

# COMPLIANT SUBVERSION

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*Compliance and subversion are not mutually exclusive. Police officers can comply with Miranda requirements while subverting their purpose through creative workarounds; individuals facing deportation can comply with immigration procedures while clogging them up with frivolous claims; anti-death penalty activists can avoid violation of Eighth Amendment doctrine while undermining the executions it approves. These and other deliberate actions to obstruct judicial protections of rights and powers fall in a gray area between compliance and noncompliance. This Note articulates a transsubstantive legal theory underlying these actions, referred to as “compliant subversion”: attempts to make judicial protections of rights or powers unworkable while maintaining facial compliance with the law. After defining this concept and exploring its manifestations across different areas of law, the Note examines how courts constrain compliant subversion with reference to the subversive intent underlying it. Finally, the Note presents a normative critique of when judicial consideration of compliant subversion is inappropriate.*

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## INTRODUCTION

There is no law against being sneaky. Indeed, legal systems encourage all sorts of actors—lawyers, litigants, law enforcement officers, activists, legislators, and others—to engage in gamesmanship.<sup>1</sup> Yet gamesmanship sometimes extends beyond strategy and tactical advantage, and undermines a procedure or rule of law itself. The *Glossip v. Gross*<sup>2</sup> decision in 2015 presented a striking example. Seven years earlier, the Supreme Court had cautioned that lethal injection was only permissible when an inmate first received a proper dose of sodium thiopental, a fast-acting sedative, in order to avoid suffocation and pain from the subsequent execution drugs.<sup>3</sup> In response, activists around the world engaged in a well-documented effort to make sodium thiopental unavailable to the states that incorporated it into their execution protocols.<sup>4</sup> In this effort, the activists' greatest success was not through direct legal confrontation, but rather through an indirect medium: the market. Human rights groups, such as UK-based Reprieve, pressured international pharmaceutical companies to cease production and shipment of the drug to American states.<sup>5</sup> The death penalty abolitionists' theory was clear: If States needed an effective

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<sup>1</sup> See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 532 (2007) (“U.S. litigation tolerates a certain amount of gamesmanship—especially in civil litigation—where there exists a semblance of adversarial equality and where attorneys representing private clients are bound by rules of ethics to serve their clients’ private interests zealously within the bounds of the law.”). Compare *Taylor v. Blakey*, 490 F.3d 965, 976 (D.C. Cir. 2007) (suggesting that a party who engages in “tactical maneuvering” to avoid preclusive effects of judgment against another closely related party may have been “virtually represented” by the former party), with *Taylor v. Sturgell*, 553 U.S. 880, 906 (2008) (rejecting, on appeal of the D.C. Circuit’s decision, the relevance of a “mere whiff” of tactical maneuvering in determining whether nonparty claim preclusion applies).

<sup>2</sup> 135 S. Ct. 2726 (2015).

<sup>3</sup> *Baze v. Rees*, 553 U.S. 35, 53 (2008) (“[F]ailing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.”).

<sup>4</sup> See Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, THE NEW YORKER (May 21, 2016), <http://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs>; Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J. (Jan. 22, 2011), <http://www.wsj.com/articles/SB10001424052748704754304576095980790129692>; *Cruel and Unusual*, RADIO LAB PRESENTS: MORE PERFECT (June 2, 2016), <https://www.wnyc.org/story/cruel-and-unusual/> (interviewing Maya Foa, an activist who pushed to eliminate execution drugs from the market).

<sup>5</sup> Koppel, *supra* note 4. The shutdown was so effective that thirteen states asked the U.S. Department of Justice for help in identifying other drug suppliers. See A Communication from the Chief Legal Officers of the Following States: Alabama, Colorado, Delaware, Florida, Idaho, Mississippi, Missouri, Nevada, Oregon, Tennessee, Utah, Washington, and Wyoming, to Eric Holder, U.S. Attorney Gen. (Jan. 25, 2011), <http://www.deathpenaltyinfo.org/documents/StateAGLetter.pdf>.

anesthetic to carry out executions legally, the most practical way of preventing executions was to keep such anesthetics out of States' hands.

Oklahoma, where the lethal injection has been legal since 1977,<sup>6</sup> was unable to acquire sodium thiopental, so it settled on midazolam, an anesthetic that U.S. companies produced and made easily accessible.<sup>7</sup> But after three botched executions were linked to midazolam, multiple death row inmates—one of them Richard E. Glossip—filed suit against state officials for employing an unapproved method of execution they said violated the Eighth Amendment.<sup>8</sup> The *Glossip* Court grappled at oral argument with how to weigh, if at all, this background of strategic activism in deciding the case. The following colloquy ensued:

JUSTICE ALITO: [I]s it appropriate for the judiciary to countenance what amounts to guerrilla war against the death penalty which consists of efforts to make it impossible for the States to obtain drugs that could be used to carry out capital punishment with little, if any, pain? . . .

ROBIN C. KONRAD, FOR THE PETITIONERS: Well, Justice Alito, the purpose of the courts is to decide whether a method of execution or the way that the State is going to carry out an execution is, in fact, constitutional . . . .

JUSTICE SCALIA: . . . And now you want to come before the Court and say, well, this third drug is not 100 percent sure. The reason it isn't 100 percent sure is because the abolitionists have rendered it impossible to get the 100 percent sure drugs, and you think we should not view that as—as relevant to the decision that—that you're putting before us?<sup>9</sup>

Though the petitioners themselves had not played a part in making the approved drugs unavailable,<sup>10</sup> Justices Alito and Scalia implied

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<sup>6</sup> *Glossip*, 135 S. Ct. at 2732 (citing 1977 Okla. Sess. Laws 89).

<sup>7</sup> Oklahoma only settled on midazolam after failing to secure its second-choice drug, pentobarbital. See Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>. The drug's Copenhagen-based producer, Lundbeck, had faced public pressure in Denmark and instituted distribution controls on it, prohibiting its supply for executions. *Id.*

<sup>8</sup> Matt Ford, *Midazolam and the Supreme Court*, THE ATLANTIC (Jan. 23, 2015), <https://www.theatlantic.com/politics/archive/2015/01/SCOTUS-midazolam-lethal-injection-oklahoma/384801/> (noting that midazolam had “led to at least three botched executions”).

<sup>9</sup> Transcript of Oral Argument at 14–15, *Glossip*, 135 S. Ct. 2726 (No. 14-7955).

<sup>10</sup> See Phyllis Goldfarb, *Gross Imagery: Fracturing Legally over Injecting Lethally*, GEO. WASH. L. REV. DOCKET (Oct. Term 2014) (“[T]he majority holds petitioners responsible for the unavailability of better execution drugs. Who is responsible for their unavailability? The ‘guerilla warriors’ in the lethal injection story are largely European . . . .”).

their willingness to consider the third parties' gamesmanship in eliminating these drugs from the market in deciding whether a *different* drug met constitutional standards. In ruling against the inmates' claim, the majority and concurring opinions made repeated reference to these third parties.<sup>11</sup>

Critiques of this reasoning were forceful and plentiful,<sup>12</sup> but few asked the broader question of why lawful, free market-based interference with the exercise of the death penalty could have any bearing on the Court's decision. What follows is an attempt to explore this variety of gamesmanship—referred to here as “compliant subversion”—in obstructing the law, by mapping out its various manifestations, tracking how courts respond to them, and considering when such responses are inappropriate.<sup>13</sup> This project connects manifestations of this conduct in disparate areas of law: from repeated habeas petitions intended solely to forestall executions,<sup>14</sup> to end-runs around *Miranda v. Arizona*<sup>15</sup> to elicit confessions;<sup>16</sup> from abortion provider requirements for “patient safety” that result in widespread clinic shut-

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<sup>11</sup> *Glossip*, 135 S. Ct. at 2733 (referring to “anti-death-penalty advocates”); *id.* at 2751 (Thomas, J., concurring) (referring to “death penalty abolitionists”).

<sup>12</sup> For instance, Justice Sotomayor's dissent focused mainly on the “patently absurd consequences” that such a restrictive rule allowed. “[U]nder the Court's new rule,” she explained, it “would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake: because petitioners failed to prove the availability of sodium thiopental or pentobarbital, the State could execute them using whatever means it designated.” *Glossip*, 135 S. Ct. at 2795 (Sotomayor, J., dissenting). For critiques of the reasoning underlying the Court's mistrust of third party interference, see Joseph Blocher, *The Death Penalty and the Fifth Amendment*, 111 Nw. U. L. REV. ONLINE 1 (2016); Claire M. Hillman, Note, *Capital Consequences: An Analysis of the U.S. Supreme Court's Decision to Uphold Oklahoma's Three-Drug Lethal Injection Protocol* (*Glossip v. Gross*, 135 S. Ct. 2726 (2015)), 55 WASHBURN L.J. 503 (2016); Kelley E. Nobriga, Note, *Between a Constitutional Rock and a Procedural Hard Place: Placing Petitioners in an Eighth Amendment Battle of Persuasion*, 21 ROGER WILLIAMS U. L. REV. 370 (2016); Nadia N. Sawicki, “*There Must Be a Means*”—*The Backward Jurisprudence of Baze v. Rees*, 12 U. PA. J. CONST. L. 1407 (2010).

<sup>13</sup> The concept of compliant subversion involves actors who obstruct the procedures and doctrines of the judiciary. For this reason, judicial actors themselves are excluded from the typology of compliant subversion. For an analysis of judicial actors subversively treating precedents in a manner that obscures fundamental changes in the law, see Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

<sup>14</sup> See *McCleskey v. Zant*, 499 U.S. 467, 479–89 (1991) (discussing the history and procedural effects of the lack of restrictions on habeas petitions at common law).

<sup>15</sup> 384 U.S. 436 (1966).

<sup>16</sup> See *Missouri v. Seibert*, 542 U.S. 600, 607 (2004) (resolving a circuit split over the permissibility of police department's policy omitting *Miranda* warnings in order to elicit confessions and ruling that evidence obtained after the intentional omission of a *Miranda* warning was an end-run around *Miranda*, and inadmissible).

downs,<sup>17</sup> to prosecutorial compliance with *Brady v. Maryland*<sup>18</sup> disclosure requirements aimed at bewildering defense attorneys. Through compliant subversion, actors in myriad legal environments find ways to comply facially with the law for the purpose, in fact, of subverting it.

This Note offers a descriptive claim and a normative claim. First, in Part I, it argues that compliant subversion is a transsubstantive legal phenomenon that has not been previously articulated in scholarship. Specifically, it argues that across different areas of law, diverse actors engage in a type of conduct that shares two basic characteristics: The conduct facially complies with the law, and it is intended to subvert judicial protections of rights or powers. Rather than simply regarding these actors as behaving in “bad faith” toward the court or with “discriminatory intent” toward another party, this Note suggests that the independent concept of “subversive intent” toward a court’s protections is a more accurate way of describing the intent underlying this conduct.<sup>19</sup> Part II presents a typology of how compliant subversion may undermine various judicial protections discussed in Part I. When linked with the idea of facial compliance with the law, compliant subversion emerges as a legally cognizable, standalone concept, which courts have attempted to address without a framework for conceptualizing this behavior. Part III considers the judicial effort to strike back at compliant subversion. In a rearguard posture, courts both explicitly and implicitly factor in the subversive intentions of the actors at hand. Thus, illuminating a common theme of compliant subversion across disparate areas of law is the primary, descriptive contribution of this Note to legal analysis.

