ The conscientious objector wishes to opt out. The civil disobedient, in contrast, is more interested in changing the law to which she objects than in exempting herself from participation.

While the core of civil disobedience therefore consists of a conscientious, communicative breach of law undertaken with reformist intent, two additional criteria figure prominently—though not universally—in the literature. First, numerous theorists contend, the means of resistance must be nonviolent. Nonviolence, on these accounts, is not just a hallmark of morally legitimate civil disobedience but a definitional requirement insofar as it makes “civility” possible.²⁴ Others respond that even if nonviolence is generally to be preferred, it is a category error to view any particular mode of conduct as a necessary aspect of civil disobedience.²⁵

21. See Brownlee, *Conscience and Conviction*, supra note 6, at 23 (“Disobedience carried out covertly in the first instance to ensure that the act is successful may nonetheless be open and communicative when followed by an acknowledgment of the act and the reasons for taking it.”); Raz, supra note 6, at 265 (“[O]nly the fact that an act of disobedience occurred and . . . the nature of its motivation have to be made publicly known.”).

22. See, e.g., Brownlee, *Communicative Aspects*, supra note 11, at 180 (stating civil disobedient must convey not only criticism “but also her desire for . . . a lasting change in law or policy”). But cf. Raz, supra note 6, at 263–64 (arguing civil disobedience may be “designed either to contribute directly to a change of a law or of a public policy or to express one’s protest against, and [dissociation] from, a law or public policy,” but further noting all civil disobedience is designed “to have a political effect”). Although “[a]cts of civil disobedience often have focused and limited objectives,” Brownlee, *Civil Disobedience*, supra note 6, several commentators have recently called attention to variants that aspire to challenge political structures or stimulate democratic engagement more broadly. We discuss these variants *infra* notes 110, 253–257 and accompanying text.

23. Raz, supra note 6, at 264; see also Singer, supra note 17, at 93 (noting conscientious objection “is undertaken in order to avoid taking part in the policies to which one objects, rather than in order to change those policies”). But see Walzer, *Obligation*, supra note 20, at 12 (classifying conscientious objection as form of civil disobedience); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 *Colum. L. Rev.* 1083, 1090 (2014) (arguing World War I activists and administrators conceived of conscientious objection “not as a right to opt out of the warfare state, but rather as a right to participate in . . . a particularistic manner”).

24. See, e.g., Arendt, supra note 9, at 76–77 (asserting nonviolence is “generally accepted necessary characteristic of civil disobedience”); Bedau, *On Civil Disobedience*, supra note 6, at 656 (“The pun on ‘civil’ is essential; only nonviolent acts thus can qualify.”).

25. See, e.g., Brownlee, *Conscience and Conviction*, supra note 6, at 21–23

A violent act, some writers further emphasize, may in certain cases produce less harm than a nonviolent act.²⁶ Or the evil that the civil disobedient is protesting may be so great as to justify some amount of force.²⁷

Second, classic accounts of civil disobedience envision the breach of law being paired with submission to punishment.²⁸ Martin Luther King, Jr.'s *Letter from Birmingham City Jail* famously focuses on this feature: "One who breaks an unjust law must do it openly, lovingly . . . and with a willingness to accept the penalty."²⁹ The civil disobedient's willingness to accept legal consequences evinces her commitment to the *polis* and humility before fellow citizens, notwithstanding her momentary turn away from the law. It is thus, for many theorists, a critical way of negotiating the paradox of law-breaking that is nonetheless law-respecting.³⁰

(contesting "presumed incivility of violence"); Walzer, *Civil Disobedience*, supra note 10, at 25 (arguing "insistence on the absolute nonviolence of civil disobedience is . . . a little disingenuous," in light of violence and coercion risked by all legal disobedience); Howard Zinn, *A Fallacy on Law and Order: That Civil Disobedience Must Be Absolutely Nonviolent*, in *Civil Disobedience and Violence* 103, 111 (Jeffrie G. Murphy ed., 1971) ("[I]t would be foolish to rule out at the start, for all times and conditions, all of the vast range of possible tactics beyond strict nonviolence.").

26. See Raz, supra note 6, at 267 ("[C]ertain non-violent acts, indeed some lawful acts, may well have much more severe consequences than many an act of violence: consider the possible effects of a strike by ambulance drivers."); see also Brownlee, *Conscience and Conviction*, supra note 6, at 21–22 ("[F]ocusing attention on violence draws attention away from the presumptively more salient issue of harm.").

27. See, e.g., Greenawalt, supra note 10, at 244–65 (arguing violence may sometimes be justified). Theorists have advanced additional criteria for distinguishing justified from unjustified civil disobedience. See, e.g., Rawls, supra note 6, at 371–77 (proposing civil disobedience should be limited to instances of clear and substantial injustice, used as last resort, and involve coordinated action among minority groups). But see Raz, supra note 6, at 275 (arguing such conditions represent attempt to "routinize" civil disobedience and "make it a regular form of political action to which all have a right," when civil disobedience's "exceptional character lies precisely . . . in the fact that it is (in liberal states) one type of political action to which one has no right").

28. As with nonviolence, however, some contend that willingness to accept punishment is not a definitional component of civil disobedience but rather a morally significant consideration for evaluating its practice. See, e.g., Raz, supra note 6, at 265 (adopting this view). Others stress the insufficiency of willingness to accept punishment as a basis for legitimation. See, e.g., Cohen, supra note 9, at 214 ("It is mindless to suppose that murder, rape or arson would be justified if only one were willing to pay the penalty . . .").

29. Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *A Testament of Hope* 289, 294 (James Melvin Washington ed., 1986) (emphases omitted); see also *id.* at 291 ("[W]e would present our very bodies as a means of laying our case before the conscience of the local and national community."). Drawing on King's example, contemporary critics of Edward Snowden have insisted that his flight from prosecution disqualifies him from civil disobedient status. See Michael J. Glennon, *Is Snowden Obligated to Accept Punishment?*, *Just Security* (June 3, 2014, 9:00 AM), <http://justsecurity.org/11068/guest-post-snowden-obliged-accept-punishment> (on file with the *Columbia Law Review*) (detailing and disputing this line of argument).

30. See, e.g., Rawls, supra note 6, at 366–67 (arguing "fidelity to law is expressed . . . by the willingness to accept the legal consequences of one's conduct"); Bedau, *Personal*

II. UNCIVIL OBEDIENCE

Certain acts of protest do not involve “disobedience” in the sense of a breach of law, and yet neither are they easily accommodated within familiar models of lawful dissent. Recall the speed-limit protesters discussed in the Introduction. They were not civil disobedients. By driving fifty-five miles per hour (without occupying the breakdown lane, obstructing emergency vehicles, or violating any other relevant directives³¹), they deliberately stayed within the limits of the law. And while abiding by the law is itself nothing special, the conspicuous law-abidingness of the motorists’ action was a striking feature; they displayed an extraordinary attentiveness to the rules on the books, as against common practice and widely shared sense of desirable practice. Demonstrations, boycotts, pickets, and other traditional types of protest may conform to the law as well, but the manner in which they do so is not likewise an ironic or constitutive aspect of their resistance.

Canvassing other areas of law, we find many more examples of actors engaging in a practice that seems to be a looking-glass version of civil disobedience: challenging a legal or policy scheme by adhering, in methodical yet unexpected ways, to its formal provisions. Like the speed-limit protest, some of these examples involve hyperbolic compliance with authoritative commands. Employees with grievances occasionally use a tactic that has nearly the opposite character of walking out on the job. “Working to rule,” they do exactly what they are told to do, adhere exactly to safety protocols, or report to and depart from the premises exactly on time.³² After collective bargaining between American Airlines

Responsibility, *supra* note 10, at 51 (stating civil disobedience’s occurrence within framework of rule of law necessitates “willingness on the part of the disobedient to accept the legal consequences of his act”); Bernard E. Harcourt, Political Disobedience, *in* Occupy: Three Inquiries in Disobedience 45, 46–47 (2013) (“[Civil disobedience] respects the legal norm at the very moment of resistance, and places itself under the sanction of that norm. If it resists the legal sanction that it brings upon itself, in truth it is no longer engaged in civil disobedience.”).

31. The possible application of multiple laws to “uncivil” behaviors is a focus of *infra* Part III.A.

32. See, e.g., *Local 702 Int’l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 215 F.3d 11, 14 (D.C. Cir. 2000) (considering work-to-rule action in which employees were “adhering strictly to all company safety and other rules; doing exactly and only what they were told; [and] reporting to work precisely on time” (internal quotation marks omitted)); *Direct Action: Solidarity and Sabotage*, *in* *We Are Everywhere: The Irresistible Rise of Global Anticapitalism* 456, 457 (Notes from Nowhere ed., 2003) (“The notion of the work-to-rule is brilliantly simple—workers follow every rule, no matter how foolish, inefficient, or ill-advised. They break no laws, cause as much disruption as a strike, yet everyone still gets paid!”). William Simon has described work to rule as the practice of “bring[ing] an enterprise to a halt by refusing to cut the corners necessary for things to function smoothly” and cited it as a case of “scrupulous compliance with the law [that] is so burdensome and even disruptive that it occurs only as a form of protest.” William H. Simon, *The Practice of Justice* 90–91 (1998).

and its pilots failed in 2012, for instance, the pilots began to file incessant—and technically mandatory—maintenance requests. Rather than violate company policies or industry regulations to make a point about their value to the airline, they complied in a rigid and highly disruptive manner.³³

Other examples involve maximalist uses of codified rights to “crash” or “flood” a system. In 1966, Columbia University sociologists Richard Cloward and Frances Fox Piven wrote a famous article in *The Nation* that called for “a massive drive to recruit the poor onto the welfare rolls” in order to “precipitate a profound financial and political crisis” that would lead to a replacement of welfare with “a guaranteed annual income and thus an end to poverty.”³⁴ Cloward and Piven’s plan eschewed legal fraud or trickery. Instead, it sought to exploit the “vast discrepancy . . . between the benefits to which people are entitled under public welfare programs and the sums which they actually receive.”³⁵ If millions of eligible poor people could be mobilized to claim their statutory due, Cloward and Piven thought, the welfare system would collapse, its moral and material inadequacies laid bare.

Still other examples involve the actions of government officials, including their creation of new laws.³⁶ In recent years, several states have

33. As one commentator explained:

If you ran your car like American Airlines has been running for the last two weeks[,] if your car was leaking oil on the drive, write it up. Windshield wipers streaking, write it up. Shocks squeaking, write it up. Car pulls slightly to the left, write it up A lot of systems in the morning sometimes just don’t come on line in the correct sequence. You’ll get a light or the thing won’t test so the fix is to power it down and then power it back up. Is a pilot authorized to do this[?] [N]o but we all used to do it so the flight could depart on time. Now if the same problem occurs guys are putting it in the log book and taking the delay.

Terry Maxon, Another American Airlines Pilot Explains Why AA Is Having So Many Delays, *Dall. Morning News: Aviation Biz Blog* (Sept. 30, 2012, 6:22 PM), <http://aviationblog.dallasnews.com/2012/09/another-american-airlines-pilot-explains-why-aa-is-having-so-many-delays.html> (on file with the *Columbia Law Review*).

34. Frances Fox Piven & Richard Cloward, *The Weight of the Poor: A Strategy to End Poverty*, *Nation* (Mar. 8, 2010), <http://www.thenation.com/article/weight-poor-strategy-end-poverty> [hereinafter Piven & Cloward, *Weight of the Poor*] (on file with the *Columbia Law Review*) (originally published May 2, 1966).

35. *Id.* Cloward and Piven argued that maximizing welfare rolls would strain the “big-city Democratic coalition: the remaining white middle class, the white working-class ethnic groups and the growing minority poor.” *Id.* To preserve that coalition, and spurred by lobbying from mayors and governors rather than the poor themselves, “a national Democratic administration would be constrained to advance a federal solution to poverty that would override local welfare failures, local class and racial conflicts and local revenue dilemmas.” *Id.* Although never fully implemented, the Cloward–Piven proposal remains a canonical text for the welfare rights movement. See generally Frances Fox Piven & Richard Cloward, *Poor People’s Movements 275–88* (1977) (discussing proposal).

36. We explore some of the distinctive complexities raised by this category of examples *infra* Part II.B.4.

enacted legislation mandating that all medication-induced abortions adhere strictly to a regimen approved (but not required) by the Food and Drug Administration (FDA) in 2000.³⁷ Evidence-based medicine generated a less onerous alternative protocol after 2000, and the vast majority of abortion providers have not followed the FDA-approved regimen for more than a decade.³⁸ Although the challenge to abortion rights is clear, proponents of this legislation feign obsequiousness to federal authority, insisting that they are merely hewing to the health and safety standards established by the U.S. government.

Each of these examples of subversive legalism is a type of “uncivil obedience.” This Part first defines uncivil obedience and defends our choice of label in Part II.A, and then probes some nuances and complications in Part II.B. To better illustrate the phenomenon and to underscore its potential significance, Part II.B also offers a variety of additional examples.

A. *A Definition*

Drawing on standard accounts of civil disobedience, we define uncivil obedience to consist of the following elements:

- 1) *Conscientiousness*—a deliberate, normatively motivated act or coordinated set of acts;
- 2) *Communicativeness*—that communicates criticism of a law or policy;
- 3) *Reformist intent*—with a significant purpose of changing or disrupting that law or policy;
- 4) *Legality*—in conformity with all applicable positive law; and
- 5) *Legal provocation*—in a manner that calls attention to its own formal legality, while departing from prevailing expectations about how the law will be followed or applied.

Uncivil obedience, as we conceive of it, is thus both a foil for and partial mirror of civil disobedience. It parallels the latter in its conscientiousness, communicativeness, and reformist intent, even as it reverses the central choice to violate the law. And while each type of action is meant to provoke, civil disobedience does so through unvarnished law-

37. See generally Heather D. Boonstra, *Medication Abortion Restrictions Burden Women and Providers—and Threaten U.S. Trend Toward Very Early Abortion*, 16 *Guttmacher Pol’y Rev.* 18, 21–22 (2013) (summarizing these laws); Guttmacher Inst., *State Policies in Brief: Medication Abortion* (2015), http://www.guttmacher.org/statecenter/spibs/spib_MA.pdf (on file with the *Columbia Law Review*) (same).

38. See Boonstra, *supra* note 37, at 19 (describing ways in which FDA-approved regimen has become “antiquated”); Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services in the United States, 2001*, 35 *Persps. on Sexual & Reprod. Health* 16, 20–21 & tbl.4 (2003) (finding eighty-three percent of medication abortions performed in 2001 used a third of FDA-approved mifepristone dose).

breaking, whereas uncivil obedience does so through unorthodox law-following.

Before developing these points, we stress that, while we set forth necessary and sufficient criteria in an effort to characterize uncivil obedience as clearly as possible, we cannot eliminate hard questions about the specification of the various elements. As explained in Part I, scholars of civil disobedience continue to spar about not only normative questions but also definitional ones, ranging from the place of nonviolence to the status of indirect action to the significance of an individual's willingness to suffer punishment. Comparable disagreements are to be expected for uncivil obedience. If the definition we offer generates further elaboration and contestation, so much the better.

Conscientiousness requires that the act be subjectively serious, calculated, and grounded in sincere conviction. It does not require that the act be morally attractive or guided by fundamental principles of justice. Nor does it require that the effort be devoid of self-interest—a condition even classic examples of civil disobedience could not meet. The bar to clear here is low.³⁹ The conscientiousness criterion weeds out narrowly commercial or competitive behaviors (a lawsuit brought for pecuniary gain, a sports ploy) and instinctive or whimsical behaviors (a blurted-out remark, a mischievous improvisation) that lack entirely the depth of purpose associated with civil disobedience.

It follows that the same act can fall inside or outside the category of uncivil obedience depending on the actor's motivations.⁴⁰ If driven by little more than a desire for private benefit, work-to-rule protests of the sort noted above would not satisfy the conscientiousness criterion. In contrast, work-to-rule protests animated to any significant degree by a broader normative critique—for instance, about the relationship between management and labor or the distrust of workers implied by the rules themselves—may be said to be conscientious.⁴¹ The conscientiousness criterion does not rule out instrumental behavior as such. Uncivil obedience is a tactic for challenging the prevailing order. But it must be a tactic that is rooted in genuine belief about right and wrong and, as we discuss below, that is deployed to achieve lasting reform.

39. Cf. *infra* notes 233–236 and accompanying text (explaining why strength of conviction needed to inspire uncivil obedience is likely to be weaker on average than what is needed for civil disobedience).

40. For acts taken by groups, most of the individuals involved, or at least their leaders, must be properly motivated. Those members of the group who lack conscientiousness (or reformist intent) may not themselves be uncivil obedient, even if their collaborators and the act itself so qualify.

41. We assume that most work-to-rule actions, like other labor protests, will involve a complicated and evolving mix of narrowly instrumental and broadly political motivations. As long as the latter set of motivations exerts substantial influence, we think it appropriate to characterize such actions as conscientious.

Communicativeness requires that the act convey disapproval of a law or policy. This message may be conveyed performatively, through the act itself, or it may be conveyed verbally, through commentary about the act. If a handful of protesters drove fifty-five miles per hour on the freeway one morning and never announced why, their behavior might elicit some honking but it would not register as a critique of the speed limit—and so would not satisfy the communicativeness criterion. If hundreds of motorists drove fifty-five at the same time, their critical message might become sufficiently self-evident. If the motorists affixed explanatory stickers to their rear windows, the message would become more apparent still.⁴² This criterion generally implies contemporaneous publicity as to an act of uncivil obedience's occurrence and intended significance.⁴³

Communicativeness, however, does not necessarily require candor. If it is well understood that a certain act represents a conscientious effort to disrupt a law or policy, then the act may count as uncivil obedience even if the actor herself denies any disruptive ambition. What matters is the social meaning of her words and deeds, not the semantic content of her rationalizations.⁴⁴ Employees who engage in work to rule and state legislators who limit medication abortion may claim that they are “just” looking out for workplace safety or women’s health, but their actions may disclose a distinct critical agenda concerning labor relations or the availability of abortion.

Reformist intent requires that the actor not only convey disapproval of some law or policy but also aspire to reshape it in an enduring manner, one that transcends her individual circumstances.⁴⁵ In some instances, as in the speed-limit protest and the Cloward–Piven welfare proposal, the uncivil obedient may aspire to change the law or policy with which she is

42. As this discussion reflects, uncivil obedience by private citizens may require coordination on a significant scale—not just to be effective but even to be intelligible. One civil disobedient may be able to prick the conscience of the community by lying down in the middle of a busy street. One would-be uncivil obedient achieves nothing by driving at the speed limit.

43. We say “generally” because, as with civil disobedience, certain forms of reasonably prompt ex post publicity may suffice where contemporaneous publicity would be exceedingly costly or self-defeating. *Supra* note 21 and accompanying text.

44. Social meaning refers to “the attitudes and commitments that are communicated by words or actions” in context, which may not correspond to “the words that are actually being used.” Cass R. Sunstein, *Social Norms and Big Government*, 15 *Quinnipiac L. Rev.* 147, 154 (1995).

