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POWER RULES

Samuel L. Bray·

This Essay offers a unified framework for understanding how law can protect a vulnerable person from a powerful one. One option law has is to penalize the powerful person if she harms the vulnerable person. This option can be called a "harm rule." But sometimes law shifts its focus from regulating the infliction of harm to regulating a person's accumulation of power to inflict harm. Legal rules that reflect this shift in focus can be called "power rules"; they expressly restructure underlying relations of power and vulnerability. Power rules allow legal regulation of situations in which rules directly regulating harm are not possible. Even when harm rules are possible, power rules can complement harm rules and improve their effectiveness. But power rules have drawbacks, too: They tend toward overbreadth, encourage merely expressive lawmaking, and increase enforcement discretion. The concept of power rules helps explain patterns in the use of legal rules, especially in the contexts of bargaining, competition, violence, persuasion, and the performance of relational statuses (e.g., status as a fiduciary). This concept also illuminates the tradeoffs involved when lawmakers choose among different methods of protecting vulnerable persons.

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INTRODUCTION

Political and jurisprudential theories often take as a starting point that powerful people can harm vulnerable people, and that some mechanism is needed to protect the vulnerable.[1] This mechanism might be a social contract, the state, a leader, or the law. Whatever protective mechanism is emphasized in theory, in actual practice the aim of protecting the vulnerable is ordinarily given concrete form in legal rules.[2] Persons who are vulnerable (as we all are, in one capacity or another, for each of us is susceptible to being harmed by another person) are protected by rules not only in criminal and tort law but also in labor law, family law, corporate law, health and safety regulations, election law, and so on. Both the general starting point of vulnerability and the specific legal rules that seek to ameliorate it are the subject of vast scholarly literatures, not only in law but also in political theory and other disciplines.

In between, however, is a void. We have theories of human vulnerability; we have theories about specific areas of the law in which vulnerability can be ameliorated. What we lack is a general theory about the options available to law when it seeks to protect vulnerable people regardless of the specific kind of vulnerability—whether to assault or fraud or unfair competition from political or athletic rivals. Such a theory would not tell us when law should protect a vulnerable person, but it would tell us how law could do so, and what the advantages and disadvantages of the possible methods of protection would be.

This Essay offers an initial step toward such a theory. It distinguishes between two of the ways that law can protect a vulnerable person. One way is to directly regulate conduct perceived to be harmful; such rules could be called "harm rules." The other way is to regulate conduct or conditions that are not themselves perceived as harmful but which contribute to human power or vulnerability; these rules could be called "power rules."[3] This

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1. See, e.g., H.L.A. Hart, The Concept of Law 194–95 (2d ed. 1994); Thomas Hobbes, Leviathan 144 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1668); Alasdair MacIntyre, Dependent Rational Animals: Why Human Beings Need the Virtues 1 (1999); Philip Pettit, Republicanism: A Theory of Freedom and Government 4–7 (1997); Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 Yale J.L. & Feminism 1, 8–15 (2008).

2. This Essay focuses on the U.S. legal system, but seemingly every legal system contains rules designed to protect vulnerable persons.

3. One analogue in current legal literature is "prophylactic rules," or rules meant to avoid risk, usually the risk that a government actor will violate the Constitution (e.g., the *Miranda* requirement). See generally Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 899–904 (1999); Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 21 (1975);

Essay focuses on the latter. As a means of protecting the vulnerable, power rules can be attractive because they allow legal regulation of areas of life to which harm rules are not well suited (such as unfair competition in politics or the workplace). In other areas they can improve the enforcement of harm rules (by making proof easier, for example). But power rules have drawbacks, too. They tend toward overbreadth, encourage merely expressive lawmaking, and expand the authority and discretion of the government officials responsible for their enforcement.