Second, the Note puts forth a normative argument for when judicial consideration of compliant subversion is appropriate. As Parts I & II lay out in detail, many instances of compliant subversion involve actors regulated by judicial doctrines protecting rights or powers, or involve conflict with judicial procedures in which these rights or powers are litigated—be it a police officer indirectly interfering with *Miranda* doctrine or a habeas petitioner’s successive claims conflicting with proper judicial functioning. Other manifestations of compliant subversion, however, do not involve any actor regulated by a judicial protection, such as the extralegal activism in *Glossip*. Part IV explains

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<sup>17</sup> See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (finding that the surgical center requirement, nominally for patient wellbeing, would reduce the number of abortion facilities to seven or eight).

<sup>18</sup> 373 U.S. 83, 90–91 (1963) (establishing a requirement for prosecutors to turn over all material exculpatory evidence to the defense).

<sup>19</sup> See *infra* Parts I.B and I.D.

why, to the extent courts do not wish to radically restructure their protections of rights and powers, judicial consideration of this latter type of compliant subversion should be discouraged. Factoring this type of compliant subversion into a decision transforms something doctrinally unregulated into something regulated—in other words, it adds a layer of protection to the entity exercising the right or power. Part IV urges judicial restraint in factoring this type of compliant subversion into adjudication.

## I

### DEFINITIONS AND COMPARISONS

At its most basic level, compliant subversion refers to attempts to make judicial protections of rights or powers unworkable while maintaining facial compliance with the law. This Part defines with greater precision the dual components of compliant subversion—first, subversive intent, and second, the act of compliance—and compares them to other conceptual frameworks, with the goal of illuminating important differences.

#### A. *Subversive Intent*

The first component of this definition is an intent factor: the intent to make a judicial protection unworkable, or in other words, to subvert it. While the *target* of this intent is common across all instances of compliant subversion, the actor possessing the intent is not. Unlike many inquiries into intent, which tether intent to a specific actor (for instance, inquiries into “legislative intent”<sup>20</sup> or the “subjective purpose of law enforcement officers”<sup>21</sup>), this analysis does not pin down a particular class of actors. Legislatures, police officers, activists, attorneys, and prisoners alike may bear subversive intent. What unites these diverse actors is how they position their subversive intent: toward the court or, more specifically, to judicial protections of rights and powers.

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<sup>20</sup> See generally Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 323, 327–31 (1997) (critiquing recent constitutional rulings of the Supreme Court as inquiries into the legitimacy of legislative intent, rather than the rationality and fitness of legislative means); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016) (arguing that the Supreme Court’s constructions of forbidden legislative intent in constitutional jurisprudence are varied and inconsistent).

<sup>21</sup> Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1430 (2011); see also John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982) (suggesting a need for subjective inquiries into law enforcement motives in the Fourth Amendment context).

What does “judicial protection” mean here? The judicial branch sets the boundaries of rights and powers, approving of zones in which states may create and enforce laws without abridging rights,<sup>22</sup> and concomitantly guarding individual rights against State intrusion.<sup>23</sup> These protections take a variety of forms, giving actors a variety of ways to subvert them. One category of protection is judicial procedure. This category involves rights or powers that can only be exercised through functioning judicial procedures—for instance, the power to prosecute criminal cases. These rights and powers directly implicate the judicial function of reviewing cases or controversies.<sup>24</sup> If an actor wishes to block the exercise of one of these rights or powers, delaying, confusing, or overburdening the judicial procedure may render the protected right or power ineffectual. A second category of protection is judicial doctrine, with two main subcategories. First are doctrinal protections that prohibit one actor from acting a certain way toward another. For instance, the *Miranda* doctrine regulates law enforcement officers, who are forbidden from impinging on a suspect’s Fifth Amendment right;<sup>25</sup> the undue burden standard regulates States and their agents, who are commanded not to impose an undue burden on a woman’s right to an abortion.<sup>26</sup> These judicial protections speak to specific actors. The second subcategory of judicial doctrine provides protections that do not speak directly to any actor: The *Baze* opinion, discussed above, provided judicial protection for a state’s power to execute so long as certain conditions were met, but did not forbid interested private actors from interfering with this power through

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<sup>22</sup> See Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511, 531 (2000) (“[P]olicing the boundaries of government power . . . is part of the judicial role. Ensuring that legislatures do not overstep the bounds established for government power in ‘free and republican’ governments is not judicial activism, but judicial fidelity.”).

<sup>23</sup> See Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 32–33 n.106 (1988) (cataloguing judicial protections of unenumerated rights); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994) (“[J]udicial interpretation and enforcement is in accord with the preeminent federal judicial mission of protecting individual rights and liberties.”); see also, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973) (“The Court has long afforded zealous protection against unjustifiable governmental interference with the individual’s rights to speak and to vote.”).

<sup>24</sup> See U.S. CONST. art. III, § 2, cl. 1.

<sup>25</sup> *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966) (holding that individuals taken into custody and interrogated must be protected by procedural safeguards).

<sup>26</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

lawful means.<sup>27</sup> In this context, many decisions ostensibly protecting individual rights, such as *Gideon v. Wainwright*,<sup>28</sup> enshrining the Sixth Amendment right to counsel, also present corresponding “protections” for state powers; framed this way, *Gideon* acknowledges a state’s ability to prosecute criminal cases so long as defense counsel is provided. Actors possessing subversive intent take these protections as their targets. Sometimes this subversive intent is clear from an action itself or from actors’ statements.<sup>29</sup> For instance, the *Glossip* activists were clear with their subversive intentions.<sup>30</sup> In other cases, intent is less clear. There are many reasons an individual on death row might file multiple habeas corpus petitions. Perhaps he wishes to impede his execution through procedural gamesmanship; perhaps he wishes to raise a new claim that an ineffective prior counsel had failed to raise in an initial petition;<sup>31</sup> perhaps both reasons apply. Thus, it is not the act of filing multiple habeas petitions itself, to use this example, that is referred to here as compliant subversion. Rather, filing these petitions with an *intention* of undermining a judicial procedure through which the State exacts its punishment is an instance of compliant subversion—whether or not other intentions are present as well. In this sense, both the habeas-happy petitioner and the market-savvy death penalty abolitionist are engaged in similar subversion.

An attempt to limit the definition of compliant subversion to those actions in which such subversive intent is the sole or primary cause beneath obstruction of a right or power would be irrelevant to the aim of this Note, which has a simpler aim: to demonstrate the capacity of a court to recognize that its protections are being deliberately subverted and censure conduct on this basis. Whether this breed of intentionality is present in an actor’s conduct, and whether it *should* weigh against an actor in a dispute, are matters for judicial

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<sup>27</sup> *Baze v. Rees*, 553 U.S. 35, 53 (2008).

<sup>28</sup> 372 U.S. 335 (1963).

<sup>29</sup> One subset of such intentional action is legislation with a clearly stated purpose, so that no judicial inquiry into intent is needed. See Fallon, *supra* note 20, at 544–45 (characterizing this objective standard of intent as one that eschews inquiries into the “thinking” of specific legislators, and instead “ascribes forbidden purposes to the legislature in categorical, rule-like terms, based on objective characteristics of statutes’ language or structure”).

<sup>30</sup> *Maya Foa*, REPRIEVE, <http://www.reprive.org.uk/about/reprieve-staff-and-fellows/maya-foa/> (last visited Oct. 15, 2017) (describing nonprofit director’s oversight of “strategic initiatives” to abolish the death penalty and highlighting her reputation as “the woman behind a shortage of execution drugs”).

<sup>31</sup> See Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 744–45 (2002) (describing a petitioner who raised a *Ford* claim, barring execution of a mentally incompetent person, for the first time on his third federal habeas corpus petition due to “shoddy lawyering,” with prior counsel failing to investigate his mental health).



resolution. The foregoing explanation of subversive intent should not be mistaken for a normative argument that courts *ought* to “smoke out” subversive intent,<sup>32</sup> nor for a doctrinal proposal of when to label subversive intent the “main” intent underlying a given action.

### B. Comparing Subversive Intent

This concept of actors intending to subvert judicial protections of rights and powers may seem ancillary to the intention of harming the *beneficiaries* of these protections. When a state enacts legislation immediately yielding a shutdown of abortion clinics, would one not regard pregnant women as the intended target of this legislation? When activists undermine a state’s ability to execute convicted prisoners, is the state not the intended target of this subterfuge? But these questions present a false dichotomy—subversive intent toward the court does not supplant, but rather supplements, an intent directed toward the beneficiaries of rights or powers.

The idea of an intent directed toward those who enjoy the exercise of a right or power is perhaps more intuitive than subversive intent. In the context of constitutional rights, and powers potentially infringing on them, the concept of discriminatory intent is ubiquitous in scholarship and case law.<sup>33</sup> As a general matter, this prohibition on animus tackles illicit intent with respect to an entity, a class, or class members. Other forms of judicially prohibited intent do not involve discriminatory animus yet still involve some sort of inappropriate motive toward another person or group: Murder convictions require a showing of how a defendant intended her actions to affect another person; a prisoner’s Eighth Amendment claim concerning an alleged excessive use of force by an officer must show that the officer used the

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<sup>32</sup> Cf. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1778 (arguing that anti-evasion doctrines “produce a net benefit in constitutional law”).

<sup>33</sup> See, e.g., Fallon, *supra* note 20 (describing the role of discriminatory legislative intent in racial discrimination equal protection jurisprudence); Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (critiquing discriminatory intent jurisprudence’s reliance on colorblindness and proposing an alternative informed by race consciousness). There are notable exceptions to this equation of “improper” with “discriminatory” in scholarship on intent. For instance, though Ashutosh Bhagwat’s article, “Purpose Scrutiny in Constitutional Analysis,” seems to equate “illegitimate-purpose analys[es]” with searches for discriminatory intent, see Bhagwat, *supra* note 20, at 327–31, Bhagwat suggests that a conceptually distinct “limited-purpose analysis” involves the Court holding that “government action will be permitted *only* if prompted by particular, specified purposes, with all other purposes being presumptively invalid.” *Id.* at 338. See also *infra* Part III.C (discussing how a court’s perception of intent impacts its responses to compliant subversion).

force “maliciously and sadistically for the very purpose of causing harm.”<sup>34</sup> These forms of improper intent are primarily aimed at a group or its members.

