

CIVILITY, RULE-FOLLOWING, AND THE AUTHORITY OF  
LAW*Daniel Markovits\***Response to: Jessica Bulman-Pozen & David E. Pozen, Uncivil Obedience, 115 Colum. L. Rev. 809 (2015)*

## INTRODUCTION

Professors Jessica Bulman-Pozen and David Pozen (BP&P) strikingly identify and intriguingly elaborate a new category of political dissent, *uncivil obedience*, which they propose serves as a complement to the better-known political category *civil disobedience*.<sup>1</sup> Civil disobedience familiarly involves law-breaking that aims not at impunity but rather legal reform and thus arises in the context of respect for the legal system as a whole.<sup>2</sup> Uncivil obedience, by contrast, pursues change through hypercompliance with the law and may (although it need not) reflect disregard for the law.<sup>3</sup> Uncivil obedience thus involves, as BP&P say, “subversive law-following.”<sup>4</sup> BP&P suggest that uncivil obedience poses a principled challenge to the present U.S. political order that equals the principled challenge posed by civil disobedience a half century ago, and they predict that uncivil obedience will in coming years acquire a practical prominence to match its theoretical interest.<sup>5</sup>

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\* Guido Calabresi Professor of Law, Yale Law School. Thanks to the editors of the *Columbia Law Review* for commissioning this piece and providing outstanding editorial assistance.

1. Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 *Colum. L. Rev.* 809 (2015).

2. *Id.* at 814 (“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.”).

3. BP&P do not emphasize this feature of uncivil obedience—that its justification is not tethered to fundamental conservatism in the manner in which the justification of civil disobedience is. But BP&P’s examples clearly illustrate uncivil obedience’s deeply radical potential. Sociologists Richard Cloward and Frances Fox Piven’s plan to “precipitate a profound financial and political crisis” by overwhelming the welfare system with valid claimants suffered no immanent constraints on its radicalism and might, quite legally and hence legitimately, have aimed at bringing down the U.S. government or the capitalist system. *Id.* at 819. By contrast, civil disobedience aiming at economic justice purchases its legitimacy at a cost of forswearing revolution in favor of ideologically conservative reforms.

4. *Id.* at 811.

5. See *id.* at 872 (“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.”).

BP&P properly—they are introducing a new phenomenon, after all—seek to illuminate uncivil obedience by identifying and reflecting on examples rather than by elaborating a set of necessary and sufficient conditions for the practice and articulating a comprehensive justification. The examples that they deploy range widely, taking in both public and private law, both legal regimes that govern citizens and those that govern officials, and both domestic and international legal orders. The enormous variety of the examples—the wide range of legal, social, and political conditions that the examples span—suggests that uncivil obedience possesses a wide scope of application. BP&P naturally take this variety to warrant their sense that they have uncovered a legal and political phenomenon that possesses profound theoretical and practical importance.

The case studies that BP&P introduce also invite an alternative reconstruction, however. The new account of the examples both narrows and—more importantly—alters the lessons that uncivil obedience might offer broader legal and political thought. According to this reconstruction, the practices that BP&P identify as uncivil obedience on closer inspection overwhelmingly remain perfectly *civil* after all, at least insofar as they really do involve law-following. These practices become uncivil only when and because they turn out, on closer inspection, to involve *disobedience*. These reflections suggest that the forms of protest that BP&P call *uncivil obedience* do not in fact present a new kind of protest, or “the mirror image of civil disobedience,” as BP&P propose.<sup>6</sup> But even as BP&P’s argument fails to sustain its express conclusions, it serves another and more profound purpose. BP&P’s illuminating account of the relations between civility and rule-following, and of the tensions that can arise between these two virtues, will reveal something generally important about civility, rule-following, and the authority of law.

The argument to sustain these claims begins by reprising six of the examples that BP&P propose as case studies of uncivil obedience. These are:

- California drivers’ protest against the fifty-five mile-per-hour speed limit through “meticulous compliance” with the new limit, designed to showcase the social costs of freeway driving at such slow speeds.<sup>7</sup>
- Sociologists Cloward and Piven’s proposal to overwhelm the welfare rolls with masses of meritorious applications, designed to bring down a system of social provision that could not meet its own promises and replace it with a more just alternative.<sup>8</sup>
- Criminal defendants’ coordinated refusals to accept plea bargains, designed to overwhelm a criminal justice system that cannot honor all the procedural guarantees that it issues and by

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6. Id. at 810.