45. Reformist intent will often follow from conscientiousness, but not always, as when the actor has not formulated any prescriptive agenda or when the change she seeks is limited to her own case. More broadly, many controversial uses of law will fail to satisfy one or more of the elements above. For instance, tax gamesmanship and “strategic lawsuits against public participation” (lawsuits brought to silence critics by burdening them with the cost of a legal defense) will generally not be uncivil obedience because they are not conscientiously pursued for the reform of law or policy. But cf. *infra* notes 66–67 and accompanying text (discussing unusual case of tax gamesmanship that met these criteria).

conspicuously complying. Following the civil disobedience literature, we will call this *direct* uncivil obedience. In other instances, as in the work-to-rule and medication-abortion examples, she may utilize one law or policy to challenge another law or policy, just as a civil disobedient might utilize trespass laws (in her case, by violating them) to protest nuclear power. We will call this *indirect* uncivil obedience and will return to the direct-indirect distinction below.⁴⁶

The reform that the uncivil obedient seeks may be more or less explicit. The National Motorists Association members who protested the fifty-five-miles-per-hour speed limit wanted Congress to repeal the relevant statute (a permanent conditional spending restriction enacted in 1974).⁴⁷ As a second-best or substitute goal, however, uncivil obedient may aim to reshape the “law in action,”⁴⁸ without necessarily revising the law on the books, so that the sociolegal environment better accommodates their beliefs. It would still be uncivil obedience if the freeway protesters addressed their complaint to the state police, rather than a legislature, and asked for an unwritten practice of nonenforcement against drivers going under seventy.

As a tactic for pursuing reform, uncivil obedience may be useful in a variety of ways, which are not independent of each other and may overlap in any given case. Most basically, uncivil obedience can enhance the salience of a regulation or highlight its objectionable nature. By adhering to the freeway speed limit, the National Motorists Association protesters sought to “demonstrate[] how ridiculous driving 55 is, and how frustrated drivers get at that speed.”⁴⁹ Uncivil obedience can also exert pressure more directly by undermining the efficacy or efficiency of a particular law, policy, or institution. Through work to rule, employees make it exceedingly difficult for management to run a successful business; they suppress the initiative and discretion needed to translate any set of formal directives into a productive, cooperative scheme. In many cases, uncivil obedience aims to raise the social as well as the private cost of

46. See *infra* Part II.B.3; see also *supra* notes 8–11 and accompanying text (describing direct-indirect distinction in civil disobedience literature).

47. See Meyer, *supra* note 1 (“Their protest is aimed at getting Congress to repeal the federal speed limit law imposed during the Arab oil embargo in 1974 and to return such authority to the states.”); see also *Marks v. Mobil Oil Corp.*, 562 F. Supp. 759, 771–72 (E.D. Pa. 1983) (summarizing legislative history behind 1974 measure). Congress did in fact repeal the national speed limit two years later, in 1995, following a decline in the price of crude oil. National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 205(d), 109 Stat. 568, 577.

48. For the canonical exposition of the distinction between law in action (or the “real rules”) and law in books (or the “paper rules”), see Roscoe Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12 (1910); see also Frederick Schauer, *Legal Realism Untamed*, 91 *Tex. L. Rev.* 749, 750–51 nn.5–6 (2013) (collecting other classic Legal Realist treatments of this distinction).

49. Meyer, *supra* note 1 (quoting protester Al Allen).

maintaining the condemned law or policy. By maximizing welfare rolls, the Cloward–Piven plan openly sought to “precipitate a profound financial and political crisis.”⁵⁰

Legality is the major point of divergence from civil disobedience. This criterion requires that authoritative directives be followed rather than flouted, obeyed rather than disobeyed. More specifically, it requires that the uncivil obedient reasonably and genuinely believe it to be clear that she is violating no positive law or regulation of an applicable jurisdiction.⁵¹ These laws and regulations may be public in nature, as in the case of a statute or a constitution, or they may be more private, as in the case of a contract or a code of conduct.⁵² We say “laws” and “regulations,” plural, because the uncivil obedient’s conduct will often be governed by an array of legal norms. As we elaborate in Part III, the mere fact of scrupulous conformity with one targeted norm (for example, a speed limit) does not necessarily ensure conformity with other relevant norms (for example, an emergency vehicle right of way). Legality, as we are using it, requires that there be no evident law-breaking of any sort.

Legality is a function of both the actor’s subjective understanding and the prevailing view of what counts as lawful in a given setting. It cannot always be ruled out that an official enforcer or adjudicator will ultimately deem an act of uncivil obedience to be proscribed—for example, on the view that it excessively frustrates the spirit or purpose of a statute—just as it cannot always be ruled out that a judge will ultimately deem an act of civil disobedience to be permitted.⁵³ The critical thing is that, at the time the act is taken, it must not be apparent to the uncivil obedient or to informed observers that her behavior is proscribed. Mere evasion does not qualify. The uncivil obedient must believe that her behavior truly conforms to relevant legal norms, not just that she is unlikely to be caught or punished.⁵⁴ By the same token, conduct taken to facilitate a test case, on the hope that a court will recognize a new legal theory or resolve a lingering legal uncertainty, does not qualify as uncivil obedience inasmuch as the decision to bring such a case reflects significant doubt about the conduct’s lawfulness.

50. Piven & Cloward, *Weight of the Poor*, supra note 34.

51. Accordingly, it is not uncivil obedience—although it may be civil disobedience—if a person violates local law *X* on the view that *X* is invalid because incompatible with a provision of “higher” positive law.

52. In defining legality to require conformity with such privately as well as publicly generated obligations, we align ourselves with those who define civil disobedience in similarly expansive terms. Supra note 10.

53. See supra notes 12–14 and accompanying text (noting this feature of civil disobedience).

54. Evasive behavior may not qualify as uncivil obedience for additional reasons, such as a lack of communicativeness or reformist intent.

An important implication of the legality criterion is that the uncivil obedient need not evince any willingness to submit to punishment by the authorities, for no formal sanction is anticipated. Any number of informal sanctions may follow an episode of uncivil obedience.⁵⁵ Motorists who drive fifty-five on the freeway can expect to be honked at or tailgated.⁵⁶ Employees who engage in work to rule may be ridiculed, harassed, or worse. But because the uncivil obedient must genuinely and reasonably believe that her actions violate no laws, she will not expect to be penalized through an official fine, forfeiture, prison sentence, or the like.

Given the legal system's broad prohibitions on premeditated violence, it further follows from the legality criterion that uncivil obedience will almost always have a nonviolent character. Whereas the nonviolence usually attending civil disobedience mitigates the breach of law, the nonviolence associated with uncivil obedience reflects the fact that no breach has occurred.

Finally, *legal provocation* requires that the act, although believed to be lawful, strike others as jarring or subversive—and strike others as jarring or subversive at least in part *because of its very attentiveness to law*. In one sense, the National Motorists Association members behaved in an utterly unexceptional manner when they drove fifty-five on the freeway. They simply followed the rules as written. But as a matter of local practice, their decision to hew to the posted speed limit was highly unconventional, outrageous even, which is why it attracted so much attention and functioned as protest. Uncivil obedience thus has a significant conventional as well as intentional aspect. Identifying its existence requires some familiarity with (or inferences about) not only the actor's motivations but also the norms of the sociolegal environment in which she is operating.

We will have more to say in Part II.B about provocation. Here, we emphasize simply that the uncivil obedient's use of an authoritative directive must itself provoke.⁵⁷ Soapbox speakers and consumer boy-

55. See *infra* Part III.C (considering informal regulation of uncivil obedience).

56. See Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 *J. Crim. L. & Criminology* 49, 58 (2006) (“[T]he unacceptably compliant driver might find himself subject to sanctions such as tailgating, horn-blowing, headlight-flashing, and obscene gestures”); see also Meyer, *supra* note 1 (describing angry responses by other drivers to National Motorists Association protest). As Mark Edwards observes more generally, while “[f]ormal institutions of enforcement are not well-equipped to punish normatively unacceptable legal behavior, because the acknowledged justification for their intervention—violation of formal law—is unavailable,” Edwards, *supra*, at 77, “[i]nformal social sanctions might be expected against behaviors that are formally compliant but normatively unacceptable,” *id.* at 58.

57. Although beyond the scope of this study, it would be possible to extend the idea of uncivil obedience to wholly nonlegal, unwritten norms, as in exaggerated compliance with a rule of etiquette. Cf. *infra* notes 247–249 and accompanying text (discussing James Scott's related concept of “critiques within the hegemony”).

cotters deliver countless orations and give up countless products in ways that are conscientious, communicative, reform-minded, and law-abiding. Their efforts typically will not qualify as uncivil obedience, however, because there is nothing about their obedience to authority that distinguishes their intervention. They act legally but not legalistically.⁵⁸ Uncivil obedience, in contrast, seeks to highlight, and exploit, the peculiar character of its compliance. Just as the civil disobedient flaunts her law-breaking, the uncivil obedient flaunts her law-following.

It is the provocative aspect of uncivil obedience that underwrites its “incivility.” The behaviors at issue defy widely held norms about how people in a given environment relate to the law, and in so doing pose a threat to social courtesies and order.⁵⁹ Like civil disobedience, uncivil obedience is a relative concept. Just as civil disobedience is notably more civil than ordinary law-breaking, uncivil obedience is notably less civil than ordinary law-following. Civil disobedience is civil in that it displays uncommon regard for law and decorum, considering that it partakes of illegality. Uncivil obedience is uncivil in that it displays uncommon disregard for principles of custom and moderation, even as it clings to formal legality. The oxymoronic labels capture these internal tensions.⁶⁰

B. *Refinements*

Uncivil obedience may therefore be defined as a conscientious, communicative, and reform-minded act that expresses criticism, ironically, through law-following rather than law-breaking. As with civil disobedience, however, any attempt to unite such a wide range of behaviors under one heading raises classificatory complications. In this Part, we explore a few additional questions about the boundaries of uncivil obedience, and we offer more examples of the phenomenon to flesh out the account offered above. Again, our aim is not so much to provide an

58. See Legalism Definition, Webster’s Third New International Dictionary of English Language 1290 (3d ed. unabridged 1993) (defining “legalism” as “excessive reliance on legal principles and practices esp[ecially] as interpreted literally”). Most socially provocative behaviors that are lawful—from speaking in a loud voice to making outrageous claims to dressing like a chicken—are not provocative in the way they relate to law. Although inherently fuzzy at the margins, the distinction we are drawing between legally provocative behavior and otherwise provocative behavior is no more (or less) problematic than the well-established related distinction between legalistic behavior and otherwise lawful behavior.

59. Cf. Uncivil Definition, *id.* at 2485 (defining “uncivil” as, *inter alia*, “lacking in courtesy” or “not conducive to civic harmony and welfare”).

60. Although we believe the “uncivil obedience” label to be the most felicitous for the way it highlights the ironic character of these practices and the comparison with civil disobedience, *cf. supra* note 3 (explaining sense in which we use “obedience”), we do not mean for the label itself to do any critical work. Acts of incivility may be fully justified under certain circumstances. In what one assumes was an effort to isolate the positive connotations of “civil disobedience,” the speed-limit protesters discussed in the main text dubbed their action National Civil Obedience Day. Meyer, *supra* note 1.

exhaustive guide to uncivil obedience as it is to provide a useful guide—and, in so doing, to put the subject on the intellectual map.

1. *Legal Provocation.* — Legal provocation—the requirement that the act strike others as jarring or subversive in its attentiveness to law—is the most distinctive element of uncivil obedience as we have defined the concept. This element does much the same work for uncivil obedience as breach of law does for civil disobedience. It is law-breaking above all else that distinguishes civil disobedience from more conventional forms of protest; legal provocation is what sets uncivil obedience apart. Yet while law-breaking is generally taken to be a straightforward proposition in the civil disobedience literature,⁶¹ legal provocation admits of degrees and assumes quite different guises that are worth pulling apart.

How does adherence to law ever manage to provoke? The superficial paradox dissolves as soon as one considers the informal social norms that shape expectations as to how any directive will be followed and applied. These norms can be breached even when the directive itself is not. Provocation inheres in the gap between the official rules and the unofficial customs that coexist in a given area,⁶² or between the letter of the law and its perceived purpose or spirit, and in the attention that is called to this gap. Just as some types of law-breaking (jaywalking with no cars around, driving fifty-seven miles per hour on the freeway) may not register as unusual or uncooperative on account of this gap, some types of law-following can trigger the opposite reaction.⁶³

Legal provocation may be especially legible when the act of uncivil obedience departs not only from social norms and regulatory goals but also from the actor's immediate interests. Americans by and large assume that motorists do not wish to drive fifty-five on the freeway and that employees do not wish to work robotically to orders. When these behaviors occur, it may therefore be all the more apparent that their law-abidingness has a critical cast. Even when provocation does not entail such self-denial, however, it is always marked by the actor's unusually

61. See, e.g., Brownlee, *Civil Disobedience*, supra note 6 (describing civil disobedience as “invariably illegal,” without further explication). The civil disobedient, it is assumed, *wants* to be seen as violating an applicable positive law. While questions may arise as to whether her violation was justified by higher-law principles, there is typically no dispute as to whether a prima facie breach occurred.

62. This “area” may be a physical domain, as in the case of a specific freeway or workplace, or it may be a regulatory domain, as in the case of a specific tax code or public benefits system. In either case, the uncivil obedient must defy practices or expectations that are widely followed or held among the community of persons bound by the law of the area. We mean for this formulation to be a bit loose. Just how widely followed or held a practice or expectation must be, and just how to mark the boundaries of a relevant area or community, are not in our view matters that can be specified *ex ante* with precision.

63. Cf. Edwards, supra note 56, at 57 (observing existence of behaviors that are formally illegal but within socially constructed “parameters of acceptable deviance,” as well as behaviors that are formally legal but outside of these parameters).

intensive, ostentatious, and self-conscious engagement with the technical legality of her protest.

Legal provocation tends to take one of several basic forms. The simplest cases involve a legal command addressed to members of the public. In some (relatively rare) instances, the very fact of compliance with the command may be provocative. The speed-limit protest is an example. The National Motorists Association members drove just as fast as the law allows. Their action nonetheless grabbed headlines because, on the Southern California freeways, the “law-as-behaved” diverged so dramatically from the “law-on-the-books” that abiding by the latter was perceived as a deviant act.⁶⁴

In other cases, the degree of compliance with an official directive can provoke. Work to rule exploits this possibility. Managers assume that employees will be responsive to orders and will respect the terms of their contracts—but not exactly and exclusively, not woodenly. Full compliance is so inconsistent with workplace norms and management desires that it is experienced as a kind of nonviolent sabotage, the equivalent of “striking on the job.”⁶⁵

Unusual methods of compliance, as well as workarounds that avoid the obligation to comply, can similarly provoke.⁶⁶ Angela and David Boyter’s protest against the federal marriage tax “penalty” offers a colorful illustration. Realizing that their tax burden would be significantly lower if they filed as single people, and further realizing that the tax code provides that marital status for a given year depends only on whether one is married on December 31, the Boyters began to divorce each December and remarry each January.⁶⁷ Spending the money they saved on a lavish trip, the Boyters used their annual vacation-divorces to ridicule and raise awareness of the marriage penalty. With the apparent aim of tightening rather than loosening federal regulation, satirist Stephen Colbert recently mocked the Federal Election Commission rules prohibiting political action committee (PAC) “coordination” with elec-

64. See *id.* at 50 (explaining that in addition to “well-recognized gap between law-on-the-books, or formal law, and law-as-enforced,” there “is a parallel gap between law-on-the-books and law-as-behaved”); see also *supra* note 48 and accompanying text (noting distinction between “real” and “paper” rules).

65. See, e.g., Jeremy Brecher, *Strike!* 251 (revised ed. 2014) (explaining work slowdowns and work-to-rule actions were common labor tactics in 1930s and were variously called “the conscious withdrawal of efficiency,” “striking on the job,” or “sabotage”).

66. In the constitutional context, Mark Tushnet defines workarounds as situations where, “[f]inding some constitutional text obstructing our ability to reach a desired goal, we work around that text using *other* texts—and do so without (obviously) distorting the tools we use.” Mark Tushnet, *Constitutional Workarounds*, 87 *Tex. L. Rev.* 1499, 1503 (2009).

67. See Michael J. Graetz, *The Decline (and Fall?) of the Income Tax* 35–39 (1997) (discussing Boyters’ protest and responses it elicited); Jill Elaine Hasday, *Family Law Reimagined* 54 (2014) (same).

toral candidates by creating a Super PAC, turning over the reins to Jon Stewart so that Colbert could run for President, and going on Stewart's television show to "not coordinate" with him about how the Super PAC's money would be spent.⁶⁸ More colorful still is the story of the female philosopher who protested an establishment's "no pants" rule for women by dropping her trousers and demanding to be seated.⁶⁹

Less ingenious examples of subversive compliance appear in the news with some regularity. Many taxpayers and toll-payers, for instance, have communicated criticism by paying the required sum in low-denomination coins.⁷⁰ Whereas work to rule provokes by fixating on the precise terms of an instruction, this tactic takes advantage of the fact that official directives invariably fail to address various details and contingencies. Under certain conditions, the resulting silences can be filled in antagonistic yet lawful ways.⁷¹

While the core case of uncivil obedience involves hyperbolic compliance with laws that tell people what they must do, legal provocation can also occur through unorthodox uses of rights and privileges that give people the *option* to do certain things. Here our label is less felicitous: It

68. Recognizing that federal election law permitted him to express his wishes for the Super PAC as long as he communicated them publicly rather than privately, Colbert came prepared with a cardboard television set and broadcast his wishes from inside the set, all while sitting at Stewart's desk. Katla McGlynn, Jon Stewart, Stephen Colbert Expose More Super PAC Loopholes Without "Coordinating," *Huffington Post* (Jan. 18, 2012, 9:01 AM), http://www.huffingtonpost.com/2012/01/18/jon-stewart-stephen-colbert-expose-super-pac-loopholes_n_1212670.html (on file with the *Columbia Law Review*) (last updated Feb. 23, 2012, 7:44 AM). To hammer home the point, Colbert's Super PAC, originally named "Americans for a Better Tomorrow, Tomorrow," was unofficially renamed "The Definitely Not Coordinating with Stephen Colbert Super PAC" after Colbert put Stewart in charge. Under New Management!, Colbert Super PAC, <http://www.colbertsuperpac.com/archive/011212a.html> (on file with the *Columbia Law Review*) (last visited Mar. 16, 2015).

69. Jane O'Grady, Elizabeth Anscombe, *Guardian* (Jan. 10, 2001), <http://www.theguardian.com/news/2001/jan/11/guardianobituaries.highereducation> (on file with the *Columbia Law Review*). Although some might prefer to limit the concept of uncivil obedience to protests against government laws or policies, on our account at least some private codes of conduct may be targeted as well. *Supra* notes 51–52 and accompanying text.