Yet courts grappling with subversive intent encounter actors with a different aim: intent to subvert judicial protections of a right or power. This idea of subversive intent relates to action that seems improperly motivated, yet without reference to discrimination or other party-directed categories of improper intent. Without question, these categories of intent may intersect. For instance, state immigration laws challenged as backdoor regulations of an area under exclusively federal purview may intend both a subversion of preemption doctrine and an “atmosphere of intimidation” toward certain classes of people.<sup>35</sup> The point here is that subversive intent captures an element of impropriety that discriminatory intent cannot capture alone. Certain instances of discriminatory intent—such as jury strikes made on the basis of race—include no subversive intent; certain instances of subversive intent—such as police gamesmanship in criminal procedure—include no discriminatory intent. Though an individual may bear the brunt of an actor’s subversive intent to undermine judicially constructed protections of an individual right, this intent is distinct from that of harming or disadvantaging the individual herself. In this way, subversive intent exists with respect to a system or a rule, in contrast to the example of discriminatory intent, which exists with respect to an entity, class, or members of a class. This comparison of different forms of intent extends to powers as well: Subversive intent targets the judiciary, not the legislative or executive branches that exercise—through creation or enforcement, respectively—these powers. In *Glossip*, for instance, even though the activists clearly aimed to undermine a state power, their strategy responded to a *judicial* decision that offered limited protection to lethal injection.<sup>36</sup>

### C. *Subversive Intent Meets Compliance*

Compliant subversion puts subversive intent into action not by breaking or challenging the law, but through behavior that facially complies with the law. Such compliance may take many forms across substantive areas of law. As a state, instead of banning abortions outright, why not institute restrictive medical requirements that no prov-

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<sup>34</sup> *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986)); see also Alice Ristorph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1380–85 (2008) (examining illicit intent in prisoner abuse cases).

<sup>35</sup> Fan, *supra* note 21.

<sup>36</sup> See *infra* Part II.C (discussing compliant subversion in the *Baze* scenario).

iders will be able to meet?<sup>37</sup> As an activist, instead of fighting the death penalty through direct legal challenge,<sup>38</sup> why not ensure that the means of carrying it out lawfully are unavailable?<sup>39</sup> As a police officer, instead of getting a confession through formal interrogation,<sup>40</sup> why not elicit the confession without initiating an interrogation at all?<sup>41</sup> Thus, how such conduct is considered “compliant” will depend on the means by which the actor acts: passing laws that impinge on rights obliquely, through causal chains, rather than directly targeting them;<sup>42</sup> engaging in lawful, extrajudicial activism to disrupt a state power, rather than breaking the law to do so; or following a prescribed procedure in a way it was not designed to be used, rather than flouting the procedure entirely. Jessica Bulman-Pozen and David E. Pozen recently examined this last form in *Uncivil Obedience*, which describes “extreme law-following” as a method of interfering with public law values.<sup>43</sup> Motorists driving at the precise speed limit and disrupting traffic, to show how irrational the limit is; unauthorized-parking offenders paying their fines in all pennies as a form of protest; and senators meticulously following legislative rules to engage in obstructionism all represent uncivil obedience.<sup>44</sup> Such literalistic or hyperbolic adherence to law falls within the larger schema here of interfering with law without directly contradicting it.<sup>45</sup>

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<sup>37</sup> Compare *Stenberg v. Carhart*, 530 U.S. 914 (2000) (analyzing a Nebraska law explicitly banning partial birth abortion), with *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (analyzing a Texas law imposing stringent medical requirements on abortion providers).

<sup>38</sup> See *McClesky v. Kemp*, 481 U.S. 279 (1987) (rejecting constitutional challenge to the death penalty).

<sup>39</sup> See *Glossip v. Gross*, 135 S. Ct. 2726, 2734–35 (2015) (discussing anti-death penalty activists who eliminated an approved execution drug from the market).

<sup>40</sup> See *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (requiring the presence of an attorney before interrogations may proceed against a defendant in custody).

<sup>41</sup> See *Missouri v. Seibert*, 542 U.S. 600, 604 (2000) (addressing police department’s policy of “two-step” interrogations, where officers elicit confessions before the Miranda warning is given, and re-elicit them after reciting the warning); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (addressing a police officer’s offhand comments, outside a formal interrogation, which led a defendant in custody to inform the officers of the location of his murder weapon).

<sup>42</sup> Compare *Illinois Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 928 (N.D. Ill. 2014) (addressing Chicago ordinance that banned transfer and sale of firearms), with *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (addressing Chicago ordinance that banned possession of handguns in the home).

<sup>43</sup> Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 809 (2015).

<sup>44</sup> See *id.* at 810–11, 837, 845.

<sup>45</sup> Compliant subversion thus does not repeat but rather encompasses the concept of uncivil obedience. Bulman-Pozen & Pozen’s concept focuses on actors who practice “meticulous adherence to the letter of the law” in a disruptive way, see *id.* at 810–11, 867; compliant subversion more broadly includes conduct that is in compliance with law, but

Outside the context of subverting judicial protections of rights and powers are broad legal precepts proscribing conduct that technically complies with the law, but in an unauthorized way. The American Bar Association codifies a prohibition on working around its Rules of Professional Conduct.<sup>46</sup> In evidentiary practice, judges frequently scold attorneys for “back-door” attempts to circumvent orders excluding testimony or evidence.<sup>47</sup> States that enact regulations in areas of law under exclusively federal purview, such as immigration law, may be accused of indirectly regulating a no-go zone.<sup>48</sup> Thus, the general intuition that one cannot stroll through the back door when the front door is closed is common.<sup>49</sup> Underlying these proscriptions is a disdain not simply for obstruction but for *knowing* obstruction—the very idea of invoking a “back door” is to remark on the impropriety of knowingly working around a closed front door. Similarly, then, for the concept of compliant subversion, what is improper is not simply the subversion of a right or power but the intentional gamesmanship that accompanied it. The point is not simply that a right or power cannot be exercised—it is that someone has engineered this result.

In practical terms, how might we distinguish subversive compliance from compliance that has no element of gamesmanship driving it? The intent factor detailed in Part I.A is crucial here. Consider the executive officers of closely-held corporations in *Zubik v. Burwell*, arguing that their religious beliefs forbade them from providing contraceptive coverage to their employees.<sup>50</sup> At first blush, this may appear similar to compliant subversion. Through the exercise of a

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which does not necessarily use excessive or literal compliance with law as its means of subversion.

<sup>46</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N, Discussion Draft 1983) (“It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist another to do so, or do so through the acts of another.” (emphasis added)).

<sup>47</sup> See *Meyer Intellectual Props. Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1376 (Fed. Cir. 2012) (“[T]he district court ultimately prohibited any such testimony on grounds that it was an impermissible attempt to ‘back-door’ the court’s prior orders. . . .”); *United States v. Pelayo-Jimenez*, 25 F. App’x 544, 547 (9th Cir. 2001) (“The district judge did not abuse his discretion in ruling that Pelayo’s proffered evidence was a ‘back-door’ attempt to introduce the substance of his exculpatory statements made during the interrogation.”).

<sup>48</sup> See *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 917 (9th Cir. 2016) (“Despite Arizona’s clear departure from federal immigration classifications, Defendants argue Arizona’s policy is not a ‘back-door regulation of immigration.’”); see also note 29 and accompanying text.

<sup>49</sup> See, e.g., *Jones v. Cannon*, 174 F.3d 1271, 1289 (11th Cir. 1999) (“[Courts cannot] permit through the back door what is prohibited through the front.”); see generally Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611 (2011).

<sup>50</sup> *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Rather than “being compelled to take government-prescribed actions to facilitate [contraceptive] coverage,” the corporations suggested total exemption from this process, with employees instead getting coverage from

religious freedom through a proper procedural channel, the corporations would have undermined the exercise of another right. Yet, *if we accept* the *Zubik* petitioners' claims of religious faith as legitimate, this implies that their use of the judicial procedure was not intentionally subversive. The good-faith vindication of a religious liberty would obstruct a privacy liberty, but not through any procedural manipulation. By contrast, recall the example of a crafty habeas petitioner, delaying punishment through successive appeals of her conviction. If there is reason to believe that such appeals are meritless, this implies the *subversion* of procedure, even though the filing of an appeal, on its face, complies with the law as prescribed.

Together, the intent and compliance components of compliant subversion make up the practice of subverting judicial protections of rights and powers through facial compliance with the law. A recent opinion in the Supreme Court of New York, *Rivera v. Lutheran Medical Center*,<sup>51</sup> demonstrates an analogous move outside the rights/powers context. In *Rivera*, the defendant's counsel "clearly solicited" for legal representation employees of the defendant for the purpose of insulating them from informal contact with the opposing party's counsel.<sup>52</sup> The defendant's counsel knew that after a recent New York Supreme Court case, *Niesig v. Team I*, the plaintiff would be entitled to informal interviews with these employees had they not been retained as clients.<sup>53</sup> In response, the court struck back at this "particularly egregious . . . end run around the laudable policy considerations of *Niesig*," and prevented the defendants from manipulating court doctrine against its underlying purpose.<sup>54</sup> On this point, the court spoke about subversion clearly: "This impropriety clearly affects the public view of the judicial system and the integrity of the court."<sup>55</sup>

Compliant subversion simply addresses a narrower type of the conduct at issue in *Rivera*: It deals only with facially lawful efforts to subvert judicial protections *of rights or powers*. Attempts to subvert judicial rules for tactical gains in private disputes do not implicate these protections. Additionally, there are many forms of strategic subversion that affect not the protections themselves, but systems *adjacent* to these protections. Imagine a highly successful effort by anti-abortion activists to rid a given state of available outlets for lawful

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government-run health-benefits exchanges. See Brief of Petitioners at 2–3, 136 S. Ct. 1557, No. 15-00035 (2016).

<sup>51</sup> 866 N.Y.S.2d 520 (2008).

<sup>52</sup> *Id.* at 525–26.

<sup>53</sup> *Id.* at 525.

<sup>54</sup> *Id.* at 526.

<sup>55</sup> *Id.*

abortions—whether by lawfully pressuring physicians to abstain from the practice, by inflating the cost of abortions through market manipulation, or by lobbying medical technology companies to stop selling legally required equipment to abortion providers.<sup>56</sup> Given that the “abortion right” only involves judicial protection against *state-imposed burdens* on abortion, this could not be considered an instance of compliant subversion—the activists would have subverted the exercise of abortion, but not judicial protections of the abortion right.<sup>57</sup> Such subversion falls outside the scope of this inquiry.

#### D. Comparing Compliant Subversion With Other Challenges of Law

Contrasting compliant subversion with other methods of challenging the law will further clarify important characteristics of this concept. *Civil disobedience*—the trans-ideological tradition of violating legal norms through the breach of positive law<sup>58</sup>—is distinguishable from compliant subversion for two main reasons. First, it requires an open, admitted *violation* of law<sup>59</sup>—by contrast, although compliant subversion may ultimately be found unlawful, it involves the actor’s asserted compliance with law. Second, civil disobedience bears a tight connection to the rule of law.<sup>60</sup> Though some drastic forms of protest may be better characterized as rebellion than civil disobedience,<sup>61</sup> civil disobedience is linked to the rule of law by one of its defining features: acceptance of punishment.<sup>62</sup> Civil disobedients do not maneuver around a law, feigning compliance with it; they profess their

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<sup>56</sup> Cf. *Maier v. Roe*, 432 U.S. 464 (1977) (suit brought against Connecticut by indigent women who could not afford abortions, and who alleged that the State’s refusal to fund abortions that were not medically necessary violated equal protection).

