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Daniel R. Correa

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# CIVIL DISSENT BY OBEDIENCE AND DISOBEDIENCE: EXPLOITING THE GAP BETWEEN OFFICIAL RULES AND SOCIETAL NORMS AND EXPECTATIONS

DANIEL R. CORREA\*

## ABSTRACT

*Civil dissent comes in many forms, from peaceful protest to open violation of official rules. But strict obedience to official rules may also serve as a dissenting act. Professors Jessica Bulman-Pozen and David E. Pozen examine obedience as dissent in their article, *Uncivil Obedience*. The term “uncivil obedience” is meant to capture what Bulman-Pozen and Pozen consider the paradox expressed by “insolence toward law” through conformity to law. This inversely mirrors the paradox expressed by a civil disobedient’s fidelity to law through violation of law.*

*Conceptually, ‘uncivil obedience’ is best understood as a form of civil disobedience. An uncivil obedient’s departure from societal expectations or norms serves the same purpose as a civil disobedient’s departure from an official rule: both expose the gap between law and societal expectations or norms and draw attention to what is just, right, or good to close the gap. Analyzing what Bulman-Pozen and Pozen term “uncivil obedience” as an act of civil disobedience also avoids theoretical problems when confronted with general jurisprudence questions pertaining to the concept of law, and avoids practical problems, namely, sleight-of-hand political maneuvering.*

## INTRODUCTION

“Injustice anywhere is a threat to justice everywhere,” wrote Martin Luther King, Jr. in his “Letter from Birmingham Jail.”<sup>1</sup> A just law for King, as well as in the tradition of Saint Thomas Aquinas, is one that

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\* Daniel is an associate attorney at Cowles & Thompson, P.C. in Dallas, Texas. The following people made this article possible and complete: Callie Brewer, Bryan S. Ryan, Ethan Brandt, Alyssa Kutner, and the Washington University Jurisprudence Review editors.

1. Martin Luther King, Jr., *Letter from Birmingham Jail*, in JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 46 (Robert L. Hayman Jr. et al. eds., 2d ed. 2002).

“squares with the moral law or the law of God.”<sup>2</sup> King considered laws that uplift human personality just and laws that degrade human personality unjust.<sup>3</sup> He openly disobeyed segregation ordinances to protest what he considered unjust laws, as he felt that “[a]ll segregation statutes are unjust because segregation distorts the soul and damages the personality.”<sup>4</sup>

King’s “Letter from Birmingham Jail” is celebrated as a justification for both civil disobedience and a duty to obey law. King writes within the natural law tradition. The natural law tradition views laws as hierarchically ordered, with human-made law (positive law) at the bottom and moral law or God’s law (natural law) at the top. This tradition confronts the following question: what is one to do when positive law directly contradicts natural law? For King the answer is to obey natural law or right reason, which often equates to “obey your conscience.”

In “Uncivil Obedience,”<sup>5</sup> Jessica Bulman-Pozen and David E. Pozen reexamine the tension that can arise between positive law and natural law that King and others sought to reconcile. The term “uncivil obedience” is meant to capture what Bulman-Pozen and Pozen consider the paradox expressed by “insolence toward law” through conformity to law. This inversely mirrors the paradox expressed by a civil disobedient’s fidelity to law through the violation of law.

Though Bulman-Pozen and Pozen claim that the ‘uncivil obedience’ label is not intended to “do any critical work,”<sup>6</sup> one cannot disassociate the label from a key characteristic attributed to uncivil obedience: legal provocation. To qualify as uncivil obedience, an act must “call[] attention to its own formal legality, while departing from prevailing customs or expectations as to how the law will be followed or applied.”<sup>7</sup> For Bulman-Pozen and Pozen, this aspect of provocation “underwrites its ‘incivility.’”<sup>8</sup> By its own terms, then, obedience does little work. Disobedience drives the entire dissenting act. Conceptually, ‘uncivil obedience’ is best understood as a form of civil disobedience.