70. See, e.g., John Del Signore, Drivers Protest Verrazano Bridge Toll with Pennies, *Gothamist* (May 19, 2009, 3:10 PM), http://gothamist.com/2009/05/19/drivers_protest_verrazano_bridge_to.php (on file with the *Columbia Law Review*) ("[F]ed up Staten Islanders disrupted traffic at the Verrazano Bridge toll booths for about 20 minutes yesterday by slowly paying the \$10 toll in pennies to protest an imminent increase."); see also Jim Shea, It's Time to Eliminate the Dreadful Penny, *Hartford Courant*, Mar. 5, 2014, at D1 ("As for the penny being an instrument of protest, let's face it, the paying of taxes or fines in pennies lacks originality to the point of now being lame.")

71. Depending on the jurisdiction and on the manner in which these behaviors are executed, some variants may run afoul of separate legal prohibitions, such as a specific cap on the number of pennies that may be used in any given transaction or a general ban on disorderly conduct, and therefore would not qualify as uncivil obedience. See *infra* Part III.A (explicating this point).

may sound odd to speak of “obedience” with regard to a right or privilege that is framed in discretionary terms. But there is nothing odd about envisioning a gap between what is technically permitted by such laws and what prevailing customs or understandings would allow. When dissenters target this gap, they too may provoke through their attentiveness to, and perverse respect for, legal language. The Cloward–Piven plan, which aimed to take down the welfare system by achieving full participation of eligible individuals, provides an example.⁷²

Cloward and Piven’s basic insight—that the welfare system might be overwhelmed by a strategic shift in the number or type of legal claims made on it, even when those claims were entirely valid—has broader application.⁷³ In recent years, for instance, civil-rights activists have proposed organizing thousands of criminal defendants to refuse to plea bargain and insist upon trials. Forgoing pleas would likely disserve the immediate interests of not only prosecutors and judges but also many defendants themselves. The broader goal, however, is to “crash the justice system.”⁷⁴ “If everyone charged with crimes suddenly exercised his constitutional rights,” Michelle Alexander argues, “there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation,” and the resulting chaos would force a sharp decline in criminal cases and an end to mass incarceration.⁷⁵

Although such uncivil obedience has not occurred on a national scale,⁷⁶ Alexander’s premise is an old one,⁷⁷ and variants of her proposal have been put into practice. Public defender offices have engaged in “general strikes,” insisting on trials for all of their clients in order to

72. See *supra* notes 34–35 and accompanying text (summarizing Cloward–Piven plan). We will soon turn to a prominent set of contemporary examples, involving use of the quorum call, hold, and other procedural privileges by minority-party senators. See *infra* notes 96–102 and accompanying text.

73. This is the case across as well as within jurisdictions. For an example of administrative flooding from the United Kingdom, see Mark Thomas, *So Many Causes, So Little Time*, *Guardian* (Oct. 11, 2006, 8:10 PM), <http://www.theguardian.com/politics/2006/oct/12/houseofcommons.comment> (on file with the *Columbia Law Review*) (describing wave of “mass lone protests,” as well as author’s own serial protests, in response to U.K. law requiring permit for all demonstrations near Houses of Parliament).

74. Michelle Alexander, *Op-Ed, Go to Trial: Crash the Justice System*, *N.Y. Times* (Mar. 10, 2012), http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0 (on file with the *Columbia Law Review*).

75. *Id.*; cf. Jenny Roberts, *Crashing the Misdemeanor System*, 70 *Wash. & Lee L. Rev.* 1089 (2013) (exploring possible refinements to and extensions of Alexander’s proposal, focused on minor misdemeanors).

76. See generally Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners’ (Plea Bargain) Dilemma*, 1 *J. Legal Analysis* 737 (2009) (discussing collective-action problems faced by defendants).

77. See, e.g., Henry T. Lummus, *The Trial Judge* 46 (1937) (“If all . . . defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of justice in any state in the Union.”).

change the way judges and prosecutors apply criminal laws.⁷⁸ In Los Angeles, for example, public defenders at one point reportedly refused to enter guilty pleas for individuals charged with prostitution until sentencing policies for the offense were amended.⁷⁹

2. *Government Actors*. — Legal provocation is not limited to actions taken by lay citizens or their lawyers. Government officials and entities can engage in it too. One virtue of the concept of uncivil obedience, in our view, is that it helps illuminate methodological continuities across public and private dissent.

We will consider the special case of subnational legislation shortly.⁸⁰ But the most easily recognizable form of legal provocation in government may be the maximalist enforcement tactics that have been adopted by certain chief executives. Just as full compliance is not common or desirable in many areas of law, neither is full enforcement.⁸¹ Without a specific legislative instruction to do so, there is little reason to expect that an executive will implement any given authority or prosecute any given prohibition to a T, at the inevitable cost of depleting resources available for other responsibilities. Full enforcement, consequently, may be seen as upending rather than perfecting the existing sociolegal order.

For example, when Theodore Roosevelt became head of the New York Police Commission in the 1890s, he began to strictly enforce laws that required saloons to close on Sundays. Previously, the laws had been rarely and selectively enforced, according to Roosevelt, “to blackmail and browbeat the saloon keepers who were not the slaves of Tammany Hall.”⁸² Roosevelt contended that his approach might precipitate repeal of the Sunday closing law and furthermore “prevent the Legislature from passing laws which are not meant to be enforced.”⁸³ He thus instantiated

78. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *Yale L.J.* 1179, 1249 (1975) (describing general strikes as “most spectacular form of bargaining leverage that a public defender office can exert”).

79. See *id.* at 1251 (recounting this episode).

80. See *infra* Part II.B.4.

81. Cf. Edwards, *supra* note 56, at 80 n.137 (“Either full enforcement or compliance would likely bring any functioning society to a crashing halt.”).

82. Mr. Roosevelt Answers, *N.Y. Times* (July 17, 1895), <http://query.nytimes.com/mem/archive-free/pdf?res=9C04E2DA103DE433A25754C1A9619C94649ED7CF> (on file with the *Columbia Law Review*).

83. *Id.* See generally Doris Kearns Goodwin, *The Bully Pulpit* 209–10 (2013) (discussing Roosevelt’s strict enforcement policy). As a journalist observed at the time:

[Roosevelt’s] reasoning had all the simplicity of originality. He was appointed to enforce the laws as they appeared on the statute books. He enforced them. That was originality; it rarely had been done before When prominent citizens and influential newspapers protested, he answered: “I am placed here to enforce the law as I find it. I shall enforce it. If you don’t like the law, repeal it.”

President Ulysses Grant's dictum: "I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."⁸⁴

Executive *nonenforcement* of the law, in contrast, will not as a general matter qualify as legal provocation. In the American constitutional system, a policy of presidential nonenforcement runs straight into the Take Care Clause and its requirement "that the Laws be faithfully executed."⁸⁵ Some believe that nonenforcement can be justified when the law at issue is clearly unconstitutional or in other circumstances.⁸⁶ But if a policy of nonenforcement provokes, it is not because it flaunts its formal legality but rather because it flirts so brazenly with illegality. Jury nullification is similar in this regard, at least in the many jurisdictions where its lawfulness is denied by judges and other authorities.⁸⁷ (In those jurisdictions where the jury's power to nullify is recognized in the constitution or otherwise clearly established,⁸⁸ an explicit and reform-minded scheme of nullification—such as Paul Butler's proposal to remedy the racial impact of our drug laws⁸⁹—could count as uncivil obedience.)

Ray Stannard Baker, Theodore Roosevelt: A Character Sketch, McClure's Mag., Nov. 1898, at 23, 30, available at <http://www.unz.org/Pub/McClures-1898nov-00023> (on file with the *Columbia Law Review*).

84. Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869), available at http://avalon.law.yale.edu/19th_century/grant1.asp (on file with the *Columbia Law Review*). More recently, critics charged that the Administrator of President Reagan's Environmental Protection Agency was interpreting the Clean Air Act in a "deliberately rigid fashion" so as to "prod Congress into reworking" the Act. Philip Shabecoff, Mrs. Gorsuch as a Crusading Tiger? Critics Wonder Why, N.Y. Times (Dec. 26, 1982), <http://www.nytimes.com/1982/12/26/weekinreview/mrs-gorsuch-as-a-crusading-tiger-critics-wonder-why.html> (on file with the *Columbia Law Review*); see also *id.* ("Mrs. Gorsuch said the imposition of sanctions would be 'an unhealthy, regressive step . . . But I always said I will fulfill my oath of office . . .'").

85. U.S. Const. art. II, § 3.

86. See, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994) (defending this general proposition and suggesting factors that ought to bear on nonenforcement decisions).

87. See generally Andrew J. Parmenter, Note, Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification, 46 Washburn L.J. 379, 402–10 (2007) (cataloging efforts by U.S. judges to prevent and delegitimize jury nullification). Jury nullification occurs when a jury acquits a defendant it believes to be guilty "either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." Black's Law Dictionary 989 (10th ed. 2014). In cases where the jurors' reasoning, including their possible dissatisfaction with the law, remains opaque to the outside world, nullification would further fail the communicativeness requirement of uncivil obedience.

88. See Parmenter, *supra* note 87, at 391 (listing Georgia, Indiana, and Maryland as having such constitutional provisions).

89. See Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677, 680 (1995) (proposing jury nullification as means to subvert racial oppression in criminal justice system and stimulate "implementation of certain noncriminal ways of addressing antisocial conduct").

While nonenforcement usually will not provoke in the necessary manner, practices that are similar in effect, but different in their legal posture, may do so. Consider the case of “big waiver.” In recent years, the executive branch has seized on broad waiver provisions in federal statutes to dramatically alter the regulatory landscape.⁹⁰ The No Child Left Behind Act of 2001, for instance, authorizes the Secretary of Education to “waive any statutory or regulatory requirement” of the Act, with limited exceptions.⁹¹ The Obama Administration has used this authority to grant more than forty states waivers from the Act’s onerous requirements—and, in so doing, has required this supermajority of states to conform to its vision of sound educational policy.⁹² Frustrated by Congress’s failure to amend No Child Left Behind, the executive has effected “nearly wholesale administrative revision” of the statute, all pursuant to the express terms of the statute.⁹³

Judicial application of the law is unlikely to qualify as uncivil obedience for a distinct set of reasons. In contemporary American practice, judges in particular are expected to attend carefully to the letter of the law.⁹⁴ Even when they construe a directive in a literalistic manner, it will therefore rarely come across as an ironic or inflammatory intervention; it is more likely to be seen as ordinary judicial fare. Judges are also believed by many to be authoritative interpreters of legal texts, so that their

90. See generally David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 *Colum. L. Rev.* 265, 267 (2013) (explaining, under “big waiver,” executive agencies claim statutory authority to decide whether policies adopted by Congress should be dispensed with or replaced).

91. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9401(a), 115 Stat. 1425, 1972 (2002) (codified at 20 U.S.C. § 7861(a) (2012)).

92. See U.S. Dep’t of Educ., ESEA Flexibility, <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (on file with the *Columbia Law Review*) (last modified Feb. 25, 2015) (indicating forty-three states have been granted waivers).

93. Barron & Rakoff, *supra* note 90, at 268. In the White House’s own words, because No Child Left Behind was “stand[ing] in the way” of state progress and Congress would not amend the law, the “Administration moved forward to offer states flexibility within the law—as authorized by provisions in the law itself.” White House, Reforming No Child Left Behind, <http://www.whitehouse.gov/issues/education/k-12/reforming-no-child-left-behind> (on file with the *Columbia Law Review*) (last visited Mar. 5, 2015). As a presidential candidate, Mitt Romney pledged that he would dismantle the Affordable Care Act, lawfully, in a similar manner, although critics pointed out that only certain provisions of the Act were subject to waiver. See Julie Rovner, Can Mitt Romney Really Repeal Obamacare?, NPR (Oct. 30, 2012, 4:00 AM), <http://www.npr.org/2012/10/30/163929221/can-romney-really-repeal-obamacare> (on file with the *Columbia Law Review*) (quoting Romney as saying, “On day one of my administration, I’ll direct the secretary of Health and Human Services to grant a waiver from Obamacare to all 50 states”).

94. Cf. Victoria F. Nourse, A Decision Theory of Statutory Interpretation: Legislative History by the Rules, 122 *Yale L.J.* 70, 90 (2012) (explaining, in United States today, even self-identified purposivist interpreters always “begin with text”); Andrew Tutt, Fifty Shades of Textualism, 29 *J.L. & Pol.* 309, 309 (2014) (“We are all Textualists now’ has become such a popular refrain [among American commentators] it borders on cliché.”).

rulings are seen as elaborating the underlying law rather than changing or challenging it in some reformist fashion. While we can imagine hypothetical examples of judges communicating a reformist intent through subversive attention to legal language (for instance, a judge sentencing at the very top of the guidelines range in order to protest draconian criminal penalties⁹⁵), and while our categories might be extended to embrace more judicial behavior, we are skeptical about the prevalence of judicial uncivil obedience as we have defined the concept.

Finally, it bears mention that legal provocation may occur within, and not just by, institutions of government. We can see this vividly in the modern U.S. Senate. In recent years, minority-party senators have relied on a host of procedural privileges to undermine measures that have already become law or are on course to doing so. These senators have demanded that the entire text of lengthy bills be read aloud on the Senate floor.⁹⁶ They have made “seemingly endless quorum calls and motions to reconsider previous votes.”⁹⁷ They have used the filibuster in a routine manner, rather than in its traditional and, in the view of many, intended capacity as “the tool of last resort.”⁹⁸ They have likewise used “holds” to stymie nominations and bills on an unprecedented scale.⁹⁹ Together with allies in the House of Representatives, several of them have deployed still more unorthodox maneuvers in a campaign to defund “Obamacare.”¹⁰⁰ Although their criticisms are pitched in the language of conscience and crisis and their tactics defy longstanding con-

95. The inverse has happened: In a 2013 case, for example, Judge John Gleeson cited his “fundamental policy disagreement” with certain “excessively severe” drug-offense sentencing guidelines in exercising his legal authority to impose a lighter sentence. *United States v. Diaz*, No. 11-821, 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013). Bracing as Judge Gleeson’s arguments are, there is nothing particularly provocative as a legal matter about a judge’s utilization of an authority, clearly recognized in Supreme Court doctrine, to downward-depart from the guidelines based on policy disagreement.

96. See Ricardo Alonso-Zaldivar, *Republicans Threaten Health Care Read-a-Thon*, *Newsday* (Dec. 18, 2009, 1:43 PM), <http://www.newsday.com/business/republicans-threaten-health-care-read-a-thon-1.1660956> (on file with the *Columbia Law Review*) (noting “senators usually waive” their right to have such bills read aloud on floor).

97. Niels Lesniewski, *Reid, Obama Call for Senate Rule Changes to Curb Filibusters*, *CQ Today* (Oct. 28, 2010, 4:39 PM), <http://www.cq.com/doc/news-3756760?7&print=true> (on file with the *Columbia Law Review*).

98. Walter J. Oleszek, *Congressional Procedure and the Policy Process* 304 (9th ed. 2014).

99. See *id.* at 257 (observing holds “are a more prominent feature of today’s Senate” and quoting one senator as lamenting that holds “have come into a form of reverence which was never to be”). The hold is an informal device through which individual senators or groups of senators, whose identities may be withheld from the public, inform party leaders that they do not want a particular measure to be taken up on the floor. *Id.* at 256.

100. See Sheryl Gay Stolberg & Mike McIntire, *A Federal Budget Crisis Months in the Planning*, *N.Y. Times* (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/us/a-federal-budget-crisis-months-in-the-planning.html?pagewanted=all> (on file with the *Columbia Law Review*) (reviewing this campaign).

ventions,¹⁰¹ the Senators who engage in these behaviors have emphasized the formal legality of their obstructionism. They have waged their campaign to undermine the majority agenda not as law-breakers but as legal maven, devotees and defenders of the procedural rulebook.

3. *Direct, Indirect, and Comprehensive Variants.* — Of course, minority-party senators have not been using procedural privileges in novel ways to challenge those privileges themselves. Rather, they are engaging in what we have called indirect uncivil obedience.¹⁰² On a micro level, these senators have turned to legalism to challenge specific laws such as Obamacare. On a macro level, they have fastened on the rules of procedure as a means to subvert the other party's entire political program.

The direct version of uncivil obedience can be an especially elegant mode of advocacy. Adherence to law is leveraged to challenge the very law that is being followed. By sticking to the speed limit, the National Motorists Association members enacted their critique of it. The arguments they offered were largely superfluous; the deed spoke for itself. The Cloward–Piven plan and Roosevelt's enforcement of Sunday saloon laws were not quite so self-explanatory, but they too sought to catalyze reform simply by demonstrating what the laws on the books, if taken seriously, were capable of.

A somewhat more complicated example of direct uncivil obedience is the Great American Boycott of 2006, during which more than a million people took to the streets demanding reform of U.S. immigration laws.¹⁰³ Responding most immediately to a House bill targeting undocumented aliens, protesters skipped work to show what the economy would look like without their labor (hence another name for the event: "A Day Without Immigrants"). Meat processing plants, vineyards, and farms were

101. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 39–46 (2014) [hereinafter Pozen, *Self-Help*] (discussing these tactics and pressure they have placed on separation-of-powers conventions). Conceivably, a President could retaliate against Congress through obstructionist uncivil obedience of her own, as by vetoing every bill that crosses her desk until Congress changes some preexisting law or policy.

102. See *supra* notes 8–11 and accompanying text (explaining civil disobedience is widely understood to include direct and indirect variants); *supra* notes 45–46 and accompanying text (extending this distinction to uncivil obedience). In late 2013, minority-party senators' continual use of the filibuster precipitated filibuster reform, unintentionally generating the sort of change that direct uncivil obedience seeks. See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, *N.Y. Times* (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html> (on file with the *Columbia Law Review*) (explaining Senate Democrats voted to end use of filibuster for executive branch nominees and non-Supreme-Court judicial branch nominees).

103. See generally Michael Cabanatuan et al., *A Million Say: Let Us All Stay/Historic Day: Across the Nation, a Rallying Call for Immigrants*, *S.F. Gate* (May 2, 2006, 4:00 AM), <http://www.sfgate.com/news/article/a-million-say-let-us-all-stay-historic-day-2519475.php> (on file with the *Columbia Law Review*) (describing this protest as "nation's largest coordinated demonstration since the war in Vietnam").

forced to close for the day.¹⁰⁴ By following the laws that bar them from employment, undocumented immigrants sought to demonstrate the laws' intolerable implications.¹⁰⁵

Indirect uncivil obedience is almost certainly more common than direct uncivil obedience. The indirect uncivil obedient has greater degrees of freedom. She may make her point by conspicuously applying or adhering to any number of laws or policies that relate to the object of her condemnation, not just the condemned law or policy itself. Under work to rule, for instance, employees may hyper-comply with dozens of safety rules, contract terms, or industry regulations in the effort to reform the employment relationship.

Although it is useful and intuitive to distinguish these two types of uncivil obedience, "direct" and "indirect" are best understood as reflecting ranges along a continuum rather than a sharp dichotomy—just as with civil disobedience.¹⁰⁶ Moreover, depending on how broadly or narrowly one defines the law or policy that is being challenged, the same act of uncivil obedience may be described as more or less direct or indirect. Consider the recurring proposals for criminal defendants to refuse to plea bargain.¹⁰⁷ The defendants involved would not, of course, be exercising their constitutional trial rights in order to undermine those rights. The point is to undermine a cluster of laws and policies contributing to mass incarceration and racial injustice, evils that may seem remote from the Sixth Amendment. Yet if we were to characterize the object of reform at a higher level of generality—as, say, the American criminal justice system—then these schemes begin to look more direct.