Although the distinction between power rules and harm rules does not, by itself, generate a comprehensive theory of law's options for protecting the vulnerable, it is highly useful. Understanding this distinction is important for people who draft laws and regulations, because they often make the choice between a power rule and a harm rule unawares, without any sense of what is gained and lost. If drafters were aware of this choice, they could achieve a closer fit between their purposes and text. For legal scholars, the distinction offers a framework for analysis of rules in otherwise disparate areas of law. Within narrow doctrinal categories, the traits of power rules have sometimes been the subject of scholarly literature.[4] And yet, given all of the centrifugal pressures in legal scholarship, it would be beneficial to have one more way of bringing insights from our subspecialties on the

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David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 190 (1988). Dominating the literature on prophylactic rules is the question of constitutional legitimacy. The desirability of prophylactic rules has been occasionally considered, but only for particular rules or contexts. See, e.g., Matthew Conaglen, The Nature and Function of Fiduciary Loyalty, 121 L.Q. Rev. 452, 468–71 (2005); Drake D. Hill, Deconstructing the Prophylactic Ban on Lawyer Solicitation, 62 Temp. L. Rev. 875, 897 (1989). No theory for the general desirability of prophylactic rules has been offered. Another analogue to power rules is "nonconsummate offenses," especially "[s]imple nonconsummate offenses." Douglas N. Husak, The Nature and Justifiability of Nonconsummate Offenses, 37 Ariz. L. Rev. 151, 169 (1995). Yet another analogue, also in the criminal law, is risk-creation offenses. See, e.g., Paul H. Robinson, Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses, 4 Theoretical Inquiries L. 367 (2003).

The concept of power rules can be seen as a different way of thinking about rules that, for the most part, fall under one or more of these headings. For such rules, this concept emphasizes not the risk of harm but rather the allocation of power and vulnerability between human actors. This shift generates a vocabulary for describing rules more precisely and observing patterns that would be missed with a more general concept like prophylactic rules. There also are differences in scope. The three analogous concepts are both broader and narrower than the concept of power rules: broader, because they include accidents and impersonal risks, see infra text accompanying note 13; and narrower, because they largely miss the category of rules described below as "power-increasing."

4. For an example, see infra note 70 and accompanying text (describing corporate law scholarship on how a certain kind of power rule is self-enforcing).

periphery back to a central conversation.[5]

This Essay proceeds as follows. Part I introduces the concept of power rules. Part II examines their attractions; Part III, their drawbacks. Finally, Part IV considers when power rules should and should not be used.

I. POWER RULES

No legal system concentrates exclusively on providing protection, and no legal system tries to protect against every kind of harm. But when the law does try to protect a vulnerable person from a powerful one, it faces a question of method. Imagine a jurisdiction where armed robbers have recently shot and killed a number of convenience store clerks. What can law do?

One approach is for law to protect the store clerks by indicating that it will penalize whoever harms them in this manner. This approach is reflected in legal rules that prohibit assault and murder. It would also be reflected in a rule raising the penalty for violence against convenience store clerks. (This is not hard to imagine: Under federal criminal law, for example, violent crimes can be punished more severely if the victim is particularly vulnerable, such as an elderly person.[6])

A second approach to protecting store clerks is less direct. The law could alter the relative power and vulnerability of robbers and store clerks.[7]

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5. Cf. Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1089 (1972).

6. U.S. Sentencing Guidelines Manual § 3A1.1(b)(1) (2009); see also United States v. Grimes, 173 F.3d 634, 637–38 (7th Cir. 1999) (affirming enhancement of defendant's sentence based on victims' vulnerability). See generally Trent M. Murch, Note, Revamping the Phantom Protections for the Vulnerable Elderly: Section 3A1.1(b), New Hope for Old Victims, 6 Elder L.J. 49, 50–51 (1998) ("The vulnerable victim sentence enhancement seeks to punish more severely criminals who victimize 'unusually vulnerable' persons such as the elderly.").

7. Words with a rich intellectual past, such as "power" and "vulnerability," may be best defined genealogically rather than analytically. For present purposes, however, a brief analytical definition is helpful: Power and vulnerability are correlative—power is the ability to harm another person; vulnerability is the susceptibility to being harmed by another person. These definitions abbreviate and abstract the definition of "power as domination" offered by Steven Lukes: "the ability to constrain the choices of others, coercing them or securing their compliance, by impeding them from living as their own nature and judgment dictate." Steven Lukes, Power: A Radical View 85 (2d ed. 2005) (reviewing half a century of debate in political theory over the concept of power).