This Article proceeds in three parts. The first lays out Bulman-Pozen and Pozen’s argument regarding ‘uncivil obedience’ as a social

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2. *Id.* at 49; ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I-II, question 96, art. 4 (R. J. Henle ed., 1993).

3. King, *supra* note 1, at 49.

4. *Id.*

5. Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015).

6. *Id.* at 826 n.60.

7. *Id.* at 820.

8. *Id.* at 826.

phenomenon. The second argues that disobedience drives the entire analysis and, consequently, that uncivil obedience is best understood as a form of civil disobedience. The third briefly addresses problems with both the definition and scope of uncivil obedience. Specifically, the term ‘uncivil obedience’ unravels when plugged into positivist and non-positivist philosophical frameworks. Further, the term creates a real risk of sleight-of-hand political maneuvering.

### I. UNCIVIL OBEDIENCE

Bulman-Pozen and Pozen identify uncivil obedience as an often overlooked, under-the-radar form of civil dissent.<sup>9</sup> Whereas a civil disobedient openly defies a law to highlight the illegitimacy of the very law disobeyed or to highlight another law or laws’ illegitimacy, the uncivil obedient “seek[s] to disrupt an existing legal regime by *adhering*—in a hyperbolic, literalistic, or otherwise unanticipated manner—to its formal rules.”<sup>10</sup> By its open defiance, civil disobedience is more transparent than uncivil obedience.<sup>11</sup>

In an effort to lend transparency to dissent by obedience to law, Bulman-Pozen and Pozen define uncivil obedience as a deliberate act that conveys criticism of a law through obedience to all applicable positive law, intending to change or disrupt that law or policy by calling attention to the act’s formal adherence to law while departing from the manner in which society customarily follows the law or expects the law to be applied (such as by departing from the purposes that underlie the target law).<sup>12</sup> This definition mirrors necessary and sufficient conditions for an act to qualify as civil disobedience, but inverts the manner of dissent (conformity to law rather than deviation from it) and what makes the act provocative (strict adherence to law rather than disregard of it).<sup>13</sup>

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9. *Id.* at 810–11.

10. *Id.* at 810. The quoted statement is too broad. Obedience to law as a form of dissent works primarily, even in the examples provided by Bulman-Pozen and Pozen, to undo a particular law, that is, to highlight the illegitimacy of a particular law. The National Motorist Association deployed its members to strictly adhere to the fifty-five mile-per-hour speed limit to challenge the law by showing it did not conform to society’s driving practices. *See id.* No legal regime was disrupted any more than a legal regime would be disrupted by mass disobedience, such as a majority of people not adhering to posted speed limits. The National Motorists Association did not employ this strategy in an effort to disrupt any legal regime; obedience to law would provide a poor route to this end.

11. *Id.* at 862–63.

12. *Id.* at 820.

13. *Id.* at 820–21.

According to their definition, uncivil obedience spans dissent by private individuals, private and public organizations, government officials, and branches of government other than the judiciary.<sup>14</sup> Private individuals might organize a protest in an effort to increase the speed limit from fifty-five miles-per-hour to sixty-five miles-per-hour by using the law against itself as their means of protest. The individuals would protest by strictly driving the speed limit, which goes against “common practice and widely shared sense of desirable practice”—i.e. driving above the speed limit.<sup>15</sup> In another example, to reform the criminal justice system people might organize to leverage their right to a trial by jury through strictly rejecting any plea offers, thereby overwhelming the legal system.<sup>16</sup> Additionally, state lawmakers might strictly adhere to federal health and safety standards as a means to challenge abortion rights, for example, by requiring “all medication-induced abortions adhere strictly to a regimen approved (but not required) by the Food and Drug Administration.”<sup>17</sup> Also, federal lawmakers might employ the filibuster procedure on a routine basis, rather than in its traditional use as “the tool of last resort,” as a means to thwart legislation.<sup>18</sup> The executive branch also may participate in acts of uncivil obedience. The President, for example, might strictly enforce a law in an effort to generate a repeal process.<sup>19</sup>