Some episodes of uncivil obedience may be especially hard to place on the direct–indirect continuum not because the fit between means and

104. See, e.g., Anita Hamilton, *A Day Without Immigrants: Making a Statement*, *Time* (May 1, 2006), <http://content.time.com/time/nation/article/0,8599,1189899,00.html> (on file with the *Columbia Law Review*) (discussing protest's economic impacts).

105. This performance of law-following, however, was itself an admission of systematic law-breaking. Undocumented workers were not truly complying with laws prohibiting their employment, or they would not have held jobs in the first place. It is necessary to isolate the one-day protest as the relevant time period, then, to appreciate its character as direct uncivil obedience.

106. See *supra* note 11 and accompanying text (noting potential blurriness of this distinction in civil disobedience context). We speculate that extreme indirectness is more likely to occur with civil disobedience than with uncivil obedience. The idea that law-breaking can be an expressive, reformist tactic is fairly well understood. The idea of law-following as such a tactic is less familiar. For those who seek to protest a certain law or policy by assiduously adhering to a distant law or policy, there is an added risk that the novelty of their approach will distract from, rather than amplify, their critical message. Lying down in the middle of traffic (unlawfully) and driving fifty-five miles per hour on the freeway (lawfully) are both extremely indirect means to protest a war. Only the latter tactic, however, seems not just attenuated but incoherent, implausible.

107. See *supra* notes 74–79 and accompanying text (discussing these proposals).

ends is so loose, but because they do not have *any* specific law or policy as their intended target. Most uncivil obedience, like most civil disobedience, has relatively “focused and limited objectives.”¹⁰⁸ Certain cases, however, reflect a more diffuse ambition. Their aim is to challenge an entire mode of governance, political structure, or similarly capacious construct.

On one reading, the obstructionist tactics of recent Senate minorities fit this description. The Republican senators who leaned so heavily on the filibuster, the hold, the quorum call, and the like arguably were not out to derail any particular Democratic initiative as much as to repudiate the entire worldview for which the Democratic Party has come to stand.¹⁰⁹ It is understandable that so many different tools of resistance would be enlisted in this campaign, as the campaign itself is so broad and encompassing. The systematic resort to legalistic obstructionism, within this context, seems better understood as a comprehensive program of uncivil obedience than as a series of discrete dissents.¹¹⁰

4. *Federalism: Lawmaking as Dissent.* — The examples of uncivil obedience we have discussed so far exploit laws or policies that are already on the books. In some cases, however, we might also conceptualize the promulgation of new laws as uncivil obedience vis-à-vis a superior legal authority. This is a necessarily indirect form of uncivil obedience—the legislation that is drafted will not be a challenge to itself but to some other law or policy. It is also a form that falls at the outer bounds of uncivil obedience and puts pressure on the definition offered above.

108. Brownlee, *Civil Disobedience*, supra note 6.

109. See, e.g., David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 *Colum. L. Rev.* 731, 747 n.53 (2012) (“The hierarchical-individualist worldview tends to be associated with the Republican Party and with those self-identifying as ‘conservative’; the egalitarian-communitarian worldview with the Democratic Party and with those self-identifying as ‘liberal.’” (citing Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in *Acquaintance-Rape Cases*, 158 *U. Pa. L. Rev.* 729, 784–85 & fig.7 (2010))).

110. Comprehensive uncivil obedience of this sort can be contrasted with the phenomenon that Bernard Harcourt calls “political disobedience.” Harcourt, supra note 30, at 47. Responding to the Occupy Wall Street movement, Harcourt recently proposed this term to capture a species of disobedience that resists not just a condemned law or policy but “the very way in which we are governed.” *Id.* Political disobedience rejects “the structure of partisan politics, the demand for policy reforms, the call for party identification It turns its back on the political institutions and actors who govern us.” *Id.*

We find it difficult to envision uncivil obedience operating on such a model, if for no other reason than its painstaking concern for legal detail. Uncivil obedience’s strategic adherence to and reliance on the formal legal system implies that its rejection of existing political structures will never be quite so profound or so radical. Political disobedience “refuses to play the game.” *Id.* at 59. Uncivil obedience, even on a comprehensive scale, plays it with extreme dexterity.

In the United States, federalism is the most fecund source of legislative uncivil obedience.¹¹¹ While traditional accounts cast the states and the federal government as separate sovereigns, recent work has emphasized that the two occupy largely overlapping and intertwined policy-making spaces.¹¹² States generate national policy together with the federal government, and they frequently push back against the vision of national policy articulated by the federal government.¹¹³ Occasionally they do so through overt resistance, engaging in something analogous to civil disobedience.¹¹⁴ But they may also find uncivil obedience to be a powerful tool: States not infrequently adopt measures that trumpet their technical consistency with federal law while at a deeper level subverting it.

States may, for example, enact laws that expressly incorporate federal law or policy in order to challenge a related body of federal law or policy, thereby disrupting its operation locally if not also nationally. Recall the medication-abortion example from the introduction to this Part.¹¹⁵ Arizona, North Dakota, Ohio, Oklahoma, and Texas have each passed laws requiring that abortions performed using the drug combination Mifeprex adhere strictly to a protocol specified by the FDA more than a decade ago.¹¹⁶ The FDA protocol is not itself binding—the FDA generally anticipates and welcomes evidence-based departures from on-label use of approved drugs—and in the years since it was adopted, practitioners have widely shifted to an alternative regimen that involves lower

111. The horizontal separation of powers across the branches of the federal government is much less fecund in this regard. Although it is possible to imagine Congress responding to a disagreeable Supreme Court ruling by passing new legislation that technically comports with the terms of the ruling but is widely understood as an effort to subvert its substance, actual cases of such legislative uncivil obedience appear to be rare at best.

112. E.g., Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (2009); Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077 (2014); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4 (2010); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 *N.Y.U. L. Rev.* 1 (2007); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *Mich. L. Rev.* 567 (2008).

113. See generally Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 *Yale L.J.* 1920 (2014).

114. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256, 1278–80 (2009) (arguing certain state responses to USA PATRIOT Act were “akin to civil disobedience”).

115. See *supra* notes 36–38 and accompanying text.

116. See Amelia Thomson-DeVeaux, *Oklahoma’s Abortion Battle Goes National*, *Am. Prospect* (Oct. 30, 2013), <http://prospect.org/article/oklahomas-abortion-battle-goes-national> (on file with the *Columbia Law Review*) (describing these five state laws as “part of the larger cascade of abortion restrictions that have swept the country in the past three years”).

doses of the drug, fewer visits to the doctor, and a greater period of availability.¹¹⁷ Certain state legislatures have, nonetheless, elevated the FDA protocol to the status of a legal requirement. Despite the implications for abortion access protected by the federal Constitution, these legislatures contend that they are ensuring abortion is safe for women by mandating compliance with federal health and safety standards.¹¹⁸

States have similarly incorporated federal law into restrictive immigration measures. Arizona's controversial S.B. 1070, for instance, hewed closely to federal immigration statutes.¹¹⁹ Among other things, S.B. 1070 made failure to comply with federal alien-registration requirements a state misdemeanor; authorized officers to make warrantless arrests of individuals they believed to be removable under federal law; and required officers to verify with the federal government the immigration status of individuals stopped or arrested and reasonably believed to be unlawfully present.¹²⁰ State sponsors were not shy about presenting S.B. 1070 as a challenge to the federal government. And yet they insisted that they were adhering to federal law, properly understood, and that their grievance lay with the federal executive branch's lack of enforcement.¹²¹ On what legal basis, they asked, could they be barred from adopting a law that "mirrors" the terms of federal law, often word for word?¹²² Like the states in the Mifeprex example, Arizona took a federal policy that leaves ample space for discretion (in this case by government enforcers rather than private actors) and challenged the policy by demanding strict adherence to it as a matter of state law.

States may also engage in a subtler legislative variant of uncivil obedience by imposing regulations that purport to be focused on discrete state responsibilities even as they affect the implementation of federal

117. Boonstra, *supra* note 37, at 18–21.

118. See, e.g., *id.* at 21 ("These restrictions are proffered, although exclusively by abortion opponents, in the purported interest of protecting women's health and safety. According to antiabortion activists, undergoing an abortion using a protocol other than that approved by the FDA . . . is a 'prescription for disaster.'").

119. See, e.g., Brief for Petitioners at 14–15, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 416748 ("Throughout the legislative process . . . , S.B. 1070 was revised to clarify and reinforce its express adoption of federal immigration standards, and the necessity that it be enforced in conformity with those standards.").

120. See *Arizona*, 132 S. Ct. at 2497–98 (describing S.B. 1070).

121. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *Colum. L. Rev.* 459, 490–91 (2012) (explaining Arizona's contention "that the federal executive is betraying Congress by underenforcing the federal immigration laws").

122. This argument against preemption became known as the "mirror-image theory." See Margaret Hu, *Reverse-Commandeering*, 46 *U.C. Davis L. Rev.* 535, 539 n.7 (2012). The theory's basic claim, in the words of its architect, is that "[s]tate governments possess the authority to criminalize particular conduct concerning illegal immigration, provided that they do so in a way that mirrors the terms of federal law." Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 *Geo. Immigr. L.J.* 459, 475 (2008).

law. For instance, state legislatures and agencies have recently targeted the federally paid “navigators” who help individuals sign up for health insurance under Obamacare. Many Republican-controlled states require that navigators undergo background checks and restrict them from offering advice about the features of particular health plans.¹²³ In contrast to more overtly oppositional efforts to thwart Obamacare, proponents of these measures stress their consistency with states’ established role in regulating the insurance industry.¹²⁴ They contend that such measures are necessary to protect privacy and safeguard consumers, and they trade on traditional understandings of separate state and federal spheres—arguing that consumer protection is a state responsibility in our constitutional system—even as they exploit the overlap of state and federal spheres to undermine federal policy.¹²⁵

While we believe each of these examples can be analyzed as uncivil obedience, they are difficult cases. Most importantly, they might be dismissed as law-evasion on the view that their state sponsors are—and appreciate that they are—violating federal mandates, just in shrewd ways

123. See Katherine T. Vukadin, *Obamacare Interrupted: Obstructive Federalism and the Consumer Information Blockade* 26–29 (July 27, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2472594> (on file with the *Columbia Law Review*) (cataloging tactics used to burden navigators); Nicholas Kusnetz, *Obamacare’s Hidden Battle: Insurance Agents Push State Regulation of Guides to New Marketplaces*, *Ctr. for Pub. Integrity* (Aug. 9, 2013, 5:00 AM), <http://www.publicintegrity.org/2013/08/09/13144/obamacares-hidden-battle-insurance-agents-push-state-regulation-guides-new> (on file with the *Columbia Law Review*) (“At least sixteen states have passed navigator laws since 2012 . . .”).

124. See, e.g., Kusnetz, *supra* note 123 (quoting numerous state sponsors who stress “[i]nsurance has long been the realm of the states” and who “maintain that these laws simply establish state oversight and ensure that consumers will be protected from unscrupulous or uninformed navigators”).

125. In a similar fashion, state legislatures have challenged women’s exercise of abortion rights by enacting TRAP (Targeted Regulation of Abortion Providers) laws that impose onerous licensing requirements on abortion facilities. States mandate specific physical dimensions for procedure rooms, hallways, and janitors’ closets; require hands-free sinks and complex ventilation systems; and impose design standards for parking lots and covered entrances. See generally Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, *Guttmacher Pol’y Rev.*, Spring 2013, at 7 (summarizing and criticizing this trend). These laws are justified by proponents as health and safety regulations of the sort the Supreme Court has upheld, see, e.g., *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (*per curiam*) (upholding state law requiring that abortions be performed by licensed physicians), even though the requirements imposed on abortion providers are significantly more exacting than those imposed on other medical facilities and the laws are widely understood to undermine and signal opposition to—without directly flouting—the constitutional right to abortion. See, e.g., Editorial, *Virginia’s Abortion Assault Claims a Victim*, *Wash. Post* (Apr. 26, 2013), <http://wapo.st/183RdOT> (on file with the *Columbia Law Review*) (characterizing Virginia’s TRAP law as anti-abortion “ideological crusade masquerading as concern for public health”).

that complicate detection or sanction.¹²⁶ This objection is clearest, perhaps, with respect to the state abortion measures. U.S. Supreme Court doctrine provides that regulations with the purpose or effect of placing substantial obstacles in the path of women seeking abortions are unconstitutional.¹²⁷ As several federal courts have recognized, the above-mentioned laws seem designed to curtail abortion rights.¹²⁸ And the Supreme Court invalidated most of the challenged provisions of Arizona's S.B. 1070 on preemption grounds, finding that the provisions were inconsistent with federal law notwithstanding their textual mimicry thereof.¹²⁹

Yet dismissing these examples as mere attempts at evasion may be too easy; it fails to capture the legal bravado of their approach as well as at least some of their proponents' self-understanding. Uncivil obedience, recall, does not lose its status as such solely because the behavior in question is ultimately deemed unlawful, just as civil disobedience does not lose its status as such solely because the behavior is ultimately deemed lawful.¹³⁰ The critical question is whether, at the time the act is taken (here, at the time the state law is passed), those responsible for the act genuinely and reasonably believe it accords with all positive law. This is a close question in each of the examples presented above, especially given that we are dealing with collective agents that may lack any shared understanding of the law. But it seems plausible that many, if not all, of the responsible state legislators believed themselves to be acting in conformity with federal law, even as they conscientiously sought to challenge a particular piece of it, on account of the care they took to model their measures on traditional state regulations or federal government texts. Through their unusual attention to legal detail, these lawmakers have been disrupting and defying federal legal policy from a posture of obedience.

126. Cf. *supra* notes 53–54 and accompanying text (explaining evasion cannot constitute uncivil obedience).

127. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

128. At this writing, Oklahoma's medication-abortion law has been enjoined, while Ohio's, North Dakota's, and Texas's have been upheld and a challenge to Arizona's is pending. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 605 (5th Cir. 2014); *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 516–18 (6th Cir. 2012); *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 32 (N.D. 2014); *Cline v. Okla. Coal. for Reprod. Justice*, 313 P.3d 253, 262 (Okla. 2013); see also *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 918 (9th Cir. 2014) (instructing district court to preliminarily enjoin Arizona's law). The Fifth Circuit recently upheld Texas's TRAP law. See *Planned Parenthood of Greater Tex. Surgical Health Servs.*, 748 F.3d at 590–600 (upholding admitting privileges requirement).

129. *Arizona v. United States*, 132 S. Ct. 2492 (2012). We return to the *Arizona* case *infra* notes 191–200 and accompanying text.

130. See *supra* notes 12–14, 51–54 and accompanying text (explaining these points).

III. CAPACITATING AND CONSTRAINING UNCIVIL OBEDIENCE

Having defined uncivil obedience and limned its basic mechanisms and variants, we now broaden the lens to explore regulatory and jurisprudential implications. This Part considers the circumstances under which laws prove more or less susceptible to uncivil obedience, as well as some of the legal responses that its practice elicits. As the discussion so far has detailed, uncivil obedience manages to provoke through and within the law by exploiting gaps between the letter of legal directives and the customs or purposes associated with them. By attending to these predicates, it becomes easier to see how the availability and efficacy of uncivil obedience may be conditioned by the surrounding doctrinal, institutional, and cultural context.

Several variables offer regulatory leverage. Here, we focus on whether a given directive assumes the form of a standard or a rule, and on whether and how a jurisdiction employs doctrines such as abuse of right and preemption. Private law, we explain, has developed more robust doctrines for disciplining uncivil obedience than has public law. We also consider the role of decentralized dynamics such as group “knittedness,” extralegal sanctions, and the prevalence of positivism and formalism versus alternative understandings of law. We do not take up the issue of when legislators, bureaucrats, and other officials will seek to curtail uncivil obedience. Although it will often be intuitive why they might wish to do so, the motivations of these actors are too diverse and contingent to treat in a general fashion. For purposes of this discussion, one need only accept that at least some officials will want to curtail uncivil obedience at least some of the time.

A. *Rules and Standards*

In the legal literature on rules versus standards, a rule is generally taken to be a directive that “binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts.”¹³¹ Rules are precise. They constrain the discretion of enforcers and interpreters through crisp *ex ante* instructions. “The speed limit is fifty-five miles per hour” is a classic rule. A standard, in contrast, “tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.”¹³² Standards are imprecise. They leave much of their content to be worked out by enforcers and interpreters on a case-by-case basis. “Drive at a reasonable speed” is a classic

131. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22, 58 (1992).

132. *Id.*

standard.¹³³ Although rules and standards do not reflect sharply delineated categories so much as ranges along “a continuum of greater or lesser ‘ruleness,’”¹³⁴ the basic distinction between the two is useful and ubiquitous.

Uncivil obedience thrives on rules. Rules are by nature both over- and under-inclusive. In the pursuit of clarity and certainty, they invariably “produce arbitrariness and errors in particular cases” that come within their ambit but do not fit well with the reasons for establishing the rule.¹³⁵ The rigidity of rules often means that they can be implemented in ways that are consistent with their terms—and therefore presumptively lawful—yet insensitive to their underlying purposes and presuppositions or to the customs of compliance and enforcement that have developed in a given context. If the one law that governs driving on the freeway is “Speed Limit 55,” then driving fifty-five miles per hour will always and unquestionably be legal (and driving fifty-six will always be illegal), no matter how deviant or disruptive any case is perceived to be. Uncivil obedience trades on this possibility of defying norms through legal exactitude.

Standards contain built-in safeguards against such manipulation, insofar as they “incorporate [their underlying] norms directly”¹³⁶ and allow enforcers and adjudicators to consider a wider range of facts and factors. A law that says “Drive at a reasonable speed” does not similarly immunize all motorists traveling fifty-five miles per hour from a finding of illegality. Any driving that comes across as bizarre or inflammatory is at risk of being construed as unreasonable.

One way to limit the incidence of uncivil obedience, then, is for authorities to employ standards instead of rules (or, more precisely, to employ directives that are more standard-like and less rule-like). Conversely, one way for activists to take advantage of uncivil obedience is to identify rules that by their plain terms insulate certain “incivilities”—abnormal, antisocial, expressive behaviors—from official sanction. If employees are asked to carry out their duties in a “timely and efficient manner” rather than to follow a detailed list of instructions, then they

133. See, e.g., Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 *Va. L. Rev.* 1, 16 (2011) (using similar speed-limit examples to illustrate rules–standards distinction); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 560 (1993) (same); Russell B. Korobkin, *Behavior Analysis and Legal Form: Rules vs. Standards Revisited*, 79 *Or. L. Rev.* 23, 23 (2000) (same).

134. Sullivan, *supra* note 131, at 58 n.231 (citing Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 *Harv. J.L. & Pub. Pol’y* 823, 828–32 (1991)); see also Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 *Colum. L. Rev.* 1, 49 (1997) (“[A]s is well recognized, ‘rules’ and ‘standards’ do not so much define a dichotomy as reflect ranges along a continuum.”).