<sup>57</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874, 877 (1992) (quoting *Maier*, 432 U.S. at 473–74 (“*Roe* did not declare an unqualified ‘constitutional right to an abortion’ . . . Rather, the right protects the woman from . . . a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”)).

<sup>58</sup> See Bulman-Pozen & Pozen, *supra* note 43, at 812–13 (noting the difficulty in defining civil disobedience, but noting that “[o]n all accounts, civil disobedience is marked by a breach of positive law”).

<sup>59</sup> ROBERT T. HALL, *THE MORALITY OF CIVIL DISOBEDIENCE* 50 (1971) (including publication of lawbreaking act in the definition of civil disobedience).

<sup>60</sup> See Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 *CARDOZO L. REV.* 2083, 2083 (2007) (explaining how the doctrine of civil disobedience takes the impulse of morally commanded lawbreaking and “steers that impulse toward a tightly-cabined form of illegal protest nevertheless consistent with respect for the rule of law”).

<sup>61</sup> See *id.* at 2086 (classifying civil disobedience as the “middle ground” between lawful protest and rebellion).

<sup>62</sup> See *id.* at 2090–92 (discussing the importance of acceptance of punishment in defining civil disobedience and noting debate over what constitutes acceptance of

violation of the law and, striving for its modification within a legal system, accept the consequences of its violation.<sup>63</sup> In “proxy protest” cases, for example, disobedients violate one law or policy for the purpose of demanding change of a different one.<sup>64</sup> The type of gamesmanship conceived here, by contrast, does not connote respect for the rule of law.<sup>65</sup> Unlike civil disobedience, which seeks to change a law through breaking it, compliant subversion tries to make law unworkable.

The next strategy distinguishable from compliant subversion is *concealed violation* of the law. Similar to the sleight-of-hand inherent to compliant subversion, this form of creating an end-run around the law involves concealment, yet it involves facial noncompliance with the law—compliant subversion, on the other hand, *may be found* to violate the law, but it involves no straightforward breach. Imagine a prosecutor who purports to comply with the requirement that she hand over all material exculpatory evidence to the defense, when in fact she withholds a portion of it.<sup>66</sup> Whereas actors engaging in compliant subversion are deliberately compliant with judicial protections, despite subverting these protections’ purposes, those engaged in con-

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punishment in the context of civil disobedience); HALL, *supra* note 59, at 50 (including a willingness to face punishment in the definition of civil disobedience).

<sup>63</sup> It should be noted that the view of civil disobedience as necessarily compatible with the rule of law has its opponents. *See generally* ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 45–55 (1968); Herbert J. Storing, *The Case against Civil Disobedience*, in ON CIVIL DISOBEDIENCE: AMERICAN ESSAYS, OLD AND NEW 236, 243 (Robert A. Goldwin ed., 1968).

<sup>64</sup> *See* Bulman-Pozen & Pozen, *supra* note 43, at 813 (“[I]n 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.”); Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1936 n.85 (2005); *see also*, Emily Badger, *Why Highways Have Become the Center of Civil Rights Protest*, THE WASHINGTON POST (July 13, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/07/13/why-highways-have-become-the-center-of-civil-rights-protest/?utm\\_term=.52c2601886da](https://www.washingtonpost.com/news/wonk/wp/2016/07/13/why-highways-have-become-the-center-of-civil-rights-protest/?utm_term=.52c2601886da) (documenting an action in protest of the killing of Philando Castile in St. Paul, Minnesota, where activists “marched . . . onto the highway, across all eight lanes of traffic. There, some of them sat down, a provocative gesture of civil disobedience in the face of rushing commerce”).

<sup>65</sup> *See* Buell, *supra* note 49, at 615 (“[T]he loopholer . . . treats a legal regime as an object of gamesmanship rather than respect.”); *infra* note 81 (discussing view of immigration activists as lacking respect for the rule of law).

<sup>66</sup> For a discussion of a recent case involving such conduct, see Gershman, *supra* note 1, at 547, recounting the case of Cuyahoga County prosecutor Carmen Marino. Marino regularly feigned compliance with discovery disclosure rules by holding an “open file” policy for defense attorneys to come into his office and investigate his files, rather than sending limited portions of evidence over to the defense. *Id.* at 548. This tactic was, in fact, a smoke screen to lull defense attorneys into believing they had been provided with all exculpatory materials relating to their clients, while Marino concealed critical exculpatory evidence for years, including evidence that may have exonerated individuals on death row. *Id.*

cealed violations of the law enjoy no such potential defense of “following the rules.”<sup>67</sup>

Another practice distinguishable from compliant subversion is *direct legal confrontation*, either through legislation or litigation. Take the Nebraska law at issue in *Stenberg v. Carhart*.<sup>68</sup> Unlike legislation setting out requirements for women’s health—legislation which indirectly impacts the availability of abortions—the law in *Stenberg* banned all partial birth abortions, with minimal safety exceptions.<sup>69</sup> The Court’s analysis in finding the law unconstitutional was “straightforward”<sup>70</sup>: *Roe v. Wade*<sup>71</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>72</sup> had both clearly established that a health exception was required when a state regulated postviability abortions, and the Nebraska law banned, in part, postviability abortions without a health exception.<sup>73</sup> The case involved no legislative end-run around the undue burden standard—the Nebraska law confronted it, head on.

*Evasion*<sup>74</sup> and *opportunism*,<sup>75</sup> the final types of legal maneuvering to compare with compliant subversion, share with this concept the element of legally compliant gamesmanship, but lack its element

<sup>67</sup> See *In re Lott*, 366 F.3d 431, 433 n.1 (6th Cir. 2004) (detailing the “shameful track record” of Marino’s violation of the law).

<sup>68</sup> 530 U.S. 914 (2000) (finding law banning all partial birth abortions with minimal safety exceptions unconstitutional).

<sup>69</sup> See NEB. REV. STAT. ANN. § 28-326(9) (LexisNexis 2007). Compare *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (holding provisions of Texas law regulating abortion facilities unconstitutional for placing a substantial obstacle in the path of women seeking a previability abortion), with *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>70</sup> *Stenberg*, 530 U.S. at 938.

<sup>71</sup> 410 U.S. 113 (1973).

<sup>72</sup> 505 U.S. 833 (1992).

<sup>73</sup> Not all of the Court’s members agreed that the case’s resolution was straightforward. Compare *Stenberg*, 530 U.S. at 938 (“Requiring . . . [a health] exception in this case is no departure from *Casey*, but simply a straightforward application of its holding.”), and *id.* at 955 (Scalia, J., dissenting) (“[I]t is really quite impossible for us dissenters to contend that the majority is *wrong* on the law—any more than it could be said that one is *wrong in law* to support or oppose the death penalty, or to support or oppose mandatory minimum sentences.”), with *id.* at 957 (Kennedy, J., dissenting) (explaining that any addition of a health exception would be meaningless given the Court’s granting of expansive discretion to individual physicians in making this health determination) and *id.* at 1010 (Thomas, J., dissenting) (“*Roe* and *Casey* say nothing at all about cases in which a physician considers one prohibited method of abortion to be preferable to permissible methods.”). None of the dissenters, however, disputed that the Nebraska legislature had attempted to proscribe a method of abortion without a health exception; the state of Nebraska conceded as much on appeal, and simply argued there was “no such need” for an exception. *Id.* at 931.

<sup>74</sup> See generally Buell, *supra* note 49 (discussing the problem of evasion and offering good faith doctrine as one solution to evasion in contract and corporate law); see also Denning & Kent, Jr., *supra* note 32, at 1796–815 (assessing the benefits and tradeoffs of anti-evasion doctrines).

<sup>75</sup> See generally Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* (Harvard Pub. Law Working Paper No. 15-13, 2015), <https://papers.ssrn.com/>



of subversive intent. These concepts describe conduct that circumvents legal rules to avoid sanction or to maximize personal benefit. Judicial anxiety toward evasion and opportunism has longstanding roots, dating back to the famous case of *Riggs v. Palmer*, where a young boy intentionally poisoned his grandfather for the purpose of acquiring property in the latter's will.<sup>76</sup> Like subversive compliance, opportunistic and evasive ploys work around legal rules to achieve facially proper results (in the *Riggs* case, the execution of a will). Without question, a more generalized version of compliant subversion's intent element is present in these concepts as well: A law evader, as Samuel W. Buell explains, "acts intentionally and does so with respect to the relationship between her conduct and a legal regime."<sup>77</sup> Buell and others have likened this intentionality to bad faith, an "endeavor to manipulate the legal process in ways that [one] knows exceed recognized limits of fair play."<sup>78</sup> This echoes the earlier discussion of subversive intent as an intent with respect to the judiciary. Evasion or opportunism, with their "bad faith" intent and gamesmanship, are distinguishable from compliant subversion simply due to their breadth. These concepts do not speak narrowly to an intent to undermine the judiciary's protection of rights and powers. They may speak to all sorts of dishonesty, manipulation, or double-heartedness with respect to the judiciary, its rules, and its procedures.<sup>79</sup> Though the subversive intent of compliant subversion builds on the idea of bad faith, it addresses a more specific target.

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sol3/papers.cfm?abstract\_id=2617413 (exploring the concept of equity in private law as a "second-order refinement to the law where the law invites opportunism").

<sup>76</sup> 22 N.E. 188, 189 (N.Y. 1889) ("It is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed . . . give this property to the murderer.").

<sup>77</sup> See Buell, *supra* note 49, at 621.

<sup>78</sup> See *id.* at 646.

<sup>79</sup> Cf. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 926, 930, 938 (2016) (laying out varieties of "constitutional bad faith," including "double-heartedness or imperfect commitment to the Constitution[,] . . . unwarranted deviations from constitutional convention. . . . [and] minimizing of inconvenient facts about the Constitution and the judicial role" (emphasis in original)); Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503 (2009) (exploring concept of a political goal where "some parts of the Constitution's text seem fairly clear in prohibiting people from reaching that goal directly, yet . . . there appear to be other ways of reaching the goal that fit comfortably within the Constitution"). Pozen's article, while closer to this Note's focus on constitutional law, tackles broader questions than subversions of rights and powers: Pozen focuses on the relative absence of constitutional doctrine on "bad faith" (compared to private and international law), despite its pervasiveness in the conduct of constitutional actors. Our conceptual projects diverge further as Pozen embarks on his main task: understanding how self-deception with regard to one's normative commitments—"Sartrean bad faith"—leads to excessive "bad faith talk" (accusations of others' intentions) in constitutional culture. Pozen, *supra*, at 947–54.

## II

## THREE TYPES OF COMPLIANT SUBVERSION

With this understanding of compliant subversion as a theory, we can now explore how it appears in practice. Following the earlier explanation of the three kinds of judicial protections of rights and powers in Part I.A—judicial procedure, judicial doctrine regulating particular actors, and judicial doctrine not regulating particular actors—this section will illuminate how actors subvert each of these protections. Once this is clear, we can examine how courts respond to compliant subversion (Part III), and when these responses are inappropriate (Part IV).