Bulman-Pozen and Pozen offer their definition of uncivil obedience in an effort to generate theoretical and empirical research on the matter. Uncivil obedience, they claim, should be subject to the same normative assessment as civil disobedience.<sup>20</sup> By investigating subversive obedience to law, social scientists and legal philosophers might delineate when such action promotes public values, how marginalized and powerful groups leverage law to their benefit, and reveal that protest and dissent span the political left and right.<sup>21</sup>

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14. *Id.* at 833–34.

15. *Id.* at 818.

16. *Id.* at 830.

17. *Id.* at 819–20.

18. *Id.* at 834 (quoting Walter J. Oleszek, *Congressional Procedure and the Police Process* 304 (9th ed. 2014)).

19. *Id.* at 831–32.

20. *Id.* at 860.

21. *Id.* at 860–71.

## II. CIVIL DISSENT BY OBEDIENCE AND DISOBEDIENCE: WHERE DOES THE PROVOCATION LIE?

Provocation drives both uncivil obedience and civil disobedience. An uncivil obedient's attentiveness to law "strike[s] others as jarring or subversive" when it runs against prevailing customs, according to Bulman-Pozen and Pozen.<sup>22</sup> Likewise, a civil disobedient's open violation of law is provocative on its face, because most people expect general obedience to law.<sup>23</sup> A closer look reveals that obedience to law does little to no work in the provocation analysis. Like civil disobedience, what makes an uncivil obedient's attentiveness to law provocative is his or her disobedience to prevailing customs, social expectations, or the purposes that underlie the subject law or official rule.

This part demonstrates that disobedience drives uncivil obedience by looking at Socrates' defiant stance against the prevailing custom in Athens of fleeing a death sentence and by looking at how obedience and disobedience work when official rules align and when they do not align with prevailing custom or practice. Revealing the dissenting nature of obedience under these conditions helps rid clutter from our conceptual space. What Bulman-Pozen and Pozen wish to call 'uncivil obedience' is better understood and examined as civil dissent on par with, and possibly only with, civil disobedience.

### A. *Socrates and the Hemlock: Civil Dissent Through Obedience to Law by Disobedience to Prevailing Customs*

Plato's *Crito* offers a compelling philosophical defense for an unequivocal duty to obey the law. In the *Crito*, Socrates appears to defend obedience to law—even to what one may consider an unjust law—as he stoically accepts his death sentence. Frances Olsen suggests, however, that if one were to look to Athenian social practices at the time, Socrates's obedience to law may have been considered a defiant act, an act Olsen describes as civil disobedience.<sup>24</sup>

Socrates in the *Apology* adamantly defends obedience to his own conscience over unjust laws.<sup>25</sup> After he is convicted and sentenced to death

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22. *Id.* at 825.

23. *Id.* at 827, 827 n.61.

24. Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929 (1984).

25. *Id.* at 933–38.

for violating those same laws, a wealthy friend pays Socrates a visit and offers Socrates an opportunity to escape jail.<sup>26</sup> Socrates lays out an argument as to why he has a duty to follow through with his sentence and drink the hemlock, notwithstanding the extent to which the laws under which he was convicted were unjust.<sup>27</sup> He then declines his friend's offer.