135. Cass R. Sunstein, *Problems with Rules*, 83 *Calif. L. Rev.* 953, 992 (1995).

136. Dodson, *supra* note 133, at 17.

will have little prospect of engaging in work to rule.¹³⁷ If the tax code determined marital status through a totality-of-the-circumstances test rather than a December 31 snapshot, then the Boyters would have been blocked from carrying out their divorce-and-remarry scheme.¹³⁸ If senators' option to use read-a-thons and holds were tied to an explicit requirement of "necessity," "exceptional circumstances," or the like, then critics would have an easier time casting repeat users as lawbreakers (whether or not the requirement could ever be enforced in court).¹³⁹ In some cases, the switch from a rule to a standard may go further and eliminate the substantive basis for uncivil obedience. If Congress had told freeway motorists to drive at a safe speed rather than at fifty-five miles per hour or less, then the National Motorists Association presumably never would have staged its protest.¹⁴⁰

The turn to standards can undermine uncivil obedience at the level of legitimacy as well as legality, not only by increasing the protester's odds of punishment but also by foregrounding the subversive aspect of her behavior. Standards *moralize* the practice of compliance. "Rather than applying a rule by rote, citizens must ask themselves, for example, whether they are treating one another fairly, whether they are acting in good faith, whether they are taking due care, whether they are behaving reasonably, and the like."¹⁴¹ The very framing of these questions invites normative deliberation¹⁴² and suggests the appeal of established custom.

Importantly, the standard that forecloses uncivil obedience need not be adopted in lieu of a rule, but may be adopted in addition to a rule. In some cases, that is, practices may be governed by both a rule and a standard¹⁴³—often, a standard that applies to a wider swath of behavior than

137. See *supra* notes 32–33, 65 and accompanying text (explaining work to rule); cf. David Luban, *Misplaced Fidelity*, 90 *Tex. L. Rev.* 673, 688 (2012) (book review) (observing work to rule is effective "because in the real world we expect people to make the innumerable minor adjustments that rules cannot capture"). In this sense, the use of the word "rule" in the label "work to rule" is entirely appropriate.

138. See *supra* note 67 and accompanying text (describing Boyters' protest against marriage tax penalty).

139. See *supra* notes 96–102 and accompanying text (considering systematic Senate obstructionism as form of uncivil obedience).

140. See *supra* notes 1–4, 47–48 and accompanying text (discussing this protest).

141. Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 *Harv. L. Rev.* 1214, 1217 (2010).

142. See generally *id.* at 1219–31 (arguing relatively opaque and moralistic idiom of standards induces deliberation).

143. Cf. Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 *Harv. J.L. & Pub. Pol'y* 213, 220 (2012) ("The legal landscape is a complex mix of rules and standards, which often overlap. Drivers must obey both traffic rules like the speed limit and traffic standards like laws against reckless driving and tort norms against negligent driving."). On the potential role of "abuse of right" as a super-standard proscribing incivility, see *infra* Part III.B.1.

the rule—and the standard may provide a backstop against certain forms of rule-conforming incivility. This is most likely to occur when the standard targets disruptive or pretextual activity. For instance, if the relevant rule instructs motorists to pay posted tolls, a would-be uncivil obedient who pays in pennies with the intent of obstructing traffic might, in some jurisdictions, be vulnerable to a charge of disorderly conduct or public nuisance.¹⁴⁴ (A large group of penny-payers may be especially vulnerable, given the likely correlation between the protest's scale and the level of disruption.) At a significant potential cost to legal certainty and civil liberties,¹⁴⁵ broadly framed prohibitions of this sort can effectively reduce the overinclusiveness of permissive rules and the underinclusiveness of restrictive rules in regulating unanticipated, uncooperative behaviors.

If the specter of uncivil obedience can push lawmakers to frame directives as standards, so too may it push interpreters and implementers to construe rules in more standard-like terms. A formal revision to the governing law is not always necessary. Through “rule-avoidance strategies” such as the creation of ad hoc exceptions, resort to reasonableness qualifications, and broad forms of purposive analysis, interpreters and implementers may be able to functionally convert a seemingly stringent rule into a more open-ended standard.¹⁴⁶ In this vein, for example, some work-to-rule campaigns have been deemed inconsistent with the employment contracts to which they strictly adhered (and thus tantamount to unprotected partial strikes).¹⁴⁷ And one federal appellate panel suggested

144. See, e.g., Minn. Stat. Ann. § 609.74(2) (West 2009) (defining public nuisance to include intentionally “interfer[ing] with” or “obstruct[ing]” “any public highway or right-of-way”); Utah Code Ann. § 76-9-102(1)(b)(iv) (LexisNexis 2013 & Supp. 2014) (defining disorderly conduct to include “obstruct[ing] vehicular or pedestrian traffic” with “inten[t] to cause public inconvenience, annoyance, or alarm”). Other jurisdictions, in contrast, limit the offenses of disorderly conduct and public nuisance to a distinct set of enumerated behaviors or to the creation of hazardous conditions. See, e.g., Tex. Penal Code Ann. § 42.01 (West 2013 & Supp. 2014) (restricting definition of “[d]isorderly [c]onduct” to enumerated behaviors); Tex. Civ. Prac. & Rem. Code Ann. §§ 125.062–.063 (West 2011) (limiting “public nuisance” to “continuously or regularly associat[ing] in gang activities” or habitually using particular location “for engaging in gang activity”). In a much-publicized 2011 incident, a Utah man who paid a disputed bill in pennies was cited for disorderly conduct—although reportedly for dumping thousands of coins over the counter and floor rather than for using pennies per se. See Eoin O’Carroll, 2,500 Pennies: Is It Legal to Pay a Bill in Pennies?, CSMonitor.com (June 6, 2011, 1:01 PM), <http://www.csmonitor.com/Business/2011/0606/2-500-pennies-Is-it-legal-to-pay-a-bill-in-pennies> (on file with the *Columbia Law Review*).

145. Just consider the potential costs to personal freedom and public discourse of maintaining an open-ended (though not unconstitutionally vague) prohibition on disorderly conduct.

146. See Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. Rev. 303, 312–15 [hereinafter Schauer, *Convergence*] (cataloging “rule-avoidance strategies”).

147. See, e.g., *Lenox Educ. Ass’n v. Labor Relations Comm’n*, 471 N.E.2d 81, 82–83 (Mass. 1984) (holding “concerted refusal by public school teachers to perform services

that the Boyters' divorces might not be recognized under the tax code because they were "shams."¹⁴⁸ Consistent with Frederick Schauer's "convergence hypothesis," the desire to avert uncivil obedience thus provides an additional basis for predicting the evolution of rules into standards in the face of legalistic behavior.¹⁴⁹ What begins as uncivil obedience *ex ante* may emerge from adjudication as law-breaking *ex post*.

In some cases, it is unnecessary to shift to a standard, through any means, to foreclose uncivil obedience. A diametrically opposed response is for lawmakers to counter instances of uncivil obedience with still more specific rules. To deal with the problem of protesters who pay their taxes and tolls in low-denomination coins, several countries have declined to enlist expansive notions of disorderly conduct, public nuisance, or the like. Rather, they have simply decreed that their smallest units of currency cease to count as legal tender when aggregated above a certain amount. In the United Kingdom, for example, "coins of bronze" are not legal tender "for payment of any amount . . . exceeding 20 pence."¹⁵⁰ Attempting to discharge a £200 tax debt with pence is not a provocative method of complying with the law in London. It is an underpayment of £199.80.

customarily performed by teachers generally, but not expressly described in their most recent collective bargaining agreement," constituted unprotected strike); *Jeld Wen Corp.*, Case 9-CA-28831, 1992 WL 83506, at *1-*2 (NLRB Office of Gen. Counsel Feb. 4, 1992) (finding work-to-rule action, in which employees "strictly adher[ed] to Employer instructions," constituted unprotected slowdown). But see, e.g., *Riverside Cement Co.*, 296 N.L.R.B. 840, 841 (1989) (stating, in decision for employees who alleged unlawful retaliation for engaging in work to rule, "[w]here an action is voluntary, the concerted refusal by employees to perform that action is a protected concerted activity and does not constitute an unlawful partial strike").

148. *Boyter v. Comm'r*, 668 F.2d 1382, 1388 (4th Cir. 1981). Without expressing a view on the merits, the panel remanded the case to the tax court "to determine whether the divorces, even if valid under Maryland law, are nonetheless shams and should be disregarded for federal income tax purposes for the years in question." *Id.* When this happened, the Boyters divorced for a final time without remarrying, vowing to remain divorced until the law was changed. Graetz, *supra* note 67, at 37.

149. See Schauer, *Convergence*, *supra* note 146, at 311-21 (hypothesizing general tendency for rules and standards to converge); see also Pierre Schlag, *Rules and Standards*, 33 *UCLA L. Rev.* 379, 428-29 (1985) (noting "tendency of rules to evolve or degenerate . . . into standards, and standards to evolve or degenerate into rules"). When standards become "rulified" over time through the efforts of interpreters and enforcers to provide more concrete guidance—so that, for example, motorists come to learn that driving under sixty-five miles per hour in dry weather will be deemed to comply with a directive to "drive safely"—opportunities for uncivil obedience may reemerge.

150. *Coinage Act*, 1971, c. 24, § 2(1d) (U.K.). For similar rules, see, for example, *Currency Act 1965* (Cth) s 16(1) (Austl.) (restricting ability to tender payment using coins of various denominations); *Currency Act*, R.S.C. 1985, c. C-52, § 8 (Can.) (same). The United States Senate's new limitations on the filibuster provide another example of a more fine-grained set of rules adopted to counteract uncivilly obedient uses of the prior regulations. See *supra* note 102 (describing this development).

By putting pressure on the existing rules in these various ways, uncivil obedience dynamically refines but also complicates the project of regulation. Rules are often preferred to standards because they are thought to generate greater certainty, predictability, and uniformity.¹⁵¹ Uncivil obedience recasts these features as liabilities: The rigidity and clarity they generate are what allow dissenters to unsettle the status quo from a secure legal perch. To the extent that citizens and officials wish to stave off uncivil obedience, then, they may have to forfeit some of the benefits of rules and accept the higher levels of indeterminacy, enforcement discretion, and administrative costs associated with standards; or else they may have to undergo the trouble of supplementing the current rules with more severe rules, which will in turn come with their own negative externalities.¹⁵² In either event, they will be pushed away from their initial choice as to the appropriate mix of rules and standards and the desired level of specificity at which to frame directives in a given domain. Uncivil obedience reveals the latent subversive potential of regulatory precision, and in so doing both catalyzes legal change and raises the cost of lawmaking.

B. *Transsubstantive Doctrines*

Legal designers may also seek to constrain uncivil obedience in a more comprehensive fashion, through general principles or “interstitial norms” that condition all uses of law by certain subjects.¹⁵³ In contemporary practice, the doctrines of abuse of right, equity, and preemption, in particular, have come to serve this function.

1. *Abuse of Right, Equity, and Related Doctrines.* — A version of the doctrine of abuse of right (*abus de droit*) appears in many civil-law and mixed jurisdictions, as well as in international law.¹⁵⁴ The basic idea is that conduct that adheres to the plain terms of the law may nonetheless be treated as unlawful when sufficiently unreasonable or antisocial—abu-

151. See, e.g., Dodson, *supra* note 133, at 16 (summarizing literature). Conversely, standards are often praised for, among other things, being easier to craft and fairer as applied to particular cases. *Id.* at 17.

152. The United Kingdom’s bar on payments in bronze coins exceeding twenty pence, for example, knocks out not only disruptive tax protests but also innocent attempts by children to empty their piggy banks at the candy store.

153. See Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *The Role of Law in International Politics* 207, 212–21 (Michael Byers ed., 2000) (defining “interstitial norms” as norms that lack “independent normative charge of their own” but instead “direct the manner in which competing or conflicting norms that do have their own normativity should interact in practice,” and citing abuse of right as prominent example).

154. For useful surveys, see Council of Europe, *Abuse of Rights and Equivalent Concepts* (1990), and Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 *McGill L.J.* 389 (2002). The doctrine has been substantially codified in European domestic systems but remains largely uncoded in international law.

sive—in some respect. “In international law,” for example, “abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State.”¹⁵⁵ In the domestic context, the doctrine acts as a safeguard against legalistic assertions of rights, powers, privileges, claims, or immunities by private parties that are seen to reflect bad faith or to impose unwarranted social costs.¹⁵⁶ Abuse of right “soften[s] the harshness of the positive law and of contractual provisions in light of society’s concerns that transcend individual interests.”¹⁵⁷

The narrowest formulations of abuse of right are unlikely to check uncivil obedience. Focused on the right holder’s subjective intent, these formulations ask whether causing harm to another was her only or predominant purpose in acting as she did.¹⁵⁸ The classic example is the landowner who erects a tall fence on her property for the sole, spiteful end of depriving her neighbor of light.¹⁵⁹ A somewhat looser and more objective version of the doctrine proscribes otherwise lawful conduct that lacks any “legitimate interest,” as when a landowner “pump[s] from her land the

155. Alexandre Kiss, *Abuse of Rights*, in 1 *Encyclopedia of Public International Law* 4, 4 (Rudolf Bernhardt ed., 1992).

156. The term “abuse of right” is thus misleadingly narrow insofar as it suggests that only Hohfeldian rights are implicated. Cf. Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 *Pac. L.J.* 37, 54 n.76 (1995) (invoking Hohfeld and noting “term ‘abuse of rights,’” as used by author and countless others, “encompasses rights, powers, privileges, immunities, etc.”). There is a long-running debate over whether the term is more deeply misleading because conduct found to be an abuse of right is best understood as never having been within the scope of the right, rather than as a genuine exercise of the right that loses protection because of its abusive character. See, e.g., 2 Marcel Planiol, *Treatise on the Civil Law* no. 871 (La. State Law Inst. Trans., 11th ed. 1939) (insisting “the right ceases where the abuse commences”); Frederick Schauer, *Can Rights Be Abused?*, 31 *Phil. Q.* 225, 225–27 (1981) (exploring this puzzle).

157. A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New . . .*, 54 *La. L. Rev.* 1173, 1195 (1994); see also Joseph Voyame et al., *Abuse of Rights in Comparative Law*, in *Abuse of Rights and Equivalent Concepts*, supra note 154, at 23, 23 (describing abuse of right as “legal mechanism designed to ease the inflexibility of the legal relationships derived from statutory, judicial or treaty rules”).

158. See Byers, supra note 154, at 393–94 (listing Germany, Italy, and Austria as examples of legal systems that conceive of abuse of right in these terms); Voyame et al., supra note 157, at 28–31 (listing Italy, Austria, and Liechtenstein as countries that continue to employ “extremely narrow” approach of making “malicious intent . . . the sole essential element of the abuse”). The German Civil Code, for example, provides that “[t]he exercise of a right is unlawful, if its purpose can only be to cause damage to another.” Byers, supra note 154, at 393 (quoting *Bürgerliches Gesetzbuch [BGB]* [Civil Code] art. 226 (Ger.), translated in *The German Civil Code* (Simon L. Goren trans., 1994)).

159. See Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 *Hastings L.J.* 687, 691 (2010) (identifying this as “classical textbook example” of abuse of right).

groundwater feeding her neighbor's mill only to end up wasting it."¹⁶⁰ Uncivil obedience, as we have defined it, is all but certain to evade these understandings of abuse of right. The limited class of malicious and arbitrary acts they condemn is readily distinguishable from the uncivil obedient's conscientious and communicative attempt to effect lasting change to law or policy.

Broader formulations of abuse of right, however, can pose a significant challenge to uncivil obedience. Some of these formulations ask if the right holder's conduct is contrary to the "normal function" of the right or its "socio-economic purpose,"¹⁶¹ while others ask if her conduct is unreasonable "in the light of the prevailing social conscience"¹⁶² or in light of "the disproportion between [her] interest to exercise the right and the harm caused thereby."¹⁶³ All of these broader variants focus, in one way or another, on "the act itself" and whether it is "abnormal or excessive" or "its consequences unacceptable."¹⁶⁴ Often a form of teleological reasoning underwrites these inquiries. Abuse is taken to occur when the right holder's behavior is facially consistent with formal law but "inconsistent with the aim of the institution, its spirit and its ultimate purpose."¹⁶⁵

It is not hard to imagine how these notions of abuse of right could be applied to stifle uncivil obedience. Employees who engage in work to rule could be (and have been) accused of undermining the "normal function" of the workplace.¹⁶⁶ Taxpayers who pay in pennies could be accused of acting in an unreasonable or antisocial manner. Critics who advocate maxing out the welfare system could be accused of subverting the socioeconomic purpose of public benefits laws. And so on. Even the National Motorists Association members who drove at the speed limit might have been charged with abusing the freeway laws' "ultimate pur-

160. *Id.*; see also Voyame et al., *supra* note 157, at 31–35 (discussing countries that "define any harmful act perpetrated in the absence of legitimate interest as an abuse").

161. Di Robilant, *supra* note 159, at 691–92; see also, e.g., John H. Crabb, *The French Concept of Abuse of Rights*, 6 *Inter-Am. L. Rev.* 1, 9 (1964) ("When the right is being abused, the actor is technically or mechanically within the formal limits of the right accorded, and may also be acting carefully. But he is not employing the right in conformity with its nature and purpose . . .").

162. Kazuaki Sono & Yasuhiro Fujioka, *The Role of the Abuse of Right Doctrine in Japan*, 35 *La. L. Rev.* 1037, 1037 (1975).

163. Byers, *supra* note 154, at 395 (quoting BW art. 13(2) (Neth.), translated in *New Netherlands Civil Code* (P.P.C. Haanappel & Ejan Mackaay trans., 1990)).

164. Voyame et al., *supra* note 157, at 35 (summarizing approach of countries that "apply an objective conception of abuse of rights").

165. *Id.* at 33 (quoting Louis Josserand, "the father" of modern French abuse-of-right theory).

166. See di Robilant, *supra* note 159, at 691–92 ("At the height of nineteenth-century industrial struggles [in Europe], unions were found to abuse their right to strike when their action departed from the right's 'normal function.'").

pose” of ensuring the smooth and safe flow of traffic. If this logic were extended to domestic public law, abuse of right could provide a powerful basis for attacking behaviors such as Senate minorities’ relentless use of the hold and other procedural privileges.¹⁶⁷

Uncivil obedience, once again, provokes by exploiting gaps between the letter of legal directives and the customs or purposes associated with them. The broadest versions of the abuse-of-right doctrine close these gaps as a matter of law. They effectively impose a requirement of civility on all legal transactions. If prohibitions on disorderly conduct, public nuisance, and the like can curb uncivil obedience through a mix of discrete rules and standards, abuse of right may amount to a roving super-standard—with super-sized implications for the typical costs and benefits associated with the regulatory form. As compared to a patchwork of directives that target incivility in specific domains, a broad doctrine of abuse of right is significantly easier to develop and adapt to new circumstances. It is also significantly more likely to generate confusion, chilling effects, and executive and judicial discretion.¹⁶⁸

Outside the civil-law enclave of Louisiana,¹⁶⁹ the doctrine of abuse of right has played little explicit role in the Anglo-American legal system. Late-nineteenth-century English cases arguably reject the doctrine’s subjective formulations altogether, as in Lord Halsbury’s famous statement in *Mayor of Bradford v. Pickles* that “[i]f it was a lawful act, however ill the motive might be, he had a right to do it.”¹⁷⁰ Yet as several scholars have documented, the United States and other common-law jurisdictions nevertheless employ a number of concepts that serve a comparable function in private law “under such labels as nuisance, duress, good faith, economic waste, public policy, misuse of copyright and patent rights, lack

167. See *supra* notes 96–102 and accompanying text (describing these Senate behaviors). At present, the doctrine of abuse of right “is rarely mentioned in constitutional law,” although some influential European jurists have begun to urge this change. András Sajó, *Abuse of Fundamental Rights or the Difficulties of Purposiveness*, in *Abuse: The Dark Side of Fundamental Rights* 29, 33 (András Sajó ed., 2006). Abuse of right has been “neglected” in public law, according to Sajó, because of the prominence of concepts such as “discretionary power and legislative sovereignty” and the privileging of “categorical” (rather than balancing) approaches to rights. *Id.* at 34.