7. Id.

8. Id. at 819.

causing procedural embarrassment, to reduce the harshness of the substantive criminal law.<sup>9</sup>

- Employees' determinations to work to rule, designed to disrupt production and induce employer concessions in collective bargaining.<sup>10</sup>
- Minority-party senators' use of technical procedural rights, designed to undermine the effectiveness and democratic functioning of the Senate.<sup>11</sup>
- A state's exercise of a right provided by international law, designed to promote an improper purpose and to impede the international legal rights of other states.<sup>12</sup>

These six cases divide naturally into two groups of three each, with very different normative structures.

In the first three cases, the legal rules at issue all involve vertical relations between the state and citizens subject to the state's political authority. The cases raise serious questions about whether the state is exercising its authority prudently and justly, to be sure; and in each case, protesters claim that the state's conduct is in fact imprudent or unjust. But there is no doubt that the broader legal- and political-authority relations at issue in these cases are asymmetrical. In particular, the citizens have and assert no general right to reject the state's laws; on the contrary, they are, if anything, subject to a general—a plenary—duty to obey.

The last three cases have a fundamentally different structure: They all involve horizontal relations among persons, none of whom enjoy plenary, or even broad, authority over any other and who instead engage one another symmetrically, typically grounding claims against one another in actual mutual consent. Employees and employers thus construct their obligations to one another by contracts. The rules of the Senate have less the structure of ordinary law, enacted by officials to govern the citizenry at large, and more the structure of an agreement, made among officials (and remade each time the Senate reconstitutes itself following an election), concerning how to regulate their joint exercise of the powers and duties of their offices.<sup>13</sup> And much, although admittedly not all,

9. *Id.* at 830.

10. See *id.* at 818–19 (describing “working to rule” as form of “hyperbolic compliance with authoritative commands” in which employees “do exactly what they are told to do, adhere exactly to safety protocols, or report to and depart from the premises exactly on time”).

11. *Id.* at 834–35.

12. See *id.* at 848 (describing abuse-of-right doctrine).

13. See U.S. Senate, Rules and Procedure, [http://www.senate.gov/reference/reference\\_index\\_subjects/Rules\\_and\\_Procedure\\_vrd.htm](http://www.senate.gov/reference/reference_index_subjects/Rules_and_Procedure_vrd.htm) [<http://perma.cc/8WKE-GNZW>] (last visited Mar. 6, 2016) (describing Senate process as “governed by a set of standing rules, a body of precedents created by rulings of presiding officers or by votes of the Senate, a variety of established and customary practices, and ad hoc arrangements the Senate makes to meet specific parliamentary and political circumstances”).

of international law arises out of, or at least has its roots in, treaties, enacted by independent states not under any plenary international legal authority.<sup>14</sup>

This structural difference matters immensely to understanding what is going on in the several cases. In particular, it inserts a seam to separate the first three from the last three. The remainder of this piece elaborates and reflects on the distinction between vertically and horizontally structured rules. Parts I and II will examine these two groups in turn. Part III concludes by taking up two additional examples BP&P identify—states’ subverting federal law and civilian private law—that test the principle identified by the analysis of the first two Parts: that incivility and obedience are, with respect to protest, mutually exclusive.

### I. VERTICAL RELATIONS

In the first three cases that BP&P identify, the citizens’ obedience arises in the shadow of a generalized duty to obey the law that applies entirely apart from the actual consent of those whom the law governs. A broadly rights-respecting, democratic state, such as the United States, enjoys presumptively legitimate authority to regulate the speed at which drivers might negotiate its roads, to set the conditions under which citizens might claim public benefits, and to establish the sanctions to be imposed for violations of its criminal law and the procedures by which violators will be identified. Indeed, the state enjoys presumptive authority to regulate virtually all aspects of its citizens’ lives, subject of course to carve-outs concerning respect for fundamental rights. Moreover, the state enjoys its authority on account of considerations—the effective security and substantial justice of the public order that the state sustains and the democratic pedigree of the political processes through which the state governs—that do not depend on any actual or ongoing consent by the governed, so that even the most legitimate state governs, as a matter of fact, by imposition.