However, Olsen questions whether one should read the *Crito* so superficially. Among Crito's arguments to Socrates as to why he should flee is that "if he refused to escape, the people of Athens would blame Socrates's friends for having failed him."<sup>28</sup> Among Greek popular values, "successful and admirable men (*agathos*) were those able to protect and benefit their friends, and by the generally accepted scale of values it was *agathos* to thwart the laws to benefit one's family or friends."<sup>29</sup> Taking Crito's concern seriously, Olsen posits that a custom of securing a friend's freedom may have existed at this pivotal moment in Socrates's life.<sup>30</sup> Knowing this scale of values, and having exhausted his remedies in the legal system, Socrates's refusal to escape may be read not as obedience to law, but as his final act of defiance.<sup>31</sup>

By accepting his death, Socrates would have the Athenian people accept the full breadth of the laws that purported to govern them. Condemning one to death would arguably weigh less on one's conscience when a background custom allows the condemned person to escape. Rather than let Athenians have it both ways, Socrates's defiance to custom would force Athenians "to reconsider their unjust ways."<sup>32</sup> He drew attention to the conflict that existed between "what the law *said* and what the people really meant . . . [and] between the virtuous sentiments that the people of Athens claimed to believe and the behavior that they actually practiced."<sup>33</sup> This act of disobedience to custom is appropriately analyzed as an act of civil disobedience.<sup>34</sup>

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26. *Id.* at 931.

27. *Id.* at 931–32.

28. *Id.* at 944.

29. *Id.* at 945.

30. *Id.* at 945–46.

31. *Id.* at 946.

32. *Id.*

33. *Id.* at 947.

34. *Id.* at 959–66.

*B. Obedience and Disobedience When Law Aligns with Custom/Practice or the Law's Purpose*

Provocation, according to Bulman-Pozen and Pozen, “inheres in the gap between the official rules and the unofficial customs that coexist in a given area, . . . and in the attention that is called to this gap.”<sup>35</sup> To unpack this statement, consider where the provocation lies when official rules align with unofficial customs. But first, what content fills the gap? The gap contains the reformist’s values and his or her beliefs as to what is just, right, or good.<sup>36</sup>

If the official speed limit is fifty-five miles per hour and the unofficial custom is to drive fifty-five miles per hour, obedience to one is obedience to the other, no matter one’s motive to obey the one or the other. And, if one wished to exploit the gap between official rule and unofficial custom by pointing to what is good, just, or right, at best others will view any reformist intent as trivial. Nothing provocative occurs.

Conversely, disobedience to one is disobedience to both, which is highly provocative. The act of disobedience itself draws attention to the gap, to what is good, right, or just. It is safe to conclude that when the official rules and unofficial customs align, only disobedience is provocative in any interesting sense.

*C. Obedience and Disobedience When Law Does Not Align with Custom/Practice or the Law's Purpose*

When official rules and unofficial customs do not align, opportunities to exploit the gap appear available through either obedience or disobedience. But upon close inspection, disobedience really drives the exploitation.

If the official speed limit is fifty-five miles per hour and the unofficial custom is to drive sixty-five miles per hour, obedience to one is disobedience to the other, and vice-versa. Where does the provocation lie? That is, what draws attention to the gap? Bulman-Pozen and Pozen point to what they consider unconventional obedience to official rules—strictly driving the speed limit. But one can just as easily point to disobedience to

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35. Bulman-Pozen & Pozen, *supra* note 5, at 827.

36. See Olsen, *supra* note 24, at 956–57 (describing Socrates’ struggle as one about human values); Bulman-Pozen & Pozen, *supra* note 5, at 814–15, 815 n.17 (explaining that an act of civil disobedience requires the actor to hold sincere desire to change the law as a matter of justice or morality).

unofficial custom, like the Socrates example above. In fact, executive officials have no reason to be provoked by obedience to law. The goal of any legal system is to garner perfect obedience to official rules.

If, instead, a group of persons gets together to protest the fifty-five mile-per-hour speed limit by driving sixty-five miles per hour and plastering their vehicles with big signs that say, ‘I am driving ten miles over the speed limit,’ would one consider their obedience to unofficial custom provocative? Executive officials will consider disobedience to the unofficial rules provocative. But others within the purview of the community’s customs have little reason to be provoked by others driving within the unofficial customary limits.