168. On the notorious vagueness of abuse of right, see, for example, Robert Krieps, General Report, in *Abuse of Rights and Equivalent Concepts*, *supra* note 154, at 166, 173 (“[E]ven an experienced jurist . . . would be hard put to say precisely what was the criterion that determined that a right had been abused . . .”); Voyame et al., *supra* note 157, at 23 (“[W]ithin most countries, there is no unanimous agreement as to the scope of the prohibition of abuse of rights; doctrinal disputes and contradictory judgments are commonplace.”).

169. See generally Yiannopoulos, *supra* note 157 (reviewing history of abuse of right in Louisiana law).

170. [1895] A.C. 587 (H.L.) 594 (appeal taken from Eng.).

of business purpose in tax law, extortion, and others.”¹⁷¹ Where these concepts apply, they may similarly serve to constrain uncivil obedience. An unanticipated, mechanistic application of a contract term, for example, might be construed to violate the implied duty of good faith.¹⁷²

Historically, equity has played an especially important role in common-law systems in policing conduct that adheres to a law’s formalistic requirements but clashes with the purposes or values the law was meant to serve. Many of the concepts discussed just above “are themselves largely . . . the result of the gravitational pull of the equitable doctrines that provide the judicial recourse of last resort to invalidate facially legal conduct when the available interpretive strategies would strain credulity and undermine legal meaning generally.”¹⁷³ According to Henry Smith’s “safety valve” theory of equity, its principal function has been to prevent opportunistic behavior that would be too costly to define and deter *ex ante*.¹⁷⁴ Like abuse of right in civil systems, equity supplies common lawyers with a highly adaptable “anti-opportunism device.”¹⁷⁵

It is important to see, however, that the success of equity and its offshoots in preventing uncivil obedience has been incomplete. This is so for at least two main reasons. First, as Smith notes, equity intervenes “in a limited domain.”¹⁷⁶ Even if the “distinctive traditions of equity now pervade the legal system” in some sense following the merger of law and

171. Perillo, *supra* note 156, at 40; see also, e.g., D.J. Devine, *Some Comparative Aspects of the Doctrine of Abuse of Rights*, 1964 *Acta Juridica* 148, 164 (“Despite the lack of any general principle of abuse of right, . . . in some particular instances, English Law does admit what amounts to [such] a doctrine These instances occur mainly in the law of nuisance, conspiracy, abuse of process and qualified privilege in defamation.”); di Robilant, *supra* note 159, at 696 (arguing abuse of right “was silently at work” in English and especially American private law during late nineteenth and early twentieth centuries, through “functional equivalents” such as “malice’ tests and ‘reasonable user’ rules”).

172. But cf. Perillo, *supra* note 156, at 69–77 (emphasizing haziness surrounding idea of good faith in American contract law and arguing abuse-of-right framework would be clearer and more constraining).

173. Email from Jody S. Kraus, Patricia D. & R. Paul Yetter Professor of Law and Professor of Philosophy, Columbia Law Sch., to authors (Sept. 8, 2014, 3:26 PM EDT) (on file with the *Columbia Law Review*).

174. Henry E. Smith, *An Economic Analysis of Law Versus Equity* (Oct. 22, 2010) (unpublished manuscript), available at http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf (on file with the *Columbia Law Review*). For a similar theory of the duty of good faith in civilian contract law, see Ejan Mackaay, *The Economics of Civil Law Contract and of Good Faith* 15 (2009) (unpublished manuscript), available at https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/3016/Mackaay_Trebilcock-Symposium%20_3_.pdf (on file with the *Columbia Law Review*) (arguing good faith supplies “residual concept with which to fashion new remedies [for opportunism] where no existing one is appropriate”).

175. Smith, *supra* note 174, at 33.

176. *Id.* at 53.

equity in most U.S. courts,¹⁷⁷ formalism, clear rules, and other limits on judicial discretion continue to cabin equity's reach,¹⁷⁸ especially in public law.¹⁷⁹ Second, uncivil obedience does not necessarily involve opportunism, either in the economists' sense of "self-interest seeking with guile"¹⁸⁰ or in Smith's preferred formulation of behavior "that would be contracted away if ex ante transaction costs were lower" and that "often violates moral norms."¹⁸¹ Given its conscientiousness and reformist ambition, uncivil obedience is a more morally ambiguous category. Even where equitable principles do hold sway, they may not condemn uncivil obedience.

This Article's examples reflect as much. Senators who have made "uncivil" use of their procedural privileges have suffered no legal sanction. Neither did the National Motorists Association members who drove at the speed limit; nor did Stephen Colbert when he strategized with the head of his Super PAC on television without technically "coordinating"; nor did any number of lawyers and activists who have tried to "crash" the criminal justice and public benefits systems. Not coincidentally, the examples that come closest to ordinary opportunism—the Boyters' divorce-and-remarry scheme and work to rule—have encountered greater legal resistance. Yet even these cases reveal the limits of that resistance. Although one appeals court eventually suggested that the Boyters' divorces might be treated as "sham" transactions, it never ruled on the issue.¹⁸² And while some work-to-rule campaigns have been treated as un-

177. Douglas Laycock, *The Triumph of Equity*, 56 *Law & Contemp. Probs.*, Summer 1993, at 53, 53.

178. See, e.g., Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 *Minn. L. Rev.* (forthcoming 2015) (manuscript at 38–49) (on file with the *Columbia Law Review*) (detailing "underenforcement" of duty of good faith in American contract law).

179. See, e.g., Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 *Notre Dame L. Rev.* 1291, 1292 (2000) ("It did not take long after Professor Chayes celebrated the 'triumph of equity' in public law litigation to recognize that the announcement was premature . . . (quoting Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1292 (1976)); Thomas D. Rowe, Jr., *No Final Victories: The Incompleteness of Equity's Triumph in Federal Public Law*, 56 *Law & Contemp. Probs.*, Summer 1993, at 105, 105 (reviewing cases "demonstrating the limited nature of equity's 'triumph' in federal public law" and modern Supreme Court's "hostility toward the spirit of equity" in this area); David E. Pozen, *Constitutional Bad Faith*, 129 *Harv. L. Rev.* (forthcoming 2016) (manuscript at 8–19) (on file with the *Columbia Law Review*) (documenting marginalization of principle of good faith in American constitutional law); cf. Vernon Valentine Palmer, "May God Protect Us from the Equity of Parlements": Comparative Reflections on English and French Equity Power, 73 *Tul. L. Rev.* 1287, 1292 (1999) ("[Historically,] English equity was confined to private law. It had little or no public-law dimension or application . . ."). Abuse of right has been similarly sidelined in European countries' domestic public law. *Supra* note 167.

180. Oliver E. Williamson, *The Economic Institutions of Capitalism* 47 (1985).

181. Smith, *supra* note 174, at 9.

182. See *supra* note 148 and accompanying text (discussing this litigation).

protected partial strikes, others have fared much better in court,¹⁸³ and the National Labor Relations Board “has not directly addressed the legal status of work-to-rule or delineated when it crosses the line into unprotected partial strike activity.”¹⁸⁴

In sum, both the spirit of equity and its specific doctrinal manifestations in American contract law, tort law, and elsewhere may be enlisted to rein in uncivil obedience, especially when it comes across as deceptive or self-serving. But they have not foreclosed this mode of dissent. In contemporary practice, abuse of right appears to offer a more powerful tool for disciplining and deterring uncivil obedience.

These observations raise the interesting—and potentially testable¹⁸⁵—question whether uncivil obedience tends to flourish in common-law jurisdictions relative to civil-law jurisdictions (thus making the “uncivil” label all the more appropriate). The lack of a standalone doctrine of abuse of right would seem to put uncivil obedience on a firmer legal footing in the United States than, say, in France; all else equal, Americans who exercise their rights in unconventional and disruptive ways ought to face lower odds of formal sanction across various areas of law. They may also face lower odds of informal condemnation, inasmuch as the very existence of an abuse-of-right doctrine makes it easier for people in civil-law countries to recognize hyperbolic adherence to law as a form of incivility, as a potential “abuse” of the system rather than an unusually restrained mode of dissent. The absence of this doctrine in the United States, moreover, may reflect features of our legal culture that facilitate uncivil obedience in a deeper sense, such as comparatively low levels of comfort with teleology and balancing as interpretive methods, or comparatively high levels of reverence for text-based reasoning and liberal individualism.¹⁸⁶

2. *Preemption.* — Abuse of right and related doctrines can thus serve as a check against the uncivil obedience of private parties, as well as nation-states, by stripping legal protection from a more or less open-ended set of legalistic incivilities. These doctrines, however, remain on the margins of domestic public law in general and American public law in particular. And as we have noted, a federal system such as the United

183. See *supra* note 147 and accompanying text (noting mixed case law in this area).

184. Robert M. Schwartz, *Strikes, Picketing, and Inside Campaigns* 30 (2006).

185. The empirical and methodological challenges would be formidable, but researchers could conceivably perform interjurisdictional comparisons of rates of work-to-rule actions, tax payments in coins, efforts to flood the courts, and so forth. At a minimum, surveys and laboratory experiments could be used to test perceptions of various kinds of uncivil obedience across common-law and civil-law subjects.

186. Cf. H.C. Gutteridge, *Abuse of Rights*, 5 *Cambridge L.J.* 22, 22 (1933) (asserting “theory of the abuse of rights . . . has been rejected by our [Anglo-American] law” in favor of “theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism”).

States' is ripe for an especially vexing type of uncivil obedience—when states enact measures that flaunt their superficial attentiveness to federal law or policy while at the same time attempting to subvert it.¹⁸⁷ Beyond any of the constitutional principles that limit state legislative authority in specific domains, the transsubstantive doctrine of preemption offers the most significant safeguard against this legislative variant of uncivil obedience.

Obstacle preemption is the key. As currently configured, U.S. preemption doctrine reaches not only state laws that are expressly displaced by federal law or that occupy a regulatory field understood to belong exclusively to the federal government, but also state laws that impliedly conflict with federal law. Such a conflict may arise either when “compliance with both federal and state regulations is a physical impossibility”¹⁸⁸ or, more broadly, when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁸⁹ This broader strand of implied preemption doctrine parallels the broader strands of abuse-of-right doctrine in its privileging of functional and purposive considerations, and in the discretion that is consequently afforded to judges.¹⁹⁰ Like abuse of right, obstacle preemption refuses to accept that technical compatibility with legal language ensures substantive legality.

Arizona v. United States provides a notable recent example of how obstacle preemption can thwart uncivil obedience.¹⁹¹ As explained in Part II, the legal architects of Arizona's S.B. 1070 sought to insulate themselves from a preemption challenge, even as they railed against the federal government's immigration policy, by “mirroring” the terms of federal immigration law: A state statute can hardly be said to conflict with a federal statute, they argued, when the two use the same words.¹⁹² In dissent, Justice Scalia credited this approach with ensuring “complete compliance” with federal law.¹⁹³ A majority of the Justices, however, rejected the mirror-image theory on the ground that key provisions of S.B. 1070 were designed to “undermine federal law” rather than

187. See *supra* Part II.B.4.

188. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

189. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

190. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (“What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”).

191. 132 S. Ct. 2492 (2012); see also *supra* notes 119–122 and accompanying text (describing Arizona's challenged immigration law).

192. See *supra* note 122 and accompanying text (explaining “mirror-image theory”).

193. *Arizona*, 132 S. Ct. at 2522 (Scalia, J., concurring in part and dissenting in part); see also *id.* at 2521 (“[T]o say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind.”).

reinforce it,¹⁹⁴ creating “an obstacle to the full purposes and objectives of Congress” in regulating immigration.¹⁹⁵ Meticulously reprising the terms of federal law, the Court reasoned, can be just as disruptive as openly rejecting them. Although the facts of *Arizona* may be peculiar, this reasoning is broadly generalizable. A concern with uncivil obedience could lead judges to look warily at state efforts at self-insulation far beyond the preemption-heavy realms of immigration and foreign affairs.¹⁹⁶

Arizona v. United States is instructive in another respect as well. To thwart state uncivil obedience, preemption doctrine may need to cast the executive branch’s delegated discretion as part of the federal law that has preemptive effect. The State of Arizona argued that to the extent S.B. 1070 differed from federal immigration policy, it departed only from the federal executive branch’s law enforcement, not from the underlying congressional mandate.¹⁹⁷ But the Court declined to parse legislative and executive power in this way. Instead, it conceived of the executive’s enforcement discretion as an integral component of Congress’s design.¹⁹⁸ The Justices in the majority were not troubled by the alleged gap that had opened up between the relatively rigid law on the books and the more flexible law in action. By construing such gaps as a feature rather than a bug of a federal statutory scheme, courts make it much more difficult for states to challenge federal policy as the ostensible agents of Congress.

Obstacle preemption and, especially, the assigning of preemptive effect to executive-branch actions are both controversial propositions.¹⁹⁹

194. *Id.* at 2510 (majority opinion).

195. *Id.* at 2507; see also *id.* at 2505 (“Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.”).

196. State laws touching on immigration and foreign affairs have been invalidated on grounds of field, as well as conflict, preemption. In *Arizona*, the Supreme Court invoked both field and conflict preemption, even, oddly enough, with regard to the same provision of the state law. See *id.* at 2503 (noting certain “specific conflicts between state and federal law simply underscore the reason for field preemption”).

197. See *supra* note 121 and accompanying text (reviewing Arizona’s argument).

198. See Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 *Sup. Ct. Rev.* 31, 33 (arguing *Arizona* “endorses the idea that immigration law is centrally the product of executive ‘lawmaking’ that bears little relation to immigration law on the books”). Similar reasoning appeared in *Buckman Co. v. Plaintiffs’ Legal Committee* with respect to state tort law. 531 U.S. 341 (2001). The *Buckman* Court emphasized that “the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration,” and held that the FDA’s discretion in exercising this authority amounted to part of the federal law bearing preemptive effect. *Id.* at 348.

199. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment) (“I have become increasingly skeptical of this Court’s ‘purposes and objectives’ pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law.”); Ernest A. Young, *Executive Preemption*, 102 *Nw. U. L.*

We take no position in this Article on whether they should be extended or curtailed in light of the phenomenon of legalistic state dissent.²⁰⁰ Our claims here are that these doctrines are well-suited to identifying and checking such dissent; that they already play this regulatory role; and that it is impossible to assess them without considering the varieties of uncivil obedience to which they may respond.

C. *Decentralized Dynamics*

Thus far, this Part has focused on governmental responses to uncivil obedience, involving the adoption and implementation of official doctrines and directives. In many contexts, however, informal dynamics may play a large role in regulating these acts of dissent. Uncivil obedience manages to be uncivil and obedient at the same time by defying unwritten norms concerning how the law is to be followed or applied. Where these norms exert stronger disciplinary force, then, we should tend to see less uncivil obedience. Three broad sets of variables are especially relevant.

First, uncivil obedience may be subject to more intensive nonlegal regulation in close-knit environments with high degrees of interaction, information flow, and trust among the participants.²⁰¹ In these environments, a substantial literature has shown, norms of reciprocity and decency often emerge and suppress antisocial behavior.²⁰² Once estab-

Rev. 869, 871 (2008) (contending preemption based on agency activity “seem[s] to shift preemptive authority from Congress to the agency—a result that contravenes both the text of the Supremacy Clause and the structural safeguards of federalism and separation of powers”).

200. As a growing literature emphasizes, there are many reasons one might welcome state dissent from federal policy and accordingly be wary of “civilizing” reforms. See generally Bulman-Pozen & Gerken, *supra* note 114, at 1284–94 (identifying potential benefits of “uncooperative federalism”); Hills, *supra* note 112, at 4 (proposing “often competitive interaction between the levels of government” can make “Congress a more honest and democratically accountable regulator of conduct throughout the nation”); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *Tex. L. Rev.* 1, 130–34 (2004) (arguing limiting federal preemption of state law would advance values such as citizen participation and deliberation).

201. Cf. *supra* note 62 (discussing different types of environments in which uncivil obedience may occur).

202. See, e.g., Robert C. Ellickson, *Order Without Law* 167–78 (1991) (defining close-knit groups as ones in which “informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them,” and arguing their members will tend to develop and maintain welfare-enhancing norms of cooperation); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Legal Stud.* 115, 140 (1992) (discussing importance of “geographical concentration, ethnic homogeneity, and repeat dealing” for emergence of reputational norms). But cf. Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 *U. Chi. L. Rev.* 359, *passim* & 365 n.31 (2003) (exploring conditions under which cooperative norms can arise in non-close-

lished, moreover, these cooperation-promoting norms may operate independently from, and even in the teeth of, formal legal entitlements.²⁰³ Compared to a driver or a taxpayer considering whether to comply with the freeway speed limit or the federal tax code in a formally lawful yet unconventional manner, a homeowner in a close-knit neighborhood considering whether to register her dissent by taking advantage of a technicality in the zoning code is more likely to have internalized social norms that hold her back (at least, assuming her neighbors are not already known to support her goals and methods). She is more likely to resist the turn to legalism. To the extent that private law tends to regulate more closely knit settings than does public law, these points suggest that uncivil obedience should have a firmer foothold in the latter—above all in the anomic space where ordinary citizens confront the regulatory state. This Article’s examples of challenges to the welfare system, the criminal justice system, and the Internal Revenue Service, among other public bureaucracies, provide some anecdotal support for this speculation.²⁰⁴

These points may also bear on the incidence of uncivil obedience within certain governmental settings. The United States Senate was known throughout the mid-twentieth century as a “gentleman’s club,”²⁰⁵ a “communitarian” institution “in which norms of restraint and reciprocity governed senators’ behavior.”²⁰⁶ By the late 1980s, however, the Senate had become a very different body, characterized by individualism, mutual mistrust, and a deep and widening partisan divide.²⁰⁷ The Senate, in other words, became less close-knit (in the Ellicksonian sense) even though its size stayed the same. This transformation, in turn, facilitated an erosion of unwritten norms of comity and solidarity that had

knit settings and positing that members’ ability to monitor noncooperation and communicate about each other’s reputations matters more than group size per se).