As used here, power may involve resources and opportunities of almost any imaginable kind, including commodities (e.g., money, weapons) or methods of influence (e.g., advertising, threats). But see Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 44 (1913) (treating power as only legal power

One could imagine a legal rule that prohibited customers from possessing firearms inside convenience stores, or within fifty feet of convenience stores, or that prohibited private possession of firearms altogether. Or there could be a legal rule that required store clerks to wear body armor, or that required the owners of convenience stores to install bulletproof glass. Or even legal rules requiring store clerks to possess firearms or nonlethal weapons.

These two approaches to protecting a vulnerable person can be described as *harm rules* and *power rules*. Harm rules regulate conduct that is perceived to be harmful in itself (such as the assault of a convenience store clerk). Power rules regulate conduct (or a condition) that contributes to human power or vulnerability but is not perceived to be harmful in itself. A power rule might, for example, restrict the purchase or use of a commodity (e.g., a handgun), or it might require the use of a commodity (e.g., bulletproof glass in convenience stores).

Beyond the convenience store scenario, the examples of power rules could be multiplied. Power rules can give a person a certain power (e.g., standing to sue, Patriot dollars[8]). Or they can set a maximum limit on someone's power, either in absolute terms (e.g., spending limits for political candidates) or in relative terms (e.g., antitrust regulations focused on market share). They can protect the vulnerable, for example, by restricting speech (e.g., limits on the placement of cigarette ads), or by requiring it (e.g., mandatory disclosures in investment prospectuses).

None of the acts or conditions that these power rules regulate—from the mere fact that a convenience store lacks bulletproof glass to a mutual fund's failure to make a required disclosure—is thought to be per se harmful to a vulnerable person. Rather, they are perceived as being likely to lead to future harm (or, in some cases, as being strong evidence of the commission of harm). These less direct regulations are still meant, ultimately, to prevent harm. Yet they do so by "evening the odds" in relations of power and vulnerability without also prohibiting the infliction of harm; they "merely" reshape the contexts in which harmful acts can occur.

Power rules can be further divided into two categories that are discussed throughout this Essay. *Power-decreasing rules* regulate a powerful person's ability to harm a vulnerable person. They might cap or reduce the power of a powerful person (e.g., limiting campaign expenditures

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and making it correlative to liability). Power may be granted by law, or permitted by law, or accumulated in spite of law. This conception of power and vulnerability is by no means the only one compatible with the analysis in this Essay.

8. See Bruce Ackerman & Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance 4 (2002) (proposing giving every citizen "Patriot dollars" to be used for political campaign contributions).

by political candidates, limiting firearm possession by convenience store customers). Or they might reduce the vulnerability of a vulnerable person (e.g., requiring store owners to install bulletproof glass). Thus a power-decreasing rule regulates either the power of the powerful or the vulnerability of the vulnerable, making it more difficult for the powerful to inflict harm.

Alternatively, *power-increasing rules* regulate something less obvious: the ability of the vulnerable person to harm the powerful one. Note that a power-increasing rule does not make the vulnerable person *less vulnerable*: An individual's ability to inflict harm is independent of her ability to withstand it. Power-increasing rules might give the vulnerable person the power to strike back (e.g., offering public funding to relatively poor political candidates, arming convenience store clerks). Or they might require that the powerful person herself be vulnerable (e.g., a rule that no convenience store customers may wear body armor).[9] Thus a power-increasing rule leaves in place the powerful person's ability to inflict harm, but it adds a deterrent, a prospect of retaliation. In somewhat overstated language drawn from international relations, when the state chooses power-decreasing rules it is imposing on powerful and vulnerable persons a regime of disarmament; when it chooses power-increasing rules it is imposing a regime of mutually assured destruction. One more basic distinction is helpful: Usually power rules are directed at the powerful person or the vulnerable person, but *third-party power rules*, which require a third party to protect a vulnerable person, are also possible. One such rule already mentioned would require that convenience store owners install bulletproof glass in order to protect their clerks.