Undoubtedly, obedience to rules in a manner designed to showcase their deficiencies may prove provocative, but it would not be so if there were not some competing norm vying for obedience. Bulman-Pozen and Pozen’s article undervalues the role disobedience plays in the dissenting act of one they label an uncivil obedient. As Olsen points out, obedience to law in a quest to exploit the gap—to attain what one considers just, good, or right—provides another avenue for civil dissent when disobedience to law or official rules proves ineffective or less effective. If one cannot get her point across by disobedience to the formal rules, one may have more luck disobeying the informal rules. Informal rules, in fact, may prove more personal to the community at issue than formal rules.

When official rules and unofficial custom do not align, civil dissent through obedience to official rules and disobedience to unofficial custom and through obedience to unofficial custom and disobedience to official rules differ only in the means employed to exploit the gap, to bring these two into alignment and in accord with what one considers good, just, or right. But both rely on disobedience to provoke others, to draw attention to the gap. And insofar as both aim to improve the existing legal system, both are civil means of protest. As a conceptual matter, to better understand civil dissent through obedience to official rules by disobedience to unofficial customs (or rules), one should explore this phenomenon as a form of civil disobedience.

### III. THE PROBLEMS THAT INHERE IN “UNCIVIL OBEDIENCE”: WHAT MAKES LAW? AND WHAT MAKES GOOD LAW-MAKING PRACTICES?

Nothing controversial lies in the proposition that obedience to rules that purport to govern a group of people can serve as a subversive act. But to consider such an act uncivil obedience raises the philosophical question whether the subject rule is law. The label ‘uncivil obedience’ threatens to

clutter conceptual space with unnecessary furniture. It conceptually unravels when faced with the jurisprudential question, “what makes law?”<sup>37</sup>

Likewise, the proposition that lawmakers might employ procedures available to all members to leverage concessions on a proposed law or to defeat a proposed law altogether raises no controversy. Nor does any controversy arise by the proposition that state lawmakers might create laws that purport to adhere to federal statutory or regulatory standards, although some legislators harbor ulterior motives. But to incorporate the lawmaking process under the label ‘uncivil obedience’ only obscures the real issue—the best lawmaking practices in a democratic society. To consider lawmaking uncivil obedience also creates opportunity for sleight of hand political maneuvering.

#### A. *What Makes Law?*

Legal philosophers have labored over determining what makes something law as opposed to just a rule-of-thumb or suggestion. Traditionally, this debate has spawned naturalism—the belief that anything called ‘law’ must conform to some moral code or conception of justice or right reason—and positivism—the position that law is a social fact, identifiable by objective criteria without repair to morality, the good, the right, or the just.<sup>38</sup> When one wishes to discuss obedience to law in the context of civil dissent, he or she must inevitably confront the question, what makes law?<sup>39</sup> Plugging ‘uncivil obedience’ into either a positivist or non-positivist<sup>40</sup> framework yields little to nothing toward understanding the posited phenomenon itself.

This part does not intend to, nor could it possibly, detail the vast literature that covers both legal positivism and non-positivism. Using Joseph Raz’s positivist approach to law and Ronald Dworkin’s moral

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37. Professor Liam Murphy tackles this age-old philosophical debate in his new book whose title tracks the inquiry, *What Makes Law?* See LIAM MURPHY, *WHAT MAKES LAW? AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (2014).

38. *Id.* at 1–5.

39. Bulman-Pozen and Pozen disclaim any interest in wading into “analytic jurisprudence and political philosophy debates over the nature of legal obligations or the justifiability of resistance to authority.” Bulman-Pozen & Pozen, *supra* note 5, at 860. The discussion in this part of this Article indirectly touches on the nature of legal obligations only insofar as it looks into the nature or essence of law. But this part, like Bulman-Pozen and Pozen’s article, does not delve into whether a *pro tanto* or general obligation to obey law exists.