*A. Compliant Subversion of Judicial Procedure*

When rights and powers rely on a judicial procedure in order to be exercised, adversaries of the given right or power may target the procedure through facially lawful obstruction. As a reminder, this is not the only path to subversion. Suppose an immigrant rights activist aims to disrupt the federal government's power to remove inadmissible noncitizens without a hearing under the Immigration and Nationality Act.<sup>80</sup> One option is to provide legal counsel to removable noncitizens who cross the border and assist them with contesting their orders of removal or applying for asylum. Another option is to corral fellow activists to physically—and unlawfully—surround offices of the Immigration and Customs Enforcement (ICE) in order to block government buses from taking deportees away. These represent two opposite ends of the legality spectrum, yet both involve direct confrontation.

Compliant subversion of judicial procedure is a third option, on murkier legal ground and not involving any sort of direct challenge to a state power (in this case, the power to remove inadmissible noncitizens). To continue with the immigration example, imagine thousands of U.S.-residing undocumented immigrants crossing the border into Mexico, promptly returning through the same border, and immediately filing for asylum, flooding ICE offices with thousands more petitions than these offices could handle. Through willing submission to ICE detention, this massive mobilization could clog the judicial procedures established for reviewing asylum claims, and, in effect, could undermine the state's channels for removing inadmissible

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<sup>80</sup> See 8 U.S.C. § 1225(b)(1)(A)(i) (“If an immigration officer determines that an alien . . . is inadmissible . . . the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”).

noncitizens. Yet these undocumented activists would have violated no law in subverting this state power.<sup>81</sup> Akin to these “clogging” efforts is the prior example of a habeas petitioner whose repetitive appeals risk endlessly delaying a judicial proceeding and the state’s penal power through which it functions.

Compliant subversion of judicial procedure may involve not only protected powers, but protected rights, too. In the right-to-counsel context, Martin Guggenheim explains how state underfunding of indigent defender systems infringes on judicial procedure.<sup>82</sup> When inadequately prepared public defenders—who “should be seen as the investigative arm of the judiciary”—are unable to investigate the State’s charges, there is a resulting “systemic failure of courts to perform their essential oversight function.”<sup>83</sup> To Guggenheim’s formulation we might add that this compliant subversion of judicial procedure results in a weak, unprotected Sixth Amendment right to counsel.<sup>84</sup> When the state underfunds indigent defense, a critical component of criminal judicial procedure is thwarted, and this leaves individuals with a practically mooted right. In sum, when rights or powers require judicial procedures for their functioning, and when directly challenging these rights or powers seems unwise, subversive actors may target the procedures themselves.

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<sup>81</sup> This instance of compliant subversion is based on an actual protest from 2013, organized by the National Immigrant Youth Alliance (NIYA). Three undocumented activists, all of whom potentially qualified for DACA relief—meaning that, unlike typical asylum seekers, they were potentially exempt from deportation for reasons unrelated to asylum—left the United States for Mexico and joined with six other activists who had either been deported or left voluntarily. See Leti Volpp, *Civility and the Undocumented Alien*, in *CIVILITY, LEGALITY, AND JUSTICE IN AMERICA* 96 (Austin Sarat, ed., 2006). Together, this group of nine—known as the “Dream 9”—approached the United States border from Nogales, Mexico, with supporters holding a nearby rally and streaming it on the Internet. *Id.* Upon detention, they requested humanitarian parole and asylum, and staged a hunger strike to draw attention to the Obama administration’s deportation policy. All nine passed a credible fear screening interview. *Id.* at 97. In response, one online petition denouncing these activists claimed that they had “no respect for United States sovereignty, the rule of law, or the thousands of people who legitimately seek asylum from regimes around the globe that persecute and torture their own citizens.” *Id.* at 98 n.116.

<sup>82</sup> Martin Guggenheim, *The People’s Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395 (2012).

<sup>83</sup> *Id.* at 400–01. See also James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1353 n.25 (2015) (characterizing plea bargaining as a context in which “the prosecutor serves as the de facto judge of guilt or innocence”).

<sup>84</sup> Guggenheim, by contrast, writes that subversion of judicial procedure results in a separation of powers problem, and a violation of what he calls the “people’s right” to counsel. See Guggenheim, *supra* note 82.

## B. *Compliant Subversion of Judicial Doctrine Regulating Particular Actors*

An actor whose conduct is explicitly regulated by a judicial doctrine may find methods of technically complying with the doctrine, yet subverting its underlying purpose. For instance, legislatures may devise innovative methods of subverting judicial doctrines, attempting to skirt these doctrines' explicit regulation of state action. Legislative enactments of onerous restrictions on abortion providers are a prime example of this, as discussed in Part I.D.<sup>85</sup> An upstream legislative regulation of the firearm market, rather than a wholesale ban on firearms,<sup>86</sup> could similarly subvert an individual right, here the Second Amendment right to bear arms.

The enforcement of law is another way for regulated actors to subvert judicial protections. This is most evident in criminal procedure. The *Miranda v. Arizona*<sup>87</sup> decision provided judicial protection against law enforcement interference with the right to avoid self-incrimination;<sup>88</sup> after *Miranda*, the admissibility at trial of any custodial confession was conditioned on a waiver of one's rights.<sup>89</sup> Yet this has not prevented law enforcement officers from engaging in creative tactics to elicit voluntary confessions while still facially complying with *Miranda*. The facts underlying *Missouri v. Seibert*<sup>90</sup> provide one such example. After detaining Patrice Seibert, an officer questioned Seibert and elicited a confession without reciting the *Miranda* warning.<sup>91</sup> After a short break, the same officer gave Seibert the *Miranda* warning, obtained a signed waiver of her rights, and then asked her to *repeat* the pre-*Miranda* confession—Seibert assumed her pre-*Miranda* utterances had already incriminated her, and she confessed.<sup>92</sup> By engaging in facially compliant yet subversive behavior, the officer subverted the *Miranda* doctrine regulating him.

Other parts of *Miranda* are similarly susceptible to regulated actors—here, law enforcement officials—working around and sub-

<sup>85</sup> See *supra* notes 68–73 and accompanying text.

<sup>86</sup> See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (addressing a Chicago ordinance that banned handguns in the home).

<sup>87</sup> 384 U.S. 436 (1966).

<sup>88</sup> U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

<sup>89</sup> *Miranda*, 384 U.S. at 444 (“[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).

<sup>90</sup> 542 U.S. 600 (2004).

<sup>91</sup> *Id.* at 604–05 (“Officer Hanrahan questioned her without *Miranda* warnings for 30 to 40 minutes, squeezing her arm and repeating ‘Donald was also to die in his sleep.’”).

<sup>92</sup> *Id.* at 605.

verting the Fifth Amendment protection. For instance, once the *Miranda* warning has been given, if an individual invokes her right to an attorney, “the interrogation must cease until an attorney is present”<sup>93</sup>—but what if the officers can elicit inculpatory evidence without actually “interrogating” the suspect? In *Rhode Island v. Innis*,<sup>94</sup> after detaining an unarmed Thomas Innis on suspicion of murder and robbery, two officers openly discussed their concerns that nearby handicapped children would find the suspect’s gun, as Innis sat within earshot in the backseat of the officers’ car.<sup>95</sup> Innis had already invoked his right to counsel, but after hearing the officers’ conversation, he confessed knowledge of the gun’s location because he “wanted to get the gun out of the way because of the kids in the area.”<sup>96</sup> By avoiding formal interrogation, the officers successfully subverted the judicial doctrine protecting Innis’s Fifth Amendment right to counsel and acquired a confession. Similarly creative tactics arise in the Fourth Amendment context, where law enforcement officers may facially comply with the prohibition against unreasonable searches and seizures<sup>97</sup> yet subvert the essence of this right. Examples include arresting and removing a non-consenting occupant of a residence as a means of gaining consent from a co-occupant, when officers wish to search the residence;<sup>98</sup> and manufacturing “exigent circumstances” in order to invade private residences.<sup>99</sup>

Prosecutors, too, may subvert judicial doctrine regulating their conduct and protecting individuals charged with crimes. End-runs around the strictures of *Brady v. Maryland* are one example. Unlike the concealed violations of *Brady* discussed in Part I.D,<sup>100</sup> these end-runs involve prosecutorial compliance with the *Brady* requirement of turning over exculpatory evidence to the defense, but doing so in a manner so confusing or dilatory that the purpose underlying the right is moot—hiding the exculpatory material in a 500,000 page file, or

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<sup>93</sup> *Miranda*, 384 U.S. at 473–74.

<sup>94</sup> 446 U.S. 291 (1980).

<sup>95</sup> *Id.* at 294–95.

<sup>96</sup> *Id.* at 295.

<sup>97</sup> U.S. CONST. amend. IV (“The right of the people to be secure in their persons, . . . against unreasonable searches and seizures, shall not be violated . . .”).

<sup>98</sup> *Cf.* *Fernandez v. California*, 134 S. Ct. 1126, 1134 (2014) (considering the circumstances under which consent from only one occupant is sufficient, despite an absent co-occupant’s denial of consent).

<sup>99</sup> *Cf.* *Kentucky v. King*, 563 U.S. 452, 470 (2011) (addressing respondent’s contention that a “police-created exigency” had enabled law enforcement officers to enter respondent’s residence).

<sup>100</sup> *See supra* notes 66–67 and accompanying text.

turning over the material on the eve of trial.<sup>101</sup> In the face of judicial protections of individual rights, prosecutors may develop these and other tactics in order to facially comply with the law while creatively subverting such rights.<sup>102</sup>

One should not confuse the subversion of judicial procedure with the *use* of judicial procedure to subvert *doctrinal* protections regulating specific actors. Consider Alabama House Bill 494, which modified the state's judicial bypass system, a procedure in which a minor whose parents would not consent to her abortion can petition the court for a waiver of the consent requirement.<sup>103</sup> The bill used judicial procedure to subvert doctrinal protections of abortion through a causal chain: The new law allowed reviewing courts to appoint a *guardian ad litem* to represent "the interests of the unborn child," thus giving the hearing an adversarial character<sup>104</sup> and allowing this party (and other statutorily permitted adversaries<sup>105</sup>) to adjourn the bypass hearing to prepare evidence against the minor.<sup>106</sup> This effectively ensured that adverse parties would utilize these delays, as the delays themselves furthered these parties' interests of running out the minor's biological clock<sup>107</sup> and shutting the "brief window of time within which to obtain an abortion."<sup>108</sup> Such use of judicial procedure, from the minor's perspective, constituted subversion of the judicial *doctrine* forbidding undue state-imposed burdens on abortions rather than subversion of the judicial procedure itself.

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<sup>101</sup> See *Leka v. Portuondo*, 257 F.3d 89, 99 (2d Cir. 2001) ("[Defendant] Leka demanded *Brady* material twenty-two months before trial. Although the prosecution indicated early on in this case that a police officer had witnessed the shooting and could identify Leka, the prosecution did not identify Garcia by name until three business days before trial."); *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997), *abrogated by* *United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004) (discussing an alleged end-run around *Brady* involving prosecutorial disclosure of a 500,000-page file without flagging a relevant, exculpatory portion).