But the state’s presumptively legitimate authority and the citizens’ complementary presumptive duty to obey the law—precisely because of their plenary scope and imposed character—remain hard-won and even insecure. Every political and legal authority must contend, constantly, with the freedom and dignity of the persons subject to it and thus with the challenge of philosophical anarchism—the prospect that imposing laws on persons who reject and resist the laws constrains their freedom and violates their dignity in unacceptable and illegitimate ways.

Legitimate states invariably respond to this challenge, among other ways, by adjusting the style of the laws through which they govern. Legiti-

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14. See Yuen-Li Liang, *United Nations: Documents on the Development and Codification of International Law*, 41 *Am. J. Int’l L. (Supplement)* 29, 32 (Oct. 1947) (describing development of modern international law as beginning with 1814 Treaty of Paris).

macy requires that the state's laws respect the integrity of the individual and as one face of this respect, that the laws clearly articulate the requirements and permissions that they establish, so that the law and its limits become intelligible to citizens, who might employ law reliably as a guide to action that conforms to the state's commands. Precisely because the state's lawmaking authority is plenary and asserted by imposition rather than by consent, the state's actual laws must narrowly and precisely constrain their own scope. This requirement informs the first three cases that BP&P propose involve uncivil obedience. It reveals that insofar as the behaviors in the cases conform to the law, they are not, properly understood, uncivil.

The reason is straightforward. Plenary political authority asserted without regard to consent, coupled with political norms that require deference or submissiveness not just to the law but more broadly to the state, the state's purposes, or even the general good, becomes inevitably unconstrained in a fashion that breeds tyranny or at least illegitimacy.<sup>15</sup> The state, as a condition of its legitimacy, must therefore limit the demands that the law places on citizens to the intelligible content of the law itself. Indeed, this limit—that citizens give up no more liberty than the law itself decrees—is constitutively connected to the state's legitimate authority. Once again, states may demand that citizens generally comply with the law in part because they do not demand anything beyond compliance. As the familiar slogan goes: A legitimate state imposes the rule of law and not of men.

Accordingly, a state or political order that expects more of its citizens than conformity to intelligible, self-limiting positive law—a political order that expects citizens, as BP&P say, to display respect not just for law but also for “principles of custom and moderation”<sup>16</sup>—thereby places its own legitimacy at risk. These and like principles lack the transparency and intelligibility that might render them suitable to plenary governance, without respect to consent, of the collective life of free and equal persons. And citizens who conform to law but reject custom and moderation do not, as BP&P say, “express[] insolence towards law”<sup>17</sup> but rather show law every respect that law might legitimately command.

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15. Note that this general principle does not require that the law be interpreted maximally, narrowly, and predictably (or as a special case, that statutes be given inflexibly textualist rather than more malleable, purposivist interpretations). For one thing, one may reject an extreme without affirming its opposite. For another, BP&P concede that the behaviors in their example conform to the law, properly understood, and insist only that generally applicable principles of civility require citizens to go beyond merely conforming to the law. See Bulman-Pozen & Pozen, *supra* note 1, at 826 (“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 courtesy and order.”). The argument in the main text attacks the propriety of these principles.

16. *Id.*

17. *Id.* at 864.

BP&P's concrete examples illustrate these principles in operation. In the first example, BP&P imagine by assumption that the protesting drivers restrict their speed to fifty-five miles per hour while also obeying all other duly promulgated traffic laws: The drivers do not, that is, drive in a phalanx that might block emergency vehicles, leave illegally small stopping distances between themselves, or switch lanes unexpectedly in order to block the progress of other cars that seek to exceed fifty-five miles per hour.<sup>18</sup> But when drivers really do conform to all traffic laws, it becomes difficult to see what about their protest could possibly be uncivil. Civility, after all, does not require a person to adjust her driving to suit the convenience of other drivers—certainly not when she has substantial and legitimate reasons for driving in a way that others find inconvenient. Indeed, part of the point of traffic laws (in addition to promoting safety) is to carve out a space within which citizens might, properly and civilly, consult their own advantages and interests in deciding how to drive. A state that—citing civility or indeed any other value—demands greater deference than this exceeds its legitimate authority.