40. Liam Murphy coined the term “non-positivism” to bring analytical clarity to the philosophical debate over the nature of law. See Murphy, *supra* note 37, at 2. This Article will use “non-positivism” rather than “naturalism.”

reading (non-positivist) approach to law, this part demonstrates the conceptual instability of ‘uncivil obedience.’

### *1. Legal Positivism and Uncivil Obedience*

Joseph Raz examined the fundamental features of the thing called law by looking at the concept rather than the nature of law.<sup>41</sup> When one looks to a thing’s essence or nature, there generally will be a fact of the matter that inevitably renders disagreement moot. Whether and to what extent law is one such thing might be disputed, but Raz offered to conceptually delineate law to rationally talk about law as a thing, while retaining space for disagreement.<sup>42</sup>

Raz posits that everyone can agree that the concept of law is related to authority.<sup>43</sup> Authority over another involves showing that the person or body asserting authority through directives provides better reasons for action to the people purportedly governed by the directive than those people’s own reasons for action.<sup>44</sup> Practical authority provides a service by “mediating between people and the right reasons which apply to them, [under particular circumstances,] so that the authority judges and pronounces what they ought to do according to right reason.”<sup>45</sup>

If this is what authority requires, and law claims authority, law should provide better reasons for action under particular circumstances than the subject could provide on his or her own. The subject should not have to repair to his or her personal conception of morality, the good, the right, or the just to figure out what to do when presented with a circumstance covered by a directive. The directive provides all the reasons for action. If a directive is not authoritative in this sense, it is not law.

In their article, Bulman-Pozen and Pozen admit to using the term “obedience” “looser than some jurists would allow.” “In saying that uncivil obedient ‘obey,’ ‘follow,’ or ‘comply with’ 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.”<sup>46</sup> But if an uncivil obedient does not adhere to rules promulgated by a body purporting to exercise legitimate authority simply because he considers those rules alone to provide reasons for action, those rules are not serving as authoritative.

41. Murphy, *supra* note 37, at 85–86

42. *Id.*

43. *Id.*

44. See Joseph Raz, *Authority, Law, and Morality*, 68 THE MONIST 295, 299 (1985).

45. *Id.*

46. Bulman-Pozen & Pozen, *supra* note 5, at 811.

So, motorists who strictly adhere to the fifty-five mile-per-hour speed limit as a means to show its own folly are not, in Raz's sense, obeying any law.

Driving the posted speed limit may qualify as civil dissent, insofar as the act challenges the authoritative directive by drawing attention to the fact that hardly anyone considers the directive authoritative. But Raz's positivist account of law poses a significant hurdle for uncivil obedience as defined. If one plugs uncivil obedience into Raz's positivist account of the concept of law, she may find that the act in question is really subversive rule-following, not subversive law-following. Bulman-Pozen and Pozen, in fact, use 'law' and 'official rules' interchangeably. Whether the directive is a law or rule matters because suddenly a new problem arises: now one must determine whose or which set of rules matter and why. What marks the difference between following the posted speed limit (a rule) and following the established social practice of not following the posted speed limit (a rule)?<sup>47</sup>

## 2. *Non-Positivism and Uncivil Obedience*

Ronald Dworkin's account of the grounds of law (what makes law) dramatically differs from Raz's account. Morality plays a central role in ascertaining what the law is. Dworkin approaches the question similar to Raz by appealing to values Dworkin considers associated with law.<sup>48</sup> For Dworkin, principles undergirding the rule of law must be satisfied in order to identify true claims of law.<sup>49</sup> Law must be interpreted in its best light, considering the political community's adopted principles and moral values.<sup>50</sup> Dworkin's philosophical account is far more sophisticated than this general gloss allows, but this gloss provides enough information for this Article's purpose.