<sup>102</sup> See generally Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (documenting the growth of aggressive, deceptive tactics among prosecutors).

<sup>103</sup> Ala. Code § 26-21-4 (West 2015).

<sup>104</sup> *Id.* § 26-21-4(j).

<sup>105</sup> *Id.* § 26-21-4(i) (automatically joining the District Attorney as a party to all judicial bypass proceedings); *id.* § 26-21-4(l) (allowing the minor's parent(s) or legal guardian to join the proceeding).

<sup>106</sup> *Id.* § 26-21-4(k).

<sup>107</sup> Memorandum in Support of Plaintiffs' Motion for Preliminary Injunctive Relief at 29, 30 n.9, *Reprod. Health Servs. v. Strange*, 204 F. Supp. 3d 1300 (M.D. Ala. 2016) (No. 2:14-CV-1014-SRW), 2014 WL 12749207 (discussing the District Attorney's obligation to zealously represent the State as making the DA "effectively *obligated* to appeal," and noting how calculated delays could "potentially delay[] the abortion past the point where the minor is able to obtain one").

<sup>108</sup> *Id.* at 31.

### C. *Compliant Subversion of Judicial Doctrine Not Regulating Particular Actors*

Other instances of compliant subversion involve actors subverting judicial doctrine when the doctrine does not cover them or prohibit their conduct explicitly. The activist response to *Baze*'s protection of lethal injection is a quintessential example. As mentioned, the *Baze* Court clarified the constitutional boundary of a state's power to execute by lethal injection: Without an initial dose of sodium thiopental, a lethal injection execution would violate the Eighth Amendment.<sup>109</sup> Yet nowhere in this opinion (or any other) was the state's power to procure this drug protected from outside interference. Thus, the aforementioned campaign to eliminate sodium thiopental from the market may have operated in the shadow of judicial doctrine, but it was not explicitly the subject of regulation.

Comparable examples of compliant subversion could appear in the Sixth Amendment context, where, since *Gideon v. Wainwright*, individuals have enjoyed a right to counsel in criminal cases. In cases where indigent clients cannot otherwise afford counsel, *Gideon* conditions the state's penal power on the provision of a defense attorney to these individuals. In this way, although public defender offices are not regulated by this judicial doctrine, an office could subvert the state's ability to prosecute indigent clients by refusing to accept new clients—simultaneously undermining the *Gideon* doctrine and preventing the State from prosecuting cases.<sup>110</sup> These subversions of judicial doctrine are categorically different from cases where the subversive actor is regulated by the very doctrine she subverts, but this behavior still interacts with judicial doctrine in a deliberate, effective way. And, as the next Part illuminates, even this type of subversion, like the first two types, may tempt the Supreme Court to strike back.

## III

### CONSTRAINING COMPLIANT SUBVERSION

The following section demonstrates how courts recognize and respond to compliant subversion as an independent concept, and not as a component of traditional intent analysis. Without using the terminology of “compliant subversion,” courts in different areas of law

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<sup>109</sup> *Baze v. Rees*, 553 U.S. 35, 53 (2008).

<sup>110</sup> For an examination of a real-life analogue of this scenario in Missouri, see Paige Masters, Note, *Caught Between a Rock and a Hard Place: A Missouri Court's Tough Choice and the Power to Change the Face of Indigent Defense*, 37 OKLA. CITY U. L. REV. 97, 103–04 (2012) (discussing the crisis of the public defense system in Missouri, which is unable to comply with *Gideon*'s constitutional protection).

have used various tools to respond to essentially similar conduct— attempts to subvert judicial protections of rights and powers. This section adds to prior scholarship on how courts approach actors evading constitutional doctrine<sup>111</sup> or opportunistically exploiting gaps in private law.<sup>112</sup> The purpose here is not to discern an explanatory variable that accounts for when courts do and do not rely on the presence of compliant subversion. The search for such X-factors may develop more systematically in subsequent research.<sup>113</sup> Nor does this Part add to the swelling, scholarly chorus on how courts often deal incoherently with improper intent.<sup>114</sup> Instead, it completes the descriptive claim of this Note: Across areas of law, courts are aware of and respond to intentional, facially compliant conduct that subverts judicial protections of rights and powers.

### A. *Explicit Reliance on Compliant Subversion*

If courts relied on the presence or absence of compliant subversion to decide a case, what would this look like? In several areas of law, courts have sketched out answers, fashioning standards for weighing compliant subversion against a party. Some standards rely on the *presence* of compliant subversion and weigh it against a party. One example is Justice Marshall’s dissent in *Rhode Island v. Innis*, which parries with the majority over whether an actor should be cen-

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<sup>111</sup> Brannon P. Denning and Michael B. Kent, Jr. offer the concept of “anti-evasion doctrines” (AEDs) in constitutional law: supplementary, standard-like decision rules that help enforce the constitutional principles underlying initial decision rules. *See* Denning & Kent, *supra* note 32, at 1776 (“AEDs seek to prevent officials from complying with the form of the previously announced rule, while subverting the substance of the constitutional principle the rule sought to implement.”). Samuel Buell similarly explores the practice of evading law and, after cataloguing various unsatisfactory responses to evasion, advocates a response that relies on good faith doctrine. *See generally* Buell, *supra* note 49.

<sup>112</sup> *See generally* Smith, *supra* note 75 (suggesting that courts in the modern era continue to employ equitable principles as safety valves when opportunistic actors attempt to exploit gaps in private law).

<sup>113</sup> In the related context of bad faith doctrine, David Pozen has taken up this “why?” question. *See* Pozen, *supra* note 79, at 887, 909 (“[T]he Article aims to explain why courts have been reluctant to enforce norms against constitutional bad faith as such.”).

<sup>114</sup> *See* Bhagwat, *supra* note 20, at 319 (“Across the spectrum, . . . one central theme emerges from the literature: there is a need for a principled theory of permissible and compelling governmental purposes, and the Supreme Court has failed to articulate such a theory.”); Fallon, *supra* note 20, at 528 (“[L]eading cases display varied approaches to the identification of legislative intent, but without clear awareness of the diversity. Some of the Supreme Court’s analyses are wholly coherent. Others manifest ambiguity or confusion. But modern constitutional law has failed to settle on a single, intelligible conception of legislative intent.”); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1789 (2008) (lamenting the “incoherence of modern doctrine” in analyzing hidden statutory purposes).



sured for subverting judicial power.<sup>115</sup> In asking whether Innis was “interrogated” for Fifth Amendment purposes, the majority shies away from examining whether the law enforcement officers *intended* their colloquy about endangered handicapped children to influence Innis into confessing. Instead, it relies on an objective standard, limiting the definition of interrogation to “words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.”<sup>116</sup>

Justice Marshall, in dissent, claims to be “substantially in agreement” with this definition of interrogation, and at first glance, the test he offers appears similar: “[T]he *Miranda* safeguards apply whenever police conduct is intended or likely to produce a response from a suspect in custody.”<sup>117</sup> Yet the gap between these two standards corresponds precisely to whether compliant subversion matters. Marshall’s test would include officer conduct creatively—even absurdly—designed to elicit a response, despite there being objectively little reason to think such conduct would yield self-incrimination. As the majority notes, most of the time a police officer designs conduct to elicit self-incrimination, the conduct will be of a type that the officer should reasonably know will elicit a response.<sup>118</sup> For instance, if two officers carefully hold an “offhand” conversation in front of a tight-lipped suspect about how judges are more likely to enhance sentences for defendants who delay confessing their crimes, the intended effect is one that the reasonable officers would expect to happen. But Marshall’s intentionality test would not require any comparison to the hypothetical reasonable officer; it would simply forbid any subversively intended police conduct that successfully elicited self-incrimination.

To illuminate this difference, consider a spin on the *Innis* facts: Two officers hold an “offhand” conversation in front of a detained suspect about a nonexistent nearby kennel, and feign concern over a dog escaping from that kennel, finding the suspect’s gun, stepping on the trigger, and killing itself. No reasonable officer would expect that such an outlandish story would cause a suspect to incriminate herself

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<sup>115</sup> See *supra* Part II.B (discussing compliant subversion by regulated actors).

<sup>116</sup> *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980).

<sup>117</sup> *Id.* at 305 (Marshall, J., dissenting). Marshall claims that this intentionality-inclusive test mirrors the majority’s due to a footnote in the majority opinion dismissing the claim that “intent of the police is irrelevant,” as it “may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response.” *Id.* at 305 (quoting *id.* at 301 n.7 (majority opinion)).

<sup>118</sup> *Id.* at 301 n.7 (majority opinion) (“[W]here a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.”).

on the spot. Yet under Justice Marshall's standard, simply because the "offhand" conversation was *intended* to elicit a response—or, to use this Note's framework, because the actors engaged in compliant subversion—such action is forbidden, whereas under the majority's standard it is not.

The other method of explicit reliance on compliant subversion is a standard that regards conduct as presumptively permissible in the *absence* of compliant subversion. For instance, Justice Kennedy's concurrence in *Seibert* relies heavily on compliant subversion in creating a standard against subversively intended, "two-step" interrogations.<sup>119</sup> Unlike the plurality's conclusion that "whenever a two-stage interview occurs," an intermissive *Miranda* warning is presumptively ineffective, Kennedy presumes two-stage interviews to be permissible.<sup>120</sup> For Kennedy, such interviews will be barred only if compliant subversion is evident; that is, only if the court finds that law enforcement acted in "a calculated way to undermine" judicial protections of the Fifth Amendment.<sup>121</sup> The *Seibert* concurrence and other similar standards thus rely on the *absence* of compliant subversion as a way of validating actor conduct.<sup>122</sup>

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<sup>119</sup> *Missouri v. Seibert*, 542 U.S. 600, 620–22 (2004) (Kennedy, J., concurring) (criticizing the interrogating officers for "intentional misrepresentation"; "deliberate violation" of *Miranda*; basing their two-step interrogation on an "assumption" that it would undermine *Miranda*; and the "calculated way" in which they devised this practice).

<sup>120</sup> *Id.* at 621 (Kennedy, J., concurring).

<sup>121</sup> *Id.* at 622.