These considerations apply still more powerfully in BP&P's next two examples: flooding the welfare rolls with legitimate claimants and overwhelming the courts with defendants demanding trials. In each of these cases, the allegedly uncivil citizen merely insists on a right that the state grants her and indeed, grants pursuant to an official ideology that champions and even valorizes the right's universal application and exercise. The state might not live up to these promises to be sure—employing welfare screens that enforce material deprivation on the poor or prosecutorial techniques that coerce guilty pleas. And the state's betrayal of particular promises may not arise in isolation but rather as part of a deeper structure of injustice that the promises seek to disguise. But pointing out these failures—including by means that reveal the broader legal order's structural complicity in the failures—is surely not uncivil or “insolent” toward the law, as BP&P suppose. On the contrary, both the welfare state and the criminal law achieve legitimacy precisely because they permit the poor and the accused to assert their rights (to benefits and to due process) *at their sole discretion*. Introducing a civility norm into these legal schemes—which would require the poor or the accused to consult the convenience of the state before asserting their rights (including schemes in which depriving some citizens of material well-being or due process is precisely what the state finds convenient)—would undermine the very values that the schemes purport to assert and promote. Once again, the obedience that BP&P imagine, far from being uncivil or insolent toward the law, in fact shows the law every measure of respect that the law deserves or indeed demands.

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18. *Id.* at 818 (describing protest as “not involv[ing] ‘disobedience’ in the sense of a breach of law” but also “not easily accommodated within familiar models of lawful dissent”).

## II. HORIZONTAL RELATIONS

The last three of BP&P's cases share a very different—indeed a contrasting—structure. In each of them, the normative orders against which the uncivil, obedient protests have both a much more limited scope and a much more direct connection to the protester's own choices.

On the one hand, all three normative regimes assert only narrowly limited authority. A labor contract governs (and may legitimately govern) work life only—that is, only certain hours of the day and even within those hours, only certain aspects of conduct. The rules of the Senate govern only the official conduct of the senators and even within this narrow vein, focus principally on speaking and voting within the Senate chamber.<sup>19</sup> International law, with only a few narrow exceptions (whose narrowness is enforced by a deep respect for principles of state sovereignty), governs conduct between states rather than the conduct of persons generally or even of states within their borders. On the other hand, all these normative regimes arise more or less directly by actual consent of the parties that they govern. A labor contract is a direct creation of the parties to it—a creature of the reciprocal intentions of the employees and employer. The rules of the Senate are similarly actually chosen by the senators themselves. Even international law—although it does involve some mandatory rules—generally develops by means of the treaty consent of states and recognizes that state sovereignty imposes strict limits on imposing international legal norms without consent.

This shared structure makes general norms of deference appropriate for BP&P's last three, horizontal cases—as such norms are both required for the proper internal function of the obligations at issue and unthreatening outside of these obligations' limited scope. On the one hand, no *ex ante* elaboration of rules to govern any joint project (no matter how simple) among persons who possess only bounded rationality can ever be complete. The transactions costs of anticipating and articulating contingencies that the project might confront will inevitably require certain possibilities to remain unaddressed, and the entrenching of interests as contingencies arise entails that regulating these possibilities through new agreements, *ex post*, is impossible. A generic inclination to support the project—a commitment to abjure opportunism and indeed to display a minimum of spontaneous cooperation—is thus required to sustain any voluntary joint project in the face of the unforeseen obstacles that the project will inevitably encounter. On the other hand, the narrow scope and choice dependence of horizontal obligations jointly entail that general deference to these normative orders does not threaten the freedom or dignity of the parties who display it: Even the broadest deference remains limited by the narrow scope of the deferred-to obligation, and the

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19. See *supra* note 13 and accompanying text.

obligation itself cannot have been imposed but must have been freely accepted by actual consent.

The attitude that BP&P call *civility* captures the generalized deference that is both necessary and proper within horizontal normative orders. Critically, principles that require civility do not hover over these orders or insert themselves into the orders from the outside. Rather, the demand for civility arises spontaneously from within the normative orders in question; and the civility norm belongs directly among, and may even be constituted by, the orders' other, regular norms. This makes *uncivil obedience* impossible, at least within the horizontal orders at issue. To be uncivil is to disobey these orders' norms.

BP&P's three examples again provide concrete and particular illustrations of the abstract and general point.