203. See, e.g., Ellickson, *supra* note 202, at 4 (“Neighbors in fact are strongly inclined to cooperate, but they achieve cooperative outcomes not by bargaining from legally established entitlements, . . . but rather by developing and enforcing adaptive norms or neighborliness that trump formal legal entitlements.”); cf. Eric A. Posner, *Law and Social Norms* 12 (2002) (“[T]hat people do not rely on the law to solve day-to-day cooperative problems is clear from both formal research . . . and casual empiricism.”).

204. See *supra* notes 34–35, 67, 74–79 and accompanying text (presenting these examples).

205. See U.S. Senate, Citadel, https://www.senate.gov/reference/reference_item/Citadel.htm (on file with the *Columbia Law Review*) (last visited Mar. 25, 2015) (crediting William S. White’s 1957 book *The Citadel* with “populariz[ing] the idea of the Senate as a ‘gentlemen’s club’”).

206. Sarah Binder, *Through the Looking Glass, Darkly: What Has Become of the Senate?*, *Forum: J. Applied Res. Contemp. Pol.*, Dec. 2011, art. 2, at 1, 1.

207. See *id.* at 1–7 (discussing breakdown of comity in Senate).

previously curbed the use of uncivil obedience with respect to the chamber's procedural rules.²⁰⁸

Second, and relatedly, uncivil obedience is less likely to flourish in settings where cooperation-promoting norms are backed by effective informal sanctions. As discussed in Part II, while acts of uncivil obedience are believed to be lawful, this hardly guarantees they will escape punishment.²⁰⁹ Informal sanctions such as retaliation, ridicule, and ostracism can substitute for formal sanctions as correctives and deterrents to perceived incivilities.²¹⁰ Employees who engage in work to rule, for example, may face any manner of unofficial reprisal from their managers, even in situations where the labor laws appear to protect the employees' conduct.²¹¹ Because close-knit groups typically find it easier to impose sanctions based on reputation or reciprocity,²¹² they are better equipped to enforce as well as to develop extralegal prohibitions on legalistic dissent. More generally, all of the factors thought to enhance the efficacy of social sanctions against deviant behaviors in a given setting—from repeat play to monitoring to in-group homogeneity—may tend to correlate with lower levels of uncivil obedience.

Third, and more generally still, prospects for uncivil obedience will invariably be shaped by the surrounding legal culture and the criteria of legal validity that it recognizes. To take a stylized illustration: In *Society A* where most officials subscribe to a version of formalism conjoined with “exclusive” or “hard” legal positivism, it will be widely agreed that determining the existence and content of law depends exclusively on social facts concerning the source of relevant norms, not on moral principles, and that decisionmaking should be constrained by the specific linguistic formulation of those norms.²¹³ There is nothing inherently odd, in such a

208. See *supra* notes 96–102 and accompanying text (discussing senatorial uncivil obedience).

209. See *supra* notes 53–56 and accompanying text (noting possible formal and informal responses to uncivil obedience).

210. On the varieties of informal sanctions that may be applied, see, for example, Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 *Int'l Rev. L. & Econ.* 369, 370–72 (1999) (cataloging “sanctions that enforce [social] norms”).

211. See, e.g., *Caterpillar, Inc.*, 322 N.L.R.B. 674 (1996) (discussing supervisor's informal and formal retaliation against employees for engaging in protected work-to-rule behaviors).

212. See, e.g., Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 *Mich. L. Rev.* 1880, 1916 (1991) (“Informal sanctions appear to work best within relatively bounded, close-knit communities, whose members ‘don't mind their own business’ and who rely on each other.”).

213. “Inclusive,” “soft,” or “incorporationist” positivism, in contrast, holds that the existence and content of law may depend on moral principles insofar as they are explicitly or implicitly incorporated into a society's rule of recognition. See generally Andrei Marmor, *Exclusive Legal Positivism*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 104 (Jules L. Coleman & Scott Shapiro eds., 2002) (comparing

society, about the notion of a protester complying with a statute in a hyper-technical manner that others find offensive. So long as the statute is properly “pedigreed” and the protester’s actions seem consistent with its terms, even critics will have little choice but to concede the legality of her tactics. If uncivil obedience reveals that a law’s text may be wielded in troubling ways, that is a basis for revising the law, not for casting legal doubt on the troublemaker’s conduct.

By contrast, in Society *B* where most everyone eschews formalism and subscribes to a version of natural law, Dworkinian law-as-integrity, or another strongly “substantive” understanding of law,²¹⁴ the idea that a statute could be used to such subversive effect will be more jarring. Confronted with the taxpayer who pays in pennies or the executive who prosecutes an offense with unprecedented zeal, people would ask themselves whether this behavior is consonant with legislative purposes, established customs, principles of justice and fairness, or the like. And if they came to the conclusion that the answer was “no,” then they might have cause to challenge the behavior’s lawfulness, notwithstanding its technical conformity to the language of a duly enacted statute. Questions about a tactic’s political morality would be inextricably bound up (to various degrees and in various ways, depending on the operative theory of law) with the question of its legality. Even if these two societies share the exact same laws on the books, then, the would-be uncivil obedient who contemplates “exploiting” the letter of the rules in some disruptive fashion can have less confidence in *B* that she would actually be operating within the law.

Of course, there may be little that anyone can do to precipitate a societal shift away from positivism or formalism, or to recalibrate the informal norms and sanctions that obtain in a given setting. Unlike pre-emption doctrine or the choice between rules and standards, the decentralized dynamics sketched here are not necessarily amenable to social engineering. It is at least conceivable, however, that greater awareness of uncivil obedience would influence relevant attitudes or interpretive approaches at the margins. And whatever their prescriptive potential, these dynamics may go a long way toward shaping local experiences of uncivil obedience.

exclusive and inclusive legal positivism); see also Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509, 510 (1988) (defining formalism as decisionmaking constrained by “specific linguistic formulation of a rule”). Our aim in this paragraph and the next is to convey the basic sense in which uncivil obedience may be facilitated by legal formalism and positivism. There are countless jurisprudential nuances that we gloss over in the effort to offer a succinct statement of the issue.

214. See Simon, *supra* note 32, at 79–85 (proposing “substantivism” as umbrella term for all conceptions of law that reject core premises of positivism). Dworkin’s notion of “law as integrity” is developed in Ronald Dworkin, *Law’s Empire* 176–224 (1986).

IV. CONTEXTUALIZING AND CRITIQUING UNCIVIL OBEDIENCE

The practice of civil disobedience raises urgent and obvious questions of justification. Insofar as people in a reasonably well-functioning liberal democracy have a *prima facie* obligation to obey the law,²¹⁵ acts of law-breaking come with a taint of illegitimacy. Theorists of civil disobedience, accordingly, have devoted substantial attention to the issue of when it may be morally justified, proposing conditions such as the existence of extreme injustice, willingness to submit to punishment, and exhaustion of lawful channels of dissent.²¹⁶ Acts of uncivil obedience, in contrast, would appear to require no such special defense given that they are understood to abide by the positive law of the jurisdiction. It is the skeptic of uncivil obedience, on this view, who bears the burden of establishing conditions under which its use is *not* legitimate.

In this Part, we offer reasons to doubt the utility of this view for capturing the two practices' relationship to public values, especially where governmental uncivil obedience is concerned. This brief discussion is meant to be suggestive rather than conclusive. We do not offer any general theory of uncivil obedience, nor do we wade into broader debates in analytic jurisprudence and political philosophy over the nature of legal obligation or the justifiability of resistance to authority. Rather, we highlight several features of uncivil obedience that bear on normative assessment, with special reference to the ways in which they compare to corresponding features of civil disobedience. We also consider the interaction of uncivil obedience with ideology and partisanship. In these ways, we hope to demonstrate further the practical and philosophical significance of uncivil obedience and to lay groundwork for future research.

Examples of uncivil obedience such as the ones collected in this Article—and we are surely missing many—can both motivate and inform this research. Morally compelling acts of civil disobedience by American civil-rights protesters in the 1960s inspired searching inquiry into the place of law-breaking in a free society. Perhaps certain contemporary or future cases of uncivil obedience might spark a parallel conversation on the problematics of law-following as a mode of dissent.

A. *Public Law Values*

In assessing a phenomenon as rich and multifarious as uncivil obedience or civil disobedience, “[p]recise principles that straightaway decide

215. This proposition is vigorously disputed by numerous philosophers. See Frederick Schauer, *Official Obedience and the Politics of Defining “Law,”* 86 S. Cal. L. Rev. 1165, 1167 n.10 (2013) (collecting sources).

216. See Markovits, *supra* note 9, at 1898–901 (reviewing prominent efforts to “determine[] the metes and bounds of justified liberal disobedience”).

actual cases are clearly out of the question.”²¹⁷ As with dissent in general,²¹⁸ uncivil obedience has the capacity to advance social welfare and social justice in a wide range of contexts. This is most likely to occur when the tactics employed are minimally disruptive or coercive, especially as to third parties; when the critical message is broadly appealing or neglected in public debate; and when the targeted law or policy is itself welfare- or justice-reducing. The optimal amount of uncivil obedience in any society, it bears emphasis, is greater than zero. Yet if the potential public benefits of uncivil obedience seem fairly straightforward—because continuous in kind with the benefits associated with other forms of dissent, including civil disobedience—the potential costs of uncivil obedience are somewhat subtler.

As an initial matter, those who ascribe normative significance to the effectuation of legislative purposes or to local customs of law-following have pro tanto reason to disapprove of uncivil obedience. Uncivil obedience manages to provoke from within the law’s four corners by defying expectations and traditions as to how a directive will or should be acted on. It is not hard to see, for example, how a Burkean who believes those expectations and traditions are a repository of collective wisdom²¹⁹ might be concerned by recent transformations in the way Senate minorities wield their procedural privileges.²²⁰ Or consider the civil-law doctrine of abuse of right, which seeks, in one common formulation, to strip legal protection from otherwise lawful conduct because it flouts the perceived purpose or spirit of a law.²²¹ This is precisely what makes the conduct “abusive.”

The point here is simple but important: The very manner in which uncivil obedience “works” is by going against certain behavioral regularities or social understandings in which some commentators see considerable intrinsic or instrumental merit. Just as those who believe there is a prima facie moral obligation to obey the law have presumptive reason to disapprove of civil disobedience, those who have a principled commit-

217. Rawls, *supra* note 6, at 364.

218. See generally Cass R. Sunstein, *Why Societies Need Dissent* (2003) (arguing dissent performs variety of valuable social functions).

219. See, e.g., Russell Kirk, *The Conservative Mind: From Burke to Elliot* 38 (7th rev. ed. 2001) (reading Burke to teach “even the most intelligent of men cannot hope to understand all the secrets of traditional morals and social arrangements; but we may be sure that Providence, acting through the medium of human trial and error, has developed every hoary habit for some important purpose”).

220. See *supra* notes 96–102 and accompanying text (describing these transformations). Those who believe that unwritten “constitutional conventions” tend to promote stability, efficiency, or fairness in a political system might be similarly concerned about such intragovernmental uncivil obedience. See Pozen, *Self-Help*, *supra* note 101, at 27–48 (explaining constitutional conventions and their application to U.S. context).

221. See *supra* Part III.B.1 (exploring relationship between abuse of right and uncivil obedience).

ment to purposivism or Burkeanism in the implementation of law have presumptive reason to disapprove of uncivil obedience.²²²

Others may be more concerned about uncivil obedience's implications for various public law values.²²³ Although it conforms to the letter of applicable directives, and in that narrow sense upholds the rule of law, the practice of uncivil obedience can threaten related ideals such as social comity, accountability, and regularity. Meanwhile, uncivil obedience's law-breaking counterpart, civil disobedience, may better serve some of these same ideals. We do not mean to condemn uncivil obedience (or to celebrate civil disobedience) by calling attention to these points. We do mean to build on the civil disobedience literature in further complicating the intuitive association of law-abidingness with the substantive goals of law.

Perhaps most obviously, acts of uncivil obedience may undermine honesty and transparency. Because civil disobedience involves overt law-breaking, disclosures about the actor's true, reformist intentions will tend to *mitigate* her legal and reputational exposure, by casting her transgressive conduct in a more sympathetic light. In contrast, because uncivil obedience involves ostentatious law-following, such disclosures may not mollify but instead inflame critics—and invite hostile revisions or reinterpretations of the enabling rules²²⁴—by clarifying or confirming a subversive agenda. The typical civil disobedient has greater incentive to be forthcoming about the nature of her protest; candor holds strategic as well as ethical appeal for her. The overall practice of civil disobedience is consequently more intelligible to the world at large, its rhetoric rawer and more earnest. Whereas one never hears of a law-breaker who is widely seen as an activist or dissident yet insists she is an ordinary criminal, one finds quite a few law-followers who are widely seen as agents of change yet insist they are no such thing.²²⁵

The direct version of uncivil obedience is closer to civil disobedience in this regard.²²⁶ The National Motorists Association members who protested the freeway speed limit by driving at the speed limit; the undoc-

222. We say "presumptive" because in any given case a wide range of factors, including the justness of the uncivil obedient's cause, may overcome any such qualms about her tactics.

223. By "public law values," we mean to invoke values such as "openness, fairness, participation, impartiality, accountability, honesty and rationality" that are widely understood to reinforce the rule of law and to reflect core goals of constitutional and administrative regulation. Michael Taggart, *The Province of Administrative Law Determined?*, in *The Province of Administrative Law* 1, 3 (Michael Taggart ed., 1997).

224. See *supra* Parts III.A–B (examining possible legal responses to uncivil obedience).

225. Cf. *supra* notes 42–44 and accompanying text (discussing relationship between communicativeness and candor in practice of uncivil obedience).

226. See *supra* Part II.B.3 (explaining direct–indirect distinction).

umented aliens who protested the prohibition on their working by not working; the young Teddy Roosevelt who protested the Sunday-saloon-closure law by closing all saloons open on Sundays—in each of these examples, the uncivil obedients did not fear reconsideration of the laws they were exploiting, for this was exactly the type of legal change they were seeking. Direct uncivil obedience has “all the simplicity” of attacking the very law to which it adheres.²²⁷ The protest performs its own critique.

The more prevalent, indirect version of uncivil obedience is not “simple” in this way; it has no such built-in guarantor of intelligibility. Employees who work to rule will not necessarily acknowledge the sense in which they are defying their employers’ wishes. State legislators who regulate abortion clinics or procedures will not necessarily acknowledge their desire to limit access to abortion. A measure of opacity may better serve the reformist project. By attending so conspicuously to the letter of the law, uncivil obedience can obscure its own novelty and normativity—a sleight of hand that civil disobedience can never perform. For those who prize honesty and transparency in the utilization of law, then, the indirect variant of uncivil obedience ought to elicit particular worries.

These worries, in turn, contribute to a broader set of concerns about values such as accountability, deliberation, civic virtue, and the constraining function of law, insofar as those values depend upon honesty or transparency for their realization.²²⁸ A loose analogy might be drawn to what David Dyzenhaus calls grey holes, or situations where “there are some legal constraints . . . but the constraints are so insubstantial that they pretty well permit [an actor] to do as it pleases.”²²⁹ A black hole, in contrast, does not even pretend to constrain. It is “a lawless void.”²³⁰ Like a grey hole, uncivil obedience may allow those who use it to have their “cake and eat it too”—to give the appearance of constraint while in fact exercising extraordinary discretion, using the “cloak” of formal legality to neutralize critique.²³¹

Dyzenhaus argues that grey holes may be more corrosive than black holes to the rule of law, understood in substantive or “thick” terms, because while black holes provoke consternation when perceived, grey holes breed quiescence.²³² The dearth of critical commentary on uncivil

227. Baker, *supra* note 83, at 30.

228. See, e.g., Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 Fla. St. U. L. Rev. 601, 650 (2013) (“Overt resistance is likely to be better than covert resistance at promoting dialogue and debate . . .”).

229. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* 42 (2006). Dyzenhaus expressly ties his idea of grey holes to executive officials, but the central insights can be generalized to other actors.

230. *Id.*

231. *Id.* at 42, 50.

232. See, e.g., David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or*

obedience, as compared to the regular hand-wringing over civil disobedience, mirrors this asymmetry. Civil disobedience presents as lawless and therefore invites rather than evades correction.

Civil disobedience also demands personal sacrifice. The civil disobedient commits an open breach of law and thereby courts punishment by the state; on many accounts, she goes further and willingly submits to that punishment.²³³ The sincerity and strength of conviction needed to motivate such behavior will generally be substantial. Uncivil obedience involves a relatively minimal risk of formal sanction. This risk cannot be eliminated, as explained above,²³⁴ and in certain settings informal sanctions may provide a meaningful substitute.²³⁵ But the uncivil obedient will not expect prosecution, imprisonment, or the like, and she may well anticipate no negative repercussions whatever. The comparative cheapness of uncivil obedience lowers the likelihood that it will be undertaken only after conventional means of persuasion have been exhausted. Along with uncivil obedience's capacity to conceal aspects of its agenda, this feature exerts downward pressure on the conscientiousness criterion, if not on civic virtue more broadly.²³⁶

Civil disobedience, as explained in Part I, paradoxically expresses fidelity to the legal system as a whole even as it violates a certain legal norm. Uncivil obedience paradoxically expresses insolence toward law even as it conforms to all formal requirements. The practice of uncivil obedience not only frustrates some of law's substantive goals but also denies its claim to moral authority, mocks its aspiration to guide behavior in a principled fashion. If one common anxiety about civil disobedience is that overt law-breaking may breed disrespect for the law as such,²³⁷ uncivil obedience pushes us to ask about the externalities of extreme law-following. By showcasing the manipulation of legal rules for unintended

Outside the Legal Order?, 27 *Cardozo L. Rev.* 2005, 2026 (2006) (arguing "grey holes are more harmful to the rule of law than [are] black holes" because only former mask their "lack of substance").

233. See *supra* notes 28–30 and accompanying text (discussing these accounts of civil disobedience).

234. See *supra* notes 53–54 and accompanying text (noting possibility of finding of illegality, notwithstanding uncivil obedient's genuine, well-founded belief in legality of her conduct).

235. See generally *supra* Part III.C (discussing informal regulation of uncivil obedience).

236. Cf. Brownlee, *Communicative Aspects*, *supra* note 11, at 181 ("[T]he legal protester will not be called upon by the law to defend her decision to protest. This means that whatever conscientious intentions underpin her protest need not meet the same standards as those that distinguish serious civil disobedients from ordinary offenders.").

237. See, e.g., Brownlee, *Civil Disobedience*, *supra* note 6 (noting one harm "usually identified with civil disobedience" is that it "can encourage more than just other civil disobedience; it can encourage a general disrespect for the law").

ends, uncivil obedience may breed disrespect for the project of self-governance through law.