Is the posted speed limit law? That question may depend upon the legal practice in the relevant community. Let's say that in the community where motorists organized a protest against the posted speed limit by driving the speed limit, the practice is as follows: Most motorists drive ten miles above the speed limit, law enforcement regularly enforces the speed limit only in instances where drivers travel fifteen miles over the speed limit, and the speed limit was proposed by Mothers Against Unsafe Driving, a

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47. Penalizing rule breaking is available in either instance. One who drives over a posted speed limit may receive a speeding ticket and one driving the speed limit may be "honked at or tailgated" or perhaps worse if another driver has a fit of road rage. *See id.* at 825 and n.56.

48. Murphy, *supra* note 37, at 87–88.

49. *See* RONALD DWORKIN, *LAW'S EMPIRE* 93–94 (1986).

50. *See id.* at 224–75; RONALD DWORKIN, *JUSTICE IN ROBES* 9–21 (2006).

powerful lobbying group, without any empirical data suggesting the proposed speed limit best promoted safety, fuel economy, reduction in emissions, etcetera; and statutes and regulations are vulnerable to court invalidation. A week or so after the motorists engage in their speed limit protest, one of the drivers is ticketed for traveling ten miles per hour above the posted speed limit. He decides to contest the ticket and resolves to take the case as high up the appellate chain as possible.

At the municipal trial level, he argues that the speed limit is arbitrary and capricious and should be invalidated. Judgment is entered against him and he appeals. At the appellate level, the judges consider the community's practice and the legal practice surrounding the speed limit at issue. The judges also consider precedent where previous courts have held statutes and regulations arbitrary and capricious, therefore unenforceable, either on their face, by their rationale, or by their enforcement. If the judges decide that the speed limit is valid, and all appellate procedures are exhausted for the motorist, then the motorist will be said to have violated the law. If the judges decide that the speed limit is arbitrary and capricious, therefore unenforceable, and all appellate procedures are exhausted for the state, then the motorist will be said not to have violated the law. Under Dworkin's interpretive framework, prior treatment of the speed limit as law was a mistake.<sup>51</sup>

Plugging uncivil obedience into this non-positivist framework creates the same problems as when the label is plugged into a Razian positivist framework. But it also creates other problems that conceptually confound uncivil obedience. Recall that anything that aspires to the status of law under Dworkin's framework must promote the best interpretation of the political community's adopted principles and morals. When the rules that purport to govern do not conform to established social practice or customs, what conditions must exist for these deviations to count as law? How far afield can the rules that purport to govern depart from established social practices or established political practice and still retain enough legitimacy or recognition to comfortably refer to them as law? If law is measured by conformity to established political and social practices interpreted in their best light, would not obedience to what is later determined a mistake mean that the person was not only not obeying any law, but possibly disobeying what really was law?<sup>52</sup>

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51. Murphy, *supra* note 37, at 52–53; Dworkin, *supra* note 49, at 4–6.

52. The speed limit may not be the best example to make this point evident or pressing. If the maximum speed limit is sixty-five miles per hour, driving fifty-five miles per hour would not generate any concern about disobedience to any law unless it was below a minimum speed limit or disruptive in

### *B. Law-Making and Uncivil Obedience*

Perhaps the most troublesome move by Bulman-Pozen and Pozen is trying to squeeze uncivil obedience into lawmaking practices. This move raises cause for concern that political sleight of hand may come with the ‘uncivil obedience’ label. The move also threatens to obscure what really appears to be at issue: best lawmaking practices in a democratic society and political accountability.

Repair to two examples provided by Bulman-Pozen and Pozen demonstrate the problem. First, Republican senators have used the filibuster procedure in what some consider unconventional ways in an effort to defeat Democratic measures or political nominations. Second, Republican State lawmakers have passed health measures that require “abortions performed using the drug combination Mifeprex adhere strictly to protocol specified by the FDA.”<sup>53</sup> Undoubtedly, Democrats could employ similar efforts. But Bulman-Pozen and Pozen make clear that they believe uncivil obedience as they have defined it will serve as Republicans’ primary form of protest.<sup>54</sup>

With respect to the first example, political procedures available to lawmakers, such as the filibuster, are part of the lawmaking process in the United States. The motives that underwrite one party or the other’s decision to utilize the procedures are generally political. Trying to work in a label like ‘uncivil obedience’ only serves to make these tactics opaque by diverting attention from what is obvious political posturing, and focusing instead on motives that may only be held by a few in the bunch.