This distinction between harm rules and power rules is by no means absolute.[10] Which category a rule falls into depends on societal perceptions

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9. The concept of power-increasing rules is analogous to "governance strategies" or "principal-empowering strategies" in corporate law. See John Armour, Henry Hansmann & Reinier Kraakman, Agency Problems, Legal Strategies and Enforcement, *in* Reinier Kraakman et al., The Anatomy of Corporate Law: A Comparative and Functional Approach § 2.2 (2d ed. 2009).

10. To be clear: The distinction is not in effect, because both kinds of rules can prevent harm and can alter power and vulnerability; nor is the distinction in public justification, because both are supported, at least in contemporary liberal democracies, with appeals to the ultimate prevention of harm. Rather, the distinction lies in whether the act (or condition) being regulated is perceived to be per se harmful (examples of harm rules include prohibitions on assault, rape, securities fraud, race discrimination, intentional infliction of emotional distress). One reason the distinction is not absolute is the nebulousness of what constitutes harm. See Joel Feinberg, 1 Harm to Others: The Moral Limits of Criminal Law 31–36 (1987) ("The word 'harm' is both vauge and ambiguous . . . ."); see also Bernard E. Harcourt, The Collapse of the Harm Principle, 90 J. Crim. L. & Criminology 109, 113 (1999) ("Claims of harm have

of harm, and thus can vary between societies and within a single society over time. A prohibition on sexual relations between a more powerful person and less powerful one (an adult and a teenager, a guard and a prisoner, a teacher and a student, an officer and a subordinate) might be characterized as a prohibition on per se harmful conduct or as a prohibition on the powerful obtaining a new sphere of power over the vulnerable. Is trespass a per se harmful act or rather an act that is not intrinsically harmful but that often leads to harms, such as damage to property?[11] Either interpretation is plausible. In certain cases, then, the two categories contend with one another.[12] In many other cases, however, a legal rule falls into one category or the other. This Essay focuses on these relatively clear cases to show the usefulness of the distinction.

The central or paradigm case for the concept of power rules involves two people who are connected through some purposeful activity in which one or both of them is engaged. The activity might be, for example, bargaining, competition, violence, persuasion, or the performance of a relational status (e.g., status as a fiduciary). In these contexts there are human actors and purposeful conduct. Perhaps the concept of power rules could be stretched to include actions or effects that are not intended (e.g., crashes caused by distracted driving) or relatively impersonal risks (e.g., contaminated food) or rules that have only a distant relation to any particular harm (e.g., tax law). And yet to see why the concept fits less well for those

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become so pervasive that the harm principle has become meaningless . . . .”). This Essay relies on ordinary usage of the term in lieu of technical definition.

11. Cf. Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies 7–8 (2007) (considering why intentional trespass is a strict liability tort). Another example is a rule that an elected judge must be recused in a case involving a major contributor. See Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256–57 (2009). Such a rule might be a harm rule, if the harm is perceived to be the appearance of impropriety, or a power rule, if the harm is perceived to be actual bias.

12. In addition to instances where the power/harm rule distinction turns on the characterization of the harm, there are four kinds of cases that might be considered intermediate: (1) The law regulates conduct that is not per se harmful and yet the probability of subsequent harm approaches 100% (e.g., a person purchases large quantities of a date rape drug); (2) the law regulates conduct that is not per se harmful and yet no further steps must be taken by the actor to inflict harm (e.g., a person writes a slanderous post on a blog that no one reads); (3) the law regulates conduct that is sometimes per se harmful and sometimes not and yet we cannot be sure which one is the case (e.g., a judge votes in a major contributor’s case, if the harm is perceived as actual bias); and (4) the law regulates conduct that is per se harmful but does not do so primarily to prevent the coincident harm but rather to prevent a subsequent harm (e.g., a person’s use of fighting words). For a discussion of the various harms prevented by the regulation of fighting words, see generally Kent Greenawalt, Insults and Epithets: Are They Protected Speech?, 42 Rutgers L. Rev. 287, 294–307 (1990). I am indebted to Kent Greenawalt for suggesting these intermediate cases.

cases, consider a rule prohibiting phone conversations by drivers. The rule constrains drivers, and thus we might say that a driver's power is reduced; and it is true that the rule is meant to protect pedestrians (and others) from harm. But does this rule reduce the driver's power to harm the pedestrian? It would be odd to say it did. The driver does not want to harm the pedestrian, and we usually say that people have "power" to do things they in fact want to do. At least as a matter of usefulness, then, the concept of power rules is better suited to the central case of purposeful activity.[13]

II. WHY POWER RULES ARE ATTRACTIVE

Without power rules, a legal regime of protection might be more susceptible to evasion and less able to prevent certain harms. In broad terms, power rules are attractive in two kinds of situations: where power rules are the only viable means of regulation and where power rules can complement existing harm rules.