<sup>122</sup> *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 509–10 (1991) (Marshall, J., dissenting) (discussing the standards governing the abuse of the writ doctrine). In *Zant*, Justice Marshall again pushes an intentionality-focused inquiry, but this time with respect to the *absence* of subversive intent. *Cf. Innis*, 446 U.S. at 305 (1980) (Marshall, J., dissenting) (advancing an inquiry focused on conduct with subversive intent). Justice Marshall advocates for "bad faith" intentionality to be the hallmark of abuse of the writ of habeas corpus: Petitioners would only be barred from subsequent habeas petitions in cases of "the deliberate abandonment of a claim[,] the factual and legal basis of which are known to the petitioner (or his counsel) when he files his first petition" or where the prisoner has filed another petition "to achieve some end other than expeditious relief from unlawful confinement—such as to 'vex, harass, or delay.'" *Zant*, 499 U.S. at 509 (Marshall, J., dissenting) (quoting *Sanders v. United States*, 373 U.S. 1, 18 (1963)). Thus, Marshall would have presumed successive habeas petitions to be proper *unless* compliant subversion were apparent. Instead, the majority settled on an objective "cause and prejudice" standard, where the presence or absence of subversive intent is irrelevant to adjudicating a habeas petitioner's successive claims. *Id.* at 493 ("[T]he cause standard requires the petitioner to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim in state court.") (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Scholarship on good faith/bad faith distinctions are analogous to the positive/negative distinction described here. *See Buell, supra* note 49, at 641 ("Good faith doctrine . . . operates defensively. . . . [It] sanctions only those who harbor genuine purpose to violate the normative obligations that the rule is in the business of enforcing."); Pozen, *supra* note 79, at 898 ("Several lines of doctrine . . . are formulated in a manner that does not so much punish bad faith with a special sanction as reward good faith with a special reprieve . . .").

### B. *Implicit Reliance on Compliant Subversion*

Not all reliance on compliant subversion in deciding cases is so explicit. Justice Alito's opinion in *Glossip v. Gross* is a somewhat complicated example. The opinion requires that, for "all Eighth Amendment method-of-execution claims," a petitioner must "identify a known and available alternative method of execution that entails a lesser risk of pain."<sup>123</sup> The Court then finds that the petitioner has failed this test.<sup>124</sup> It cites directly to the 2008 *Baze v. Rees* opinion for the known-and-available-alternative test.<sup>125</sup> A basic understanding of the *Baze* opinion is crucial for understanding the leap the *Glossip* Court made to establish this requirement—and thus for understanding what factors, such as compliant subversion, may account for this leap.

The *Baze* plurality had ruled against a petitioner who had identified a proposed alternative method of execution, which the Court found was not substantially less risky than the existing method.<sup>126</sup> The Court held that when an alternative is only "slightly or marginally safer" than the existing method, the condemned prisoner's claim must fail.<sup>127</sup> Thus, the Court's decision "pertained only to challenges premised on the existence of such alternatives."<sup>128</sup> Subsequently, the *Glossip* Court purported to find in *Baze* a straightforward test for method-of-execution claims. Yet unlike *Baze*, in *Glossip* no such alternative was allegedly available. Whereas *Baze* rested on concerns over "transform[ing] courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology,"<sup>129</sup> these concerns did not exist in *Glossip*; the petitioners

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<sup>123</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> As a separate threshold matter, Justice Sotomayor takes issue with treating the plurality's known-and-available-alternative requirement as controlling law, given that "none of the Members of the Court whose concurrences were necessary to sustain the *Baze* Court's judgment articulated a similar view." *Id.* at 2793 (Sotomayor, J., dissenting); see also Justin F. Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 160 (2009) ("Chief Justice Roberts's plurality opinion [in *Baze*], which purports to provide a framework for use by lower courts evaluating the constitutional propriety of local lethal injection protocols, garnered the votes of only three Justices, leaving the individual states and lower courts to quarrel over seven separate opinions."). Justice Sotomayor's analysis proceeds by hypothetically accepting the premise that the plurality's view controls, and attacking its relevance to the present case on the merits. *Glossip*, 135 S. Ct. at 2793–95 (Sotomayor, J., dissenting).

<sup>127</sup> *Glossip*, 135 S. Ct. at 2794 (Sotomayor, J., dissenting).

<sup>128</sup> *Id.*

<sup>129</sup> *Baze v. Rees*, 553 U.S. 35, 51 (2008).

touted no new and improved methods of execution. The *Glossip* opinion thus removed the *Baze* premise of an existing alternative, and fashioned an absolute bar to Eighth Amendment method-of-execution claims that do not proffer alternatives.

What could explain the alteration in this standard between 2008 and 2015? Justice Alito leaves little room for imagination: He devotes two pages of his majority opinion to describing the compliant subversion of “anti-death-penalty advocates,” who responded to *Baze* by eradicating the supply of approved execution drugs.<sup>130</sup> All that had changed between *Baze* and *Glossip* was a deliberately dried-up market for sodium thiopental and pentobarbital—and the Court implicitly bases its altered legal standard on the presence of compliant subversion in creating this result. This point is what Justices Sotomayor and Breyer fail to acknowledge in their otherwise-cogent dissents: Compliant subversion of judicial doctrine protecting Oklahoma’s power to execute appears fundamental to Justice Alito’s curious imposition of a known-and-available-alternative requirement when he is aware that the known alternative is unavailable. The artificiality of this requirement—turning the Eighth Amendment into a conditional protection—becomes clearer when one understands Justice Alito’s view that it is the factual circumstances underlying this case that are artificial; the constitutional standard is updated to account for an artificial reality. Theoretically, Justice Alito’s protection of the state’s power to execute may have rested solely on the absence—as opposed to the intentional *elimination*—of barbiturates. Yet his attention to the subversive intent of “anti-death-penalty advocates” belies this theory.<sup>131</sup> Without explicitly placing a thumb on the scale for the state due to compliant subversion, Justice Alito relies on the subversive acts of global activists to rework the *Baze* rule into an impractical requirement for the *Glossip* petitioners.

Other instances of implicit reliance do not forthrightly integrate the intentional efforts of subversive actors into a legal standard, but gesture toward the gravity of such workarounds when they affect rights or powers. Numerous decisions in the Fifth Amendment inverse condemnation context reflect this blended approach.<sup>132</sup> It is important to note that in the takings context, courts are generally uninterested in a corrupt or illicit intent if a regulatory taking has occurred—the *effect*

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<sup>130</sup> *Glossip*, 135 S. Ct. at 2733–34.

<sup>131</sup> *Id.* at 2733; see also *supra* note 9 and accompanying text.

<sup>132</sup> For a more extensive analysis of how courts respond to governmental actors who “skirt the constitutional imperative” of the Fifth Amendment, see Denning & Kent, *supra* note 32, at 1777, 1784, 1787, 1792, 1795, 1823–24.

is what matters.<sup>133</sup> So when might the intent of a municipality or its officers be relevant? When the intent in question is to avoid legal classification as a taking at all. Consider the case of *Amen v. City of Dearborn*,<sup>134</sup> where residents of Dearborn, Michigan, alleged that the city had sought to avoid the Fifth Amendment's proscription against taking property for public use without just compensation.<sup>135</sup> The Sixth Circuit described how the city had engaged in numerous tactics to drive down the value of these residents' property and pressure them to sell to the city, including making press releases that the residents' area would be "cleared," posting signs in the neighborhood encouraging owners to sell their property, requiring homeowners to perform maintenance not required by the building code, and allowing property acquired by the city to remain vacant and unprotected—all done to "induce neighbors to sell."<sup>136</sup> In ruling for the plaintiffs, the court noted that "the City chose not to invoke its condemnation powers, but, rather, elected to engage in a deliberate course of conduct to force the sale of private property at reduced value."<sup>137</sup> Though the legal standard remained an effect-oriented question (i.e. was the property "actually taken" within the meaning of the Fifth Amendment?), the court relied on the intentional subversion of Fifth Amendment doctrine in ruling against the city, without explicitly modifying the legal standard for Fifth Amendment takings. Other courts have downplayed the intentionality of the inverse condemnation, but have highlighted aggravating factors that the city took to subvert the right to just compensation.<sup>138</sup> Even when subversive intent does not work its way into an explicit legal standard, courts may implicitly weigh compliant subversion against a party.

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<sup>133</sup> See Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 59 (1988) ("[In contrast to the clarity of racial discrimination being improper], city officials may know that they are not supposed to 'take' private property without paying just compensation, but they will have a much more hazy understanding as to what statements on their part will constitute relevant evidence that they have acted unconstitutionally."); Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 14 (2007) ("The law of regulatory takings . . . is almost entirely effects oriented. Purpose is irrelevant if a regulation effects a permanent dispossession or if it results in the complete loss of all economically viable uses . . .") (footnotes omitted). This comports with the high level of deference accorded to legislatures in examining whether proffered public purposes for takings are legitimate. See generally *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>134</sup> 718 F.2d 789 (6th Cir. 1983).

<sup>135</sup> *Id.* at 791.

<sup>136</sup> See *id.* at 795 (listing related district court findings).

<sup>137</sup> *Id.* at 797.

<sup>138</sup> See *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977) (finding a compensable taking in the City's "intended" appropriation of the plaintiff's property through devaluation of the neighborhood).

### C. Consideration of a Lack of Valid Purpose

Another way courts address compliant subversion is by focusing on the absence of a proper purpose, rather than on the presence of an improper one.<sup>139</sup> Such an approach may be especially appealing where “ferreting out” subversive intent would be practically and conceptually complex.<sup>140</sup> Adjudication based on the undue burden standard in abortion jurisprudence reflects this approach and demonstrates a debate over purpose-scrutiny *within* the “pro-choice” camp. The petitioners in *Whole Woman’s Health* desired a ruling from the Court that would have explicitly found the Texas law to violate *both* parts of the disjunctive undue burden test—forbidding a purpose *or* effect of hindering abortion.<sup>141</sup> But Justice Breyer, rather than explicitly condemning an illicit purpose, only addressed the Texas legislature’s compliant subversion by framing the law as lacking a legitimate, rational purpose, rather than clearly having an improper one.<sup>142</sup> The *Whole Woman’s Health* opinion is silent as to any illegitimate intent by the State of Texas, despite finding that its *stated* purpose for creating health regulations is unsupported by evidence and thereby invalidating the regulations.<sup>143</sup> The *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision similarly declines to chide the state for intentionally working around judicial protections of abortion, but

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<sup>139</sup> For an analogue to this inquiry, see Bhagwat, *supra* note 20, at 338 (introducing the concept of “Limited-Purpose Analysis for Direct Burdens on Core Constitutional Rights”).

<sup>140</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)) (“We apply strict scrutiny to all racial classifications to “smoke out” illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool.”); cf. Pozen, *supra* note 79, at 910–11 (explaining underenforcement of good faith in the constitutional context by reference to the problem of “ferreting out bad faith” in an internally diverse legislature or agency); Kenji Yoshino, *Deferential Strict Scrutiny and University Affirmative Action* (Nov. 23, 2016) (unpublished manuscript) (on file with author) (detailing the history of strict scrutiny as a smoking out mechanism).

<sup>141</sup> Brief for Petitioners at 30–31, 36–40, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) (“The true purpose of the Texas requirements—the only purpose those requirements actually serve—is to create obstacles to abortion access for the sake of hindering women who seek the procedure.”). Pro-choice advocates, who strongly opposed treatment of the Texas law as severable, may have also desired a reliance on improper purpose because such a decision may have led to a ruling against severability. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS & THE FEDERAL SYSTEM* 8 (7th ed. 2015 & Supp. 2016).