Begin by considering working to rule. An employment contract, like every contract, contains an implied covenant of good faith and fair dealing.<sup>20</sup> The covenant precludes a party from using its inevitable discretion in performance (enjoyed on account of every contract's necessary incompleteness) to recapture gains foregone at formation.<sup>21</sup> Now, the express rules that govern a workplace constitute part of the filling-in of the employment contract, adopted to govern the workplace in a fashion that promotes the ends of the contracting parties: paid, safe, and benign work for the employees and work product for the employer. The express rules are themselves inevitably incomplete, however, for all the reasons concerning bounded rationality and transaction costs that make the employment contracts incomplete to begin with. And once a workplace has been constructed—populated with employees and governed by expressly elaborated workplace rules—incumbent employees acquire a strategic power that they lacked when entering into their contracts of employment. Because neither the employees nor the rules can be replaced without cost, incumbent employees can exploit the rules by threatening to impose costs on their employers in order to extract concessions that they could not command at contracting when their bargaining position was weaker. Working to rule is one way of imposing such costs. And when employees work to rule to extract concessions without provocation or justification, they exploit power that they gain during performance to

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20. See Restatement (Second) of Contracts § 205 (Am. Law Inst. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

21. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 373, 387 (1980) ("Bad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting—when the discretion-exercising party refuses to pay the expected cost of performance."); see also *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933) ("[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . .").



recapture gains that their contracts expressly allocated to their employers. (Matters are, of course, entirely different when employees deploy this strategy to counterbalance undue advantage-taking by an exploitative employer.) Such bad faith constitutes a breach of the employment contract, as BP&P acknowledge when they observe that courts sometimes treat working to rule as a constructive strike.<sup>22</sup> Finally, this account of working to rule takes the example outside of the phenomenon it is supposed to illustrate. Insofar as working to rule breaches the employment contract, it constitutes not obedience but rather *disobedience*. Indeed, working to rule constitutes disobedience precisely and immediately in respect of being uncivil. Working to rule is uncivil because it approaches workplace rules in bad faith, but to act in bad faith *is* to breach the underlying contract. Indeed, the Uniform Commercial Code's (UCC's) treatment of the duty of good faith in performance makes this point at once explicit and plain: The duty of good faith in performance, the UCC observes, "does not create a separate duty of fairness and reasonableness which can be independently breached"; rather, "a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract."<sup>23</sup> Bad faith is breach; uncivility is disobedience.

The example concerning the Senate's rules follows a similar pattern. The Senate's rules, being a species of parliamentary procedure, are designed to promote democratic decision and free deliberation within that body. Neither the Senate, nor any deliberative decisionmaking body, can function well unless all of its rules are permeated by an overarching commitment to fill in the inevitable gaps in the procedures that the rules lay out in ways that enable and promote deliberative democratic decision—a principle, in other words, that completes the express rules in much the way in which contractual good faith in performance completes the express terms of contracts. The practices of minority resistance within the Senate that BP&P describe may or may not fall afoul of this good faith analog: That depends on what balance between majority power and minority privilege the Senate has and should embrace. But the question that these practices of minority resistance pose is not whether, although rule compliant, they violate some norm that stands outside the Senate's rules but rather, squarely, whether they in fact comport with the Senate's rules, properly understood. Norms of civility appear to fall outside the Senate's rules only because the Senate's place in U.S. politics renders its decisions concerning its rules effectively unreviewable, making it difficult to enforce the civility rule in the manner of rule enforcement more generally. But failures of enforcement should not be misinterpreted as going to the nature of a norm. And obstructionist senators, insofar as they are uncivil at all, are thereby once again *disobedient*.

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22. Bulman-Pozen & Pozen, *supra* note 1, at 845.

23. U.C.C. § 1-304 cmt. 1 (Am. Law Inst. & Unif. Law Comm'n 2014).

Finally, BP&P's account of abuse of right in international law reprises bad-faith contractual performance almost to the letter. BP&P thus propose that the doctrine applies to prevent a state from "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."<sup>24</sup> The parallel to contract law's prohibition on bad faith could hardly be closer: Each doctrine protects an *ex ante* settlement of rights against opportunism *ex post*, including prototypically against opportunism that exploits the inevitable incompleteness of the *ex ante* settlement itself. (Insofar as the international law rights at issue are treaty based, the analogy to contract is closer still.) International law's prohibition on abuse of right is therefore best understood, conceptually, not as functioning from outside the law to limit the assertion of genuine rights but rather as functioning within the law to limit the substantive content of the legal rights in question. Once again, when assertions of rights become uncivil, they become wrongs and thus *disobey* the legal order.