Governmental uncivil obedience exacerbates the foregoing concerns.²³⁸ It affects the regulatory process, and through it regulated subjects, in a more immediate manner given its location within that process. Whereas private uncivil obediently typically must persuade a higher authority that the reforms they seek are worthwhile, their governmental counterparts may be able to effect legal change directly, without assuming a similar burden of persuasion. And while private citizenship may demand some amount of extralegal civic responsibility, government office-holding, on almost any conception, demands a greater amount. The viability of democratic politics arguably depends on officials' comporting themselves with a certain civility—a respect for principles of tradition, moderation, and cooperation that both fosters good governance and sets a salutary example for the community at large. Inasmuch as uncivil obedience jeopardizes the efficacy or integrity of, say, the U.S. Senate, the health of the American polity, not just a particular institution, is at stake.

Governmental uncivil obedience also affects deliberation and accountability in a distinctly troubling manner. To the extent that federal or state legislators have used the cloak of legal obedience to mask the full measure of their challenge to established authorities, they have not only engaged in a kind of parliamentary sabotage but also deprived citizens of a valuable input into public debate and the electoral mechanism. They have eroded the representative process.

These points should not be overstated: As with all types of uncivil obedience, governmental uncivil obedience cannot be ruled out as a matter of principle and may be morally as well as legally justified under certain conditions. A great deal depends on context. It is important to be clear about the stakes, however. When public officials resort to legalistic dissent, the fear is not just abuse of right but abuse of power.

B. *Power*

Moral evaluations of civil disobedience often ask whether those involved could have achieved their aims through normal, lawful channels. Rawls, for instance, argues that civil disobedience should be used only as a “last resort,” when a “minority” group has already “appeal[ed] to the political majority” and found it to be immovable.²³⁹ As this language suggests, civil disobedience is commonly associated with actors who lack social and governmental power, those who are liable to lose in the political process notwithstanding the intensity of their convictions.

238. See *supra* Parts II.B.2, II.B.4 (describing uncivil obedience by government officials and institutions).

239. Rawls, *supra* note 6, at 373.

Our paradigm cases of civil disobedience involve minoritarian bids for the recognition of rights to equal treatment or basic liberties.²⁴⁰

Any comprehensive normative assessment of uncivil obedience must grapple with its utilization by the powerless and powerful alike. Of particular note, we have suggested, is the fact that government agents and entities—society’s most democratically empowered actors—frequently engage in this form of legalistic dissent. The contrast with civil disobedience is stark. Whereas government service neither selects for nor rewards a taste for reform-minded law-breaking, uncivil obedience allows officeholders to press dissenting positions from within the stance of legality that the public expects of them.²⁴¹ They may do this as individuals (as in the case of Senate holds²⁴²) or as collectives (as in the case of state legislatures challenging abortion rights and the Affordable Care Act²⁴³). They may do it within a single branch of government, between branches or levels of government, or across national boundaries.²⁴⁴

Attending to uncivil obedience therefore complicates the popular association of dissidence with private parties who lack public power.²⁴⁵ At the same time, other important examples of uncivil obedience conform closely to that model. We find criminal defendants and welfare recipients exercising their formal entitlements in unexpectedly maximalist ways, just as we find senators engaging in these behaviors. There are good reasons why uncivil obedience might appeal to the most vulnerable members of a community. For those who cannot afford to lose a job or spend time in jail, the potential downsides of overt resistance, and especially overt law-breaking, may seem too severe. Because it operates through

240. See Markovits, *supra* note 9, at 1899–901 (highlighting this feature of traditional civil disobedience and citing American civil rights movement as “most prominent” example); Brownlee, *Civil Disobedience*, *supra* note 6 (“The historical paradigms of Gandhi, King, the suffragettes, and Mandela are representative of that kind of civil disobedience which aims to guarantee legal protection for the basic rights of a specific constituency.”).

241. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *Colum. L. Rev.* 1097, 1140 (2013) (noting “pervasive existence of public ‘law talk’” in United States, in which government officials “almost always endeavor[] to argue that [their] actions are lawful”).

242. See *supra* note 99 and accompanying text (noting role of “holds” in recent senatorial uncivil obedience).

243. See *supra* Part II.B.4 (considering these examples).

244. Cf. *supra* notes 154–155 and accompanying text (describing related concept of abuse of right in international law).

245. Recent legal scholarship has complicated this association in other respects. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745 (2005) (arguing disaggregated institutions enable minorities to constitute local majorities and thereby dissent through governance decisions); Shinar, *supra* note 228 (exploring resistance by government officials to laws and policies they are responsible for implementing).

and within the law, uncivil obedience will in many cases offer a less risky form of protest.²⁴⁶

To push the point further, uncivil obedience might be understood as a peculiarly legalistic variant of what anthropologist James Scott calls “critiques within the hegemony.”²⁴⁷ Across cultures, Scott demonstrates, exaggerated compliance with authoritative norms has long been a critical source of resistance for subordinate groups.²⁴⁸ Because it adopts the ideological terms of the dominant group, such resistance is difficult to punish and to deflect: “Having formulated the very terms of the argument and propagated them, the ruling stratum can hardly decline to defend itself on this terrain of its own choosing.”²⁴⁹

A version of this tension characterizes uncivil obedience. In a society like the contemporary United States, committed in principle and in rhetoric to a norm of legality, meticulous adherence to the letter of the law presents an especially awkward problem, as it feigns obsequiousness to one of the ruling stratum’s most cherished ideals. Some of the least powerful members of society may embrace this mode of protest precisely because it disrupts the status quo without disclosing the full measure of its subversiveness.

If civil disobedience and uncivil obedience are each tools of resistance for marginalized groups, however, they may serve largely distinct roles. Civil disobedience has proven a compelling strategy in campaigns for the recognition of what international lawyers call first-generation rights, basic “civil and political rights that typically take the form of negative protections against government action.”²⁵⁰ While there is nothing that precludes uncivil obedience from being enlisted for these ends, both its dependence on formal law and the examples we have collected suggest that uncivil obedience more readily lends itself to “second-generation”²⁵¹ struggles for social and economic gains: A layer of liberal

246. See *supra* notes 233–236 and accompanying text (discussing limited liability that attends uncivil obedience).

247. James C. Scott, *Domination and the Arts of Resistance* 105 (1990) [hereinafter Scott, *Arts of Resistance*].

248. *Id.* at 103–07; see also, e.g., James C. Scott, *Weapons of the Weak* 26 (1985) (suggesting in some cases “symbolic compliance” with despised norm may be maximized in order to minimize “actual” compliance).

249. Scott, *Arts of Resistance*, *supra* note 247, at 105; cf. Saul D. Alinsky, *Rules for Radicals: A Practical Primer for Realistic Radicals* 128 (1971) (“The fourth rule [of power tactics] is: *Make the enemy live up to their own book of rules.* You can kill them with this, for they can no more obey their own rules than the Christian church can live up to Christianity.”).

250. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 *Calif. L. Rev.* 1163, 1191 (2011).

251. We bracket here many complexities regarding the precise boundaries of, and relationships between, the “first-generation” and “second-generation” concepts. See, e.g., Philip Alston & Ryan Goodman, *International Human Rights* 285 (2012) (observing these

guarantees having been conferred and administrative regulations laid down, subordinate groups may then turn to provocative modes of compliance or utilization to leverage such laws for more encompassing reforms. The Cloward–Piven plan and countless work-to-rule campaigns, for instance, have sought to leverage existing welfare-benefit and employee-protection laws to advance such groups’ actual material circumstances.²⁵²

Insofar as uncivil obedience differs from the classic paradigm of civil disobedience in this respect, it might find more common ground with the phenomenon that Daniel Markovits calls “democratic disobedience.”²⁵³ Instead of seeking to protect liberal rights against the majoritarian excesses of democracy, democratic disobedience seeks to improve democracy itself—understood in republican terms to demand robust political engagement and “a widespread sense of authorship of collective decisions”²⁵⁴—by overcoming the inertial forces “that prevent a democratic sovereign from taking up an issue.”²⁵⁵

Under the right conditions, ambitious projects of uncivil obedience could similarly trigger processes of “sovereign reengagement”²⁵⁶ with the issues that motivate them. The Cloward–Piven plan, for example, might be understood in these terms given its explicit—and at least partially realized—aim not to fend off an overreaching state but rather to stimulate new lines of policy debate, new political coalitions, and a new popular consciousness around welfare poverty.²⁵⁷ Much more work would need to be done to confidently characterize, let alone justify, any particular act of uncivil obedience as democracy-enhancing in a republican (or any other) sense. The point here is simply that the same basic moves made by Markovits to reconceptualize certain forms of broadly framed, politically destabilizing disobedience as an ally rather than a threat to democracy could be deployed, *mutatis mutandis*, in defense of comparably ambitious forms of uncivil obedience.

“two sets of rights can neither logically nor practically be separated in watertight compartments”).

252. See *supra* notes 32–35 and accompanying text (setting out these examples).

253. Markovits, *supra* note 9. Markovits’s essay, which was inspired by the antiglobalization protests of the mid-2000s, presciently anticipated the Occupy Wall Street movement. See, e.g., *id.* at 1950–52 (speculating about “growing prominence” of disobedience concerned more with democratic legitimacy and accountability than with liberal rights).

254. *Id.* at 1913.

255. *Id.* at 1940. More specifically, democratic disobedience, “when it is justified, pursues processes rather than outcomes, employs coercion only in destabilizing ways, and serves momentary coalitions rather than entrenched constituencies.” *Id.* at 1944.

256. *Id.* at 1927, 1934–36, 1940–41, 1949.

257. See generally Piven & Cloward, *Weight of the Poor*, *supra* note 34 (suggesting each of these objectives).

C. *Parties*

If uncivil obedience complicates the association of dissent with extra-legal channels and with private actors who lack public power, so too may the phenomenon complicate its association with the political left.²⁵⁸ Incorporating uncivil obedience into a richer typology of dissent would likely reveal that acts of protest are more evenly distributed across the political and ideological spectrum.

Recent work in social psychology indicates that political conservatives value deference to established authority, as such, more than political liberals do.²⁵⁹ Whereas psychological foundations of fairness and care are paramount for self-identified liberals, Jonathan Haidt argues, “intuitions about authority and the importance of respect and obedience” critically inform the moral systems of self-identified conservatives.²⁶⁰ Because dissent, generally, marks a challenge to authority, it is therefore unsurprising that dissent has been more strongly associated with liberals than with conservatives. And because civil disobedience is a particularly acute form of dissent, it is especially unsurprising that civil disobedience has this reputation.²⁶¹ Civil disobedience pairs a dissenting message with

258. See, e.g., Soc’y for Personality & Soc. Psychol., *Are Conservatives More Obedient and Agreeable than Their Liberal Counterparts?*, ScienceDaily (June 27, 2014), <http://www.sciencedaily.com/releases/2014/06/140627113048.htm> (on file with the *Columbia Law Review*) (“Historically, conservatives are viewed as being more obedient and more respectful of leadership. Whereas, liberals tend to be associated with protests and blatant acts of rebellion.”).

259. See, e.g., Bob Altemeyer, *The Authoritarian Specter* 6–49 (1996) (reviewing evidence that “right-wing authoritarians,” who tend to be conservative, exhibit high degree of submission to established authorities); George Lakoff, *Moral Politics: How Liberals and Conservatives Think* 65–140 (2d ed. 2002) (arguing conservatives have “strict father” morality while liberals have “nurturant parent” morality); Shalom H. Schwartz et al., *Basic Personal Values, Core Political Values, and Voting: A Longitudinal Analysis*, 31 *Pol. Psychol.* 421, 444–46 (2010) (finding people who endorse values of conformity and tradition tend to be conservative).

260. Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 *Science* 998, 1001 (2007). According to Haidt:

The current triggers of the Authority/subversion foundation . . . include anything that is construed as an act of obedience, disobedience, respect, disrespect, submission, or rebellion, with regard to authorities perceived to be legitimate [I]t is much easier for the political right to build on this foundation than it is for the left, which often defines itself in part by its opposition to hierarchy, inequality, and power.

Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* 168 (2013) [hereinafter Haidt, *Righteous Mind*].

261. See, e.g., Katherine Beckett & Theodore Sasson, *The Politics of Injustice* 48 (2d ed. 2004) (“Conservatives [in the 1960s] identified the civil rights movement—and, in particular, the philosophy of civil disobedience—as a leading cause of crime.”); Wil Mara, *Civil Unrest in the 1960s: Riots and Their Aftermath* 47 (2010) (“[Conservatives] have little patience for those who practice civil disobedience. In their minds breaking the law is breaking the law”); Russell Hittinger, *Resisting the Sovereign*, 3 *Tex. Rev. L. & Pol.*

conduct—law-breaking—that is itself a provocative mode of dissent. Form and content alike challenge the extant legal order, making civil disobedience at best an uncomfortable practice for those who base their moral systems on foundations of respect for and obedience to authority.

Uncivil obedience disconnects form from content. It cloaks dissent in behavior that is, at least superficially, respectful of established authority. As we have explained, the uncivil obedient emphasizes the formal legality of her action. Like the civil disobedient, she is out to change the system, but she does so by mastering the system's rules. She does so from the inside.²⁶² That alone may render uncivil obedience a more comfortable practice for conservatives in light of the social-psychological evidence noted above—perhaps all the more so if combined with a growing body of research finding that in the moral domain “people care a great deal more about appearance and reputation than about reality.”²⁶³

The foregoing discussion suggests the following hypothesis: We may expect to witness a systematic skew in the distribution of conservative dissent in the direction of uncivil obedience and away from civil disobedience.²⁶⁴ And indeed, as Part II indicates, uncivil obedience has emerged in recent years at both the state and national levels as a leading strategy of Republican²⁶⁵ opposition to a Democratic Administration and, more

149, 156 (1998) (book review) (“[T]here is almost nothing favorable to be said about civil disobedience from conservative quarters . . .”); see also Abigail A. Fuller, *Conflict Resolution and Conservative Ideology: The Use of Civil Disobedience by Operation Rescue* (Dec. 1990) (unpublished manuscript), available at http://www.colorado.edu/conflict/full_text_search/ALLCRCDocs/90-1.htm (on file with the *Columbia Law Review*) (stating civil disobedience “has rarely been used by conservative social movements”). But see Lynn Robert Buzzard & Paula Campbell, *Holy Disobedience: When Christians Must Resist the State 1–20* (1984) (offering examples of civil disobedience undertaken by conservatives).

262. Cf. Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *The Historic Turn in the Human Sciences* 339, 352 (Terrence J. McDonald ed., 1996) (observing reform tactics that exploit legal system's need for formality and generality and “employ the norms and procedures of the system against itself” may be seen as accepting, at deeper level, “ideological legitimacy of the system as a whole”).

263. Haidt, *Righteous Mind*, *supra* note 260, at 86; see also, e.g., Peter DeScioli & Robert Kurzban, *Mysteries of Morality*, 112 *Cognition* 281 (2009) (discussing significance of third-party moral condemnation); Dan Sperber & Nicolas Baumard, *Moral Reputation: An Evolutionary and Cognitive Perspective*, 27 *Mind & Language* 495 (2012) (discussing evolutionary and cognitive bases of humans' desire to secure good moral reputation).

264. This hypothesis may break down at the extreme right end of the ideological spectrum, where individuals are deeply alienated from the prevailing legal order and less likely to accept law's claim to legitimate authority.

265. While much of the social-psychological literature on morality addresses liberals and conservatives rather than Democrats and Republicans, the contemporary correlations of liberal–Democrat and conservative–Republican are sufficiently strong to apply the literature's insights to party politics. See, e.g., Alan I. Abramowitz, *The Disappearing Center* 139 (2010) (“The overwhelming majority of House and Senate Democrats are

broadly, to condemned laws and policies emanating from federal sources. Challenges to the legal availability of abortion, federal immigration policy, Obamacare, and Obama's presidency itself have all assumed this hyper-legalistic form.²⁶⁶

To be clear, this hypothesis does not imply that uncivil obedience is an exclusively or predominantly Republican tactic. Our examples show that Democrats and Republicans, liberals and conservatives, engage in the practice. If uncivil obedience regarding Obamacare, abortion, and (perceived) immigration-law underenforcement bears a conservative/Republican stamp, uncivil obedience regarding welfare policy, criminal justice, and (perceived) immigration-law overenforcement has aligned with a liberal/Democratic agenda.²⁶⁷ The point is not that uncivil obedience is a distinctively Republican practice, but rather that the Republican practice of dissent may in this era distinctively assume the form of uncivil obedience.

CONCLUSION

The subject of civil disobedience has inspired a remarkably rich body of work by legal and political theorists. The actual practice of civil disobedience, according to some of these same theorists, has become increasingly irrelevant.²⁶⁸ As guarantees of fundamental freedoms and equal treatment have been extended to more and more members of the world's democracies, classic forms of civil disobedience that seek to vindicate basic rights have lost some of their urgency.²⁶⁹ The whole liberal

liberals, and the overwhelming majority of House and Senate Republicans are conservatives."); Robert S. Erikson et al., *Public Opinion in the States: A Quarter Century of Change and Stability*, in *Public Opinion in State Politics* 229, 238 (Jeffrey E. Cohen ed., 2006) ("It is approaching common knowledge that the United States is becoming increasingly polarized in terms of the party-ideology connection.").

266. See *supra* Part II.B.4, notes 96–102 and accompanying text (exploring these developments).

267. Other examples of uncivil obedience that we have discussed, such as the speed-limit protest, are not readily identifiable in partisan or ideological terms.

268. See, e.g., Barbara B. LaBossiere, *When the Law Is Not One's Own: A Case for Violent Civil Disobedience*, 19 *Pub. Aff. Q.* 317, 317 (2005) (discussing "historical elements that have led to civil disobedience's undoing in the United States"); Herbert J. Storing, *The Case Against Civil Disobedience*, in *Civil Disobedience in Focus*, *supra* note 10, at 85, 85 ("The most striking characteristic of civil disobedience is its irrelevance to the problems of today."). See generally Brownlee, *Civil Disobedience*, *supra* note 6 ("Some theorists maintain that civil disobedience is an outdated, overanalysed notion that little reflects current forms of political activism . . .").

269. Cf. Markovits, *supra* note 9, at 1901 ("The civil rights movement—and the rights revolution more generally—represented the heyday of liberal disobedience.").

model of carefully circumscribed law-breaking may seem an awkward fit for many of the most pressing moral concerns of today.²⁷⁰

Whatever the fate of civil disobedience, this Article has suggested that its legalistic doppelganger is alive and well—and an increasingly prominent element in American politics. Moreover, uncivil obedience may be thriving in part because of the very developments that have marginalized civil disobedience. Even as the proliferation of rights language in statutes, constitutions, and judicial decisions has limited opportunities for conscientious law-breaking in the service of basic liberties, it has simultaneously expanded opportunities for disruptive modes of adherence and implementation. The denser and more detailed the law on the books, the more rules there will be for protesters to exploit in technically valid yet subversive ways. This Article is a first pass at investigating the phenomenon. Scholars, activists, and regulators alike will need to continue the study of uncivil obedience if they wish to reckon with the full possibilities and problems of dissent in the years to come.

270. See *id.* at 1933–52 (developing this argument and citing protests against Vietnam War, nuclear weapons, and globalization as examples of issues not amenable to liberal disobedience); see also Brownlee, *Civil Disobedience*, *supra* note 6 (citing environment, animal rights, nuclear disarmament, globalization, and foreign policy as issues at fore of contemporary activist agenda that do not focus on individuals' basic rights).