The same problem arises when an actual law is passed. Some state lawmakers, but not necessarily most or all of them, who pass a bill which requires abortion clinics to adhere to federal standards might harbor a motive to “limit access to abortion.”<sup>55</sup> One might say that those persons with the requisite motive engaged in uncivil obedience, while others who had in mind only health and safety standards did not. Here is where political sleight of hand rears its ugly head. The label ‘uncivil obedience’ is so subject to cherry picking that one must be on guard when another

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some other legally relevant sense. A better example is provided below respecting abortion rights and state lawmakers attempting to limit access to abortion procedures. If these efforts by lawmakers were later determined unconstitutional, the consequence of their disobedience to the law would likely already have proven disruptive or even fatal to the lives of some or many women. *See infra* Part III.B.

53. Bulman-Pozen & Pozen, *supra* note 5, at 838–39.

54. *Id.* at 871.

55. *Id.* at 863.

uses the label, for what comes across as critique may really be political posturing.

The abortion example poses additional problems. Bulman-Pozen and Pozen concede that “it may sound odd to speak of ‘obedience’ with regard to a right or privilege that is framed in discretionary terms,” but they maintain that “there is nothing odd about envisioning a gap between what is technically permitted by such laws and what prevailing customs or understandings would allow.”<sup>56</sup> With respect to abortion rights, there is no clear gap that either side can point to. For what Bulman-Pozen and Pozen view as a Republican attack on abortion rights, Republicans consider part of the state’s duty to protect the life of the unborn fetus.<sup>57</sup> The United States Supreme Court has said that the state has a right to intervene to protect the unborn fetus at some point.<sup>58</sup> So are these Republicans engaging in uncivil obedience, as in using the law with a reformist intent, or are they just making laws? Again, this raises opportunities for political sleight of hand.

Further, as discussed above, whether and to what extent Republicans would be obeying the law may be unclear until the issue is adjudicated. If a Court holds that state lawmakers cannot hide their reformist motives behind federal regulations in an effort to limit abortion access, and strikes a state law as unconstitutional, then these lawmakers arguably violated the rights of any woman whose access to an abortion was limited by the purported law. They also used the lawmaking apparatus for an unlawful purpose, to thwart protected rights. The label ‘uncivil obedience’ distracts from what is really at issue, best lawmaking practices in a democratic society and political accountability.

#### CONCLUSION

Civil dissent comes in many forms, but ‘uncivil obedience’ as defined by Bulman-Pozen and Pozen is hardly distinguishable from civil disobedience. Both rely on disobedience to shock the relevant community’s sensibilities. To avoid adding clutter to an already vast

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56. *Id.* at 829–30.

57. With respect to rights, another issue obscured by the label ‘uncivil obedience’ is the question of who gets to decide the scope of rights? The legitimacy of judicial review as practiced in the United States, a country touting adherence to democratic principles, is a very contentious issue. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006); cf. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 5–7, 32–33 (1996).

58. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992).

conceptual space, the label ‘uncivil obedience’ should be discarded and the phenomenon the label purports to describe investigated as a form of civil disobedience.

Uncivil obedience, as thought-provoking as the label appears, should be considered a non-starter for any serious normative assessment. As defined by Bulman-Pozen and Pozen, the label conceptually unravels when plugged into jurisprudential inquiries concerning the nature or concept of law. The label also threatens to obscure serious political questions as to best lawmaking practices in a democratic society and creates a real risk for sleight of hand political maneuvering. If Bulman-Pozen and Pozen wish to draw attention to conservative protest, they can merely say, “look, Republicans also engage in civil disobedience.”