BP&P's three examples thus all illustrate and reconfirm the lesson developed by the general, theoretical account of horizontal legal orders. Because these normative schemes establish substantively limited rather than plenary authority, based on actual consent rather than efficacy or justice, civility appears in them not as a brooding omnipresence from above but rather as an ordinary and grounded value that applies from within. Breaches of civility are thus breaches of law.

Uncivil obedience appears, in the light cast by these reflections, as not one phenomenon but two—neither of which possesses the properties that BP&P identify. In vertical normative orders, obedience necessarily renders protest civil; in horizontal normative orders, uncivility necessarily renders protest disobedient. The new class of protest that BP&P purport to identify and seek to explain is, on reflection, empty. "Uncivil obedience" is an oxymoron.

### III. EXCEPTIONS

Two further examples from BP&P's argument that powerfully resist easy classification along the lines just proposed illustrate and reinforce the general insight that underwrites the classification they resist; indeed, they illustrate this insight through their resistance. On the one hand, BP&P observe that the several states at times "enact measures that flaunt their superficial attentiveness to federal law or policy while at the same time attempting to subvert it."<sup>25</sup> And on the other, BP&P observe that civilian legal systems embrace a broad and open-ended doctrine of abuse

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24. Bulman-Pozen & Pozen, *supra* note 1, at 848 (quoting Alexander Kiss, Abuse of Rights, *in* 1 *Encyclopedia of International Public Law* 4, 4 (Rudolf Bernhardt ed., 1992)).

25. *Id.* at 854.

of rights that might apply throughout their private law.<sup>26</sup> These examples appear to involve more robust incivility and more robust obedience than the six discussed earlier and thus to withstand application of the rule derived from those six cases: that protest may be either uncivil or obedient but never both. The states that BP&P imagine are uncivil insofar as they violate the open-ended intergovernmental cooperation on which successful federalism depends; they are obedient insofar as they violate no express or implied federal command. The civilian legal order's abuser of right is uncivil insofar as she undermines positive-freedom-based moral principles that animate private law in civil jurisdictions; and she is obedient insofar as she complies with all the negative-freedom-based rules that dominate the black-letter and ordinary application of even civilian private law.

These two exceptions prove (in the sense of testing) the general rule. U.S. federalism and civilian private law each constitute normative orders that are neither stably and exclusively vertical nor stably and exclusively horizontal. The dual structure of U.S. sovereignty entails that the federal government is neither a plenary sovereign over states reduced to its instrumentalities nor a construction produced by a compact among independently sovereign states.<sup>27</sup> Similarly, the dual structure of civilian law entails that contract, property, and tort, in civil law systems, are neither purely public tools by which the state might promote substantive justice and flourishing among its citizens nor purely private frames within which individual citizens might exercise their powers to arrange their lives however they see fit. These dualities give civility in federalism and in civilian private law a two-faced and unstable construction. On the one hand, the vertical aspects of these legal orders—in which the federal government is sovereign over the several states and the civilian private law is a tool by which the state pursues the general good—undercut any suggestion that civility might require more than obedience to law. On the other hand, these orders' horizontal aspects—in which the federal law serves coordination among sovereign states and private law serves the purposes of sovereign citizens—make civility, understood as an independent norm, essential to their good function. Uncivil obedience is thus made possible, in these cases, because the cases' deep structure confounds the distinction on which the argument that uncivil obedience is incoherent depends.

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26. *Id.* at 848 (noting abuse-of-right doctrine acts in domestic context as “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”).

27. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1429–66 (1987) (noting, for instance, “power exercised by state Peoples and state governments [and] ultimately subject to the absolute control of the American People” does not prevent sovereign states from “continu[ing] to . . . wield delegated power”).

## CONCLUSION

These reflections, finally, introduce a broader lesson. Perhaps the true teaching BP&P's striking proposal offers is not that uncivil obedience is, in itself, an important and broadly observable form of protest, but rather that thinking through the relationship between civility and rule-following reveals something deep about the structure of authority in normative orders. When protest might indeed be at once uncivil and obedient and remain so even after the demands of civility and rule-following have been closely investigated, this fact reveals a deep structural instability in the normative order at which the protest takes aim.