<sup>142</sup> See *Hellerstedt*, 136 S. Ct. at 2316 (2016) (“[M]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary.”) (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

<sup>143</sup> See *id.* at 2311 (2016) (“We have found nothing in Texas’ record evidence that shows that . . . the new law advanced Texas’ legitimate interest in protecting women’s health.”).

rather regards its enactment as lacking a valid purpose.<sup>144</sup> These decisions may be interpreted as resting on a purpose-oriented basis, despite avoiding explicit mention of *improper* purpose.<sup>145</sup> Even when no invalid purpose is apparent from legislation, advocates may encourage—and courts may accept—an analysis that presumes impropriety when no showing of propriety is made.<sup>146</sup>

#### IV

#### CLARIFYING JUDICIAL CONSTRAINTS ON COMPLIANT SUBVERSION

The definition of compliant subversion has been left relatively broad: any intended subversion of judicial protection of a right or power which does not straightforwardly conflict with the law. But are all instances of compliant subversion appropriate for judicial consideration? There are various lines one might draw to distinguish between legally relevant and legally irrelevant compliant subversion. For instance, we might deem it improper for a court to hold a litigating party accountable for compliant subversion if a *nonparty* actor were responsible for the subversion (such as the activists in *Glossip*), while deeming such accountability proper when the party in court is the party clearly responsible for the compliant subversion (such as the State of Missouri in *Seibert*). Perhaps the forfeiture-by-wrongdoing principle from *Riggs v. Palmer* would apply to the *Glossip* petitioners, but not to the nonparty activists. As Michael Dorf noted after the decision, “[h]olding the *Glossip* petitioners responsible for the sodium thiopental shortage would be like forbidding anyone from inheriting [Palmer’s] estate, not just the murdering grandson Elmer.”<sup>147</sup> Indeed, in the absence of any agency relationship between the activists and the petitioners, it seems strange to put the petitioner on the hook for the activists’ subversion. If, in the case of *Whole Woman’s Health*, the restrictive health requirements had come about in part from private

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<sup>144</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 898 (1992) (rejecting the proffered purposes for a spousal notification provision).

<sup>145</sup> The editors of Hart and Wechsler’s famous volume develop this point. They suggest that one way of understanding the Court’s resistance to severability is in treating the decision resting on a purpose-oriented basis, “despite the absence of textual evidence that the Court intended it so to be read.” FALLON, *supra* note 141, at 8.

<sup>146</sup> See *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (*per curiam*) (“Respondents claim in this Court that the Montana law must have had an invalid purpose because ‘all health evidence contradicts the claim that there is any health basis’ for the law.”).

<sup>147</sup> Michael Dorf, *Justices Alito and Scalia Liked Death Penalty Opponents to Terrorists*, DORF ON LAW (May 4, 2015), <http://www.dorfonlaw.org/2015/05/justices-alito-and-scalia-liked-death.html>; *cf.* *Riggs v. Palmer*, 115 N.Y. 506 (1889) (precluding a grandson who murdered his grandfather from inheriting his grandfather’s estate).

agreement among local hospitals, rather than from state legislation, it would be improper to hold the State of Texas responsible for the actions of a nonparty. This potential line for when to consider compliant subversion—appropriate when it stems from a party, inappropriate when it stems from a nonparty—would also comport with basic principles of causation in standing doctrine.<sup>148</sup> Even a loose understanding of causation, such as that upheld in *Massachusetts v. EPA*, requires a clear linkage between a party and the action challenged.<sup>149</sup>

But even this division would beg the question of why, in the *Glossip* case, for instance, it should matter whether human rights organizations or Richard Glossip himself organized a *lawful* campaign to eliminate sodium thiopental from the market. In the counterfactual scenario where condemned petitioners had successfully coordinated a scheme to influence the market supply of this sedative, clear causation between the action and these party actors would not make their conduct remotely relevant to adjudication of an Eighth Amendment claim. Thus, although the party/nonparty line does track longstanding principles of causation, deciding when compliant subversion is legally relevant to a disposition must involve more than identifying whether the subversive actor is a party to the case.

The more appropriate line is an institutional one, dealing with the function of the courts themselves. To the extent the court does not wish for consideration of compliant subversion to radically rework the nature of its protections, it should abstain from considering the third type of compliant subversion—subversion of a judicial doctrine that does not explicitly prohibit conduct by an actor. Doing so would *ipso facto* alter the definition of the right or power the court purports to be protecting. When a court steps outside the boundaries of existing doctrine to strike back at compliant subversion, it invents new roles for itself. Imagine a court considering, in a suit against the government, private actors creatively disrupting an individual right against the state and transforming the nature of the judicial protection;<sup>150</sup> or a court

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<sup>148</sup> In order to establish standing, a party must allege that the opposing party caused its injury. See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (requiring that the alleged injury is not one that “results from the independent action of some third party not before the court”).

<sup>149</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 524–25 (2007) (finding a properly alleged causal link between the EPA and global warming, even though the agency’s contribution to the injury may have been no more than “a small incremental step”).

<sup>150</sup> Others have wishfully imagined such a transformation in judicial review. See Erwin Chemerinsky, *Rethinking State Action*, 80 *Nw. U. L. REV.* 503, 505 (1985) (“I suggest that it is time to begin rethinking state action. It is time to again ask why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government.”); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 *STAN. L. REV.* 3, 7 (1961) (“[T]he traditional state



factoring into its analysis the presence of lawful, private interference with the exercise of a state power, endowing the power with a new-found protection against the public.

By contrast, if a court is able to justify its consideration of compliant subversion on the basis of preserving a judicial procedure or a doctrine regulating a particular actor, no such reworking occurs. An example will illuminate this point. At first glance, the Supreme Court in *McCleskey v. Zant* appears to strike back at a habeas petitioner's successive filings because of the independent concern that a state may be left without a means of enforcing its power: "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them."<sup>151</sup> In other words, repeated habeas claims must fail due to their delaying of the very power the habeas petitioner is challenging. But this line from *McCleskey* must be understood by reference to the paragraph succeeding it, which warns that habeas review "places a heavy burden on scarce federal judicial resources" and "threatens the capacity of the system to resolve primary disputes."<sup>152</sup> And as it highlights the disruption of judicial procedure, it notes the potential for compliant subversion: "[H]abeas corpus review may give litigants incentives for manipulative purposes and may establish disincentives to present claims when evidence is fresh."<sup>153</sup> Thus, the Court does not justify its consideration of compliant subversion solely by reference to the need for a state power, but also to the need for a functioning judiciary, free of interference from compliant subversion. Similar concerns with judicial procedure seemed to motivate the Court in *Baze*, where the majority was able to frame its decision as protecting the judicial role. In the eyes of the Court, rapid-fire Eighth Amendment claims threatened to "transform courts" into boards determining best practices for execution. If an actor were to file incessant Eighth Amendment claims each time a new drug appeared on the market, the obstruction of judicial *procedure*—not the obstruction of a state power—would justify striking back at this compliant subversion.

Yet in *Glossip*, no such judicial procedure was at issue. Nor had a regulated actor subverted the Court's doctrine—yet the Court still struck back at compliant subversion. In fact, rather than framing its

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action doctrine is unsatisfactory as a guide for judicial action because it directs attention to formal questions instead of the real interests which compete for constitutional recognition.").

<sup>151</sup> *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 491–92.

response to compliant subversion as a judicial obligation, the Court justified this move solely by reference to protecting state powers themselves. As the opening of the *Glossip* syllabus states: “Because capital punishment is constitutional, there must be a constitutional means of carrying it out.”<sup>154</sup> By failing to tie the protection of a state power to a subverted judicial procedure or regulatory doctrine, the Court endows the death penalty with protection from private actors who would undermine it.<sup>155</sup> This move radically reworks the nature of the Court’s protection of the death penalty, which has never before included an effective prohibition against private interference. Censures of compliant subversion of judicial procedure or doctrine regulating specific actors do not necessarily involve magnifying the state power at issue. A censure of compliant subversion involving an *unregulated* actor undermining a power, however, necessarily involves reaching beyond existing judicial protections, beyond doctrinal parameters that the judiciary itself has fashioned.

An analogous move would be puzzling in the individual rights context. Recall the hypothetical scenario in Part I.C, where “pro-life” activists eliminate indigent access to abortions through market manipulation. As a result, millions of women are practically unable to have abortions via legal means. This engineering may be morally objectionable to some, but when private actors undermine abortion access in this way, no right has been subverted—and according individuals protection against this practice would entirely transform the right.<sup>156</sup> As Justice Powell noted in *Maher v. Roe*, there can be no claim of fundamental right infringement when “[t]he indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected [by state action].”<sup>157</sup> Regarding compliant subversion as relevant to the analysis in such a case would, for better or worse, add a layer of protection to the abortion right.

This Note is not the space for discussing, as a matter of either constitutional interpretation or moral imperative, whether rights should acquire new layers of protection, or whether powers should always have a means of being carried out. The argument here is an

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<sup>154</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2728 (2015).

<sup>155</sup> Cf. Phillip M. Kannan, *Logic from the Supreme Court that May Recognize Positive Constitutional Rights*, 46 U. MEM. L. REV. 637 (2016) (arguing that the logic of “there must be a means” could extend broadly to individual rights).

<sup>156</sup> See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1403 (2009) (“[W]hat the Court created in *Roe v. Wade* is not a right to legal abortion; it is a negative right against the criminalization of abortion in some circumstances.”).

<sup>157</sup> 432 U.S. 464, 474 (1977).

institutional one: Unless courts wish to subtly alter the protective bounds of rights and powers, responding to compliant subversion by doctrinally unregulated actors improperly expands the judicial role. Compliant subversion should be fair game for judicial cognizance only when the subversion has interfered with a judicial procedure or doctrine regulating specific actors. Thus, what stands out in *Glossip* is not simply the oddity of holding the anti-death penalty activists' subversion against unrelated petitioners,<sup>158</sup> but rather creating a newfound protection for the state's power to execute, a protection trumping the individual's right to be free from cruel and unusual punishment.<sup>159</sup>

### CONCLUSION

At oral argument, counsel for the condemned prisoners in *Glossip* did not have the opportunity to respond at length to Justice Alito's and Justice Scalia's insinuations that compliant subversion of the death penalty should weigh against the petitioners' Eighth Amendment claim.<sup>160</sup> This Note has both provided one such response and, more fundamentally, established a coherent framework for thinking about what exactly these challenges to judicial protections are, how courts respond to them, and when these responses are inappropriate. Subsequent research could systematically account for when and why courts address compliant subversion in the various ways sketched out in Part IV, and could apply the above analysis to other areas of law not discussed here. The project of connecting disparate areas of law through compliant subversion has the potential to illuminate inconsistencies in how the courts treat this action in various domains. In all, compliant subversion suggests rethinking our understanding of what is legally relevant to a disposition. And in analyzing how courts react to it, we should understand when such reactions step too far.

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<sup>158</sup> See *supra* note 10 and accompanying text.

<sup>159</sup> See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor . . . cruel and unusual punishments inflicted.").

<sup>160</sup> See *supra* note 9 and accompanying text.