A. *Power Rules as Substitute: Regulating Competitions*

Harm rules are often effective and sufficient. But in certain contexts they are difficult or impossible to formulate and apply, making power rules the most plausible means of legal regulation. This is true, for example, in competitions, such as baseball games, political elections, and the workplace.

First, consider the issue of steroids in baseball. Set to one side the self-protection argument: that a government should ban steroids because they are harmful to the persons who take them. Instead consider the argument that federal criminal law should prohibit the use of steroids by baseball players and other professional athletes because their use causes a systemic harm of "unfair competition."[14] If a Major League Baseball player injects himself with steroids, when is a teammate or an opposing team or "the

13. See supra note 3 (noting that this is one of the ways that the concept of power rules differs from the concept of prophylactic rules).

14. See, e.g., 150 Cong. Rec. 11285 (2004) (statement of Rep. Osborne, previously a highly successful college football coach) ("[T]he use of steroids and precursors threatens the integrity of athletic competition."); cf. Matthew J. Mitten, Drug Testing of Athletes—An Internal, not External, Matter, 40 New Eng. L. Rev. 797, 801 (2006) ("Pharmacological performance-enhancing substances are banned because of their adverse effects on both athletes' health and competitive integrity." (emphasis omitted)). On federal criminal law and steroids, see generally Colin Latiner, Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution, 3 DePaul J. Sports L. & Contemp. Probs. 192, 196–97 (2006) (describing federal regulation of enhancements by Congress, DEA, and FDA); Adrian Wilairat, Comment, Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors, 8 J. Health Care L. & Pol'y 377, 387–92 (2005) (detailing history of congressional regulation of anabolic steroids).

sport" injured? When the player hits a home run that he otherwise would not have hit? Which ones are those? Or does injury occur only when the player hits a home run that decides a game? Or a home run that decides which teams make the playoffs? Or one that keeps the steroid-using player in the starting lineup, or in the major leagues? No one knows the answers to these questions. Even if we could agree on a standard of fairness (for instance, "A's use of steroids harms B when it allows A to keep a spot on a major league roster that would otherwise have gone to B"), causation would be an insurmountable problem.[15] The legislative response, then, is to focus not on what is impossible to measure—the incidence of injury to other players, other teams, and the sport from "unfair competition"—and rather on the much easier to measure act of owning or possessing steroids. Note that this is not simply the commonplace problem of a legal rule having borderline cases.[16] The problem in this competition scenario is much deeper; it is having no way, even in the ordinary case, to know when or if the regulated conduct has actually caused injury.

Second, consider spending limits in political campaigns. Ignore for a moment the explanation of these limits as incumbent protection[17] or as a solution to a collective action problem for candidates who would understandably like to spend less time raising money.[18] Instead, see them in the terms employed by some proponents: as protecting fair competition by keeping a powerful candidate from excessive spending that hurts a weaker candidate.[19] A harm rule would be impossible. Imagine trying to decide

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15. In a few cases we might achieve a measure of certainty, as when a steroid-using player hits a home run that barely clears the fence.

16. See generally Timothy A.O. Endicott, Vagueness in Law (2000) (offering account of legal indeterminacy, including vague expressions with borderline cases); see also Samuel L. Bray, Preventive Adjudication, 77 U. Chi. L. Rev. (forthcoming 2010) (distinguishing two kinds of legal indeterminacy, one of which characteristically involves borderline cases).

17. Randall v. Sorrell, 548 U.S. 230, 248–49 (2006) ("[C]ontribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders . . . .").

18. See Vincent Blasi, Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All, 94 Colum. L. Rev. 1281, 1282–83 (1994) (arguing that candidates should be protected from having to "rais[e] money round-the-clock").

19. See, e.g., Keith D. Ewing, Promoting Political Equality: Spending Limits in British Electoral Law, 2 Election L.J. 499, 499 (2003) ("[S]pending limits . . . help[] to create a level playing field on which campaigns can be fought without either side having an unfair advantage based on financial resources alone."); see also Richard L. Hasen, The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After *Randall v. Sorrell*, 68 Ohio St. L.J. 849, 887 (2007) (suggesting equality as goal of some campaign finance limits). But see Citizens United v. FEC, 130 S. Ct. 876, 903—09 (2010) (rejecting equality rationale on First Amendment grounds).

exactly when one candidate's ad buys constituted unfair competition that injured another candidate.[20] Here a power rule shifts the lawmakers' task from specifying harm to specifying power, and in particular specifying power as measured in dollars spent.[21]

Third, consider the workplace, and the implicit competition between employees who take personal leave for the birth of a new child and employees who do not. Assume that a company offers maternity and paternity leave that is generous, equal, and optional. And assume that female employees are more likely to take leave than are male employees. In such circumstances, male employees may gain an advantage in retention and promotion, because the employer might assume that a male employee is, from an ex ante perspective, less likely to take leave. This harm—the inferences drawn by employers, which allow male employees to compete unfairly with female employees—would be difficult to prevent by means of a harm rule. But lawmakers could adopt a rule that limited male employees' power to refuse to take paternity leave. In other words, the law could make paternity leave mandatory.[22]

These examples suggest several generalizations about the use of power rules in regulating competitions, generalizations that also have implications, developed below,[23] for the use of power rules more broadly. First, a power rule will sometimes be the only option; in all three contexts just described a harm rule is impossible. Outside competition scenarios, harm rules will also be impossible when law cannot reach the agent of the harm. For example, when the enforcement apparatus of domestic law cannot reach hackers residing in a hostile country, the state might use a power rule requiring domestic corporations to take defensive cyber-security measures.[24]

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20. Cf. Blasi, supra note 18, at 1282 (noting that the "[d]isproportionate influence" of a campaign contributor on an officeholder "is hard to measure").

21. A power-increasing rule in election law is the Millionaires' Amendment passed as part of the Bipartisan Campaign Reform Act; it allowed a candidate with a wealthy rival to receive larger campaign donations and coordinated party expenditures. See Davis v. FEC, 128 S. Ct. 2759 (2008) (holding Millionaires' Amendment unconstitutional on First Amendment grounds). Other power-increasing rules might include a constitutional requirement to have majority-minority districts, or Bruce Ackerman and Ian Ayres's notion of Patriot dollars. On the latter, see generally Ackerman & Ayres, supra note 8.

22. For discussion of such a proposal, see Ariel Meysam Ayanna, Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace, 9 U. Pa. J. Lab. & Emp. L. 293, 301 & n.34 (2007); Michael Selmi, Family Leave and the Gender Wage Gap, 78 N.C. L. Rev. 707, 773–75 (2000); cf. Cass R. Sunstein, Human Behavior and the Law of Work, 87 Va. L. Rev. 205, 261–64 (2001) (analyzing nonwaivable rights in context of norm and preference change).

23. See infra Parts II.B, III, and IV.

24. Beyond the central case involving human actors, the law might be unable to reach the

Another generalization is that power rules that regulate competition have a strong expressive function. They draw on intuitions about fairness, intuitions frequently expressed in the cliché of a "level playing field" but also capable of more thoughtful elaboration. These intuitions drive the use of power rules not only in the competitions described above but also in bargaining scenarios. Federal law regulates the speech of employers immediately prior to union elections,[25] and it regulates the ability of medical insurers to collect DNA for calculating an insured person's health risks.[26] In both of these examples there is concern that a certain power is too great and thus must be restricted, by means of a power-decreasing rule,[27] in order to prevent the harm of unfair bargaining (again, a harm difficult to precisely identify).

A further generalization can be drawn from the fact that these power rules are all relatively easy to evade. When a harm rule regulates assault, fraud, or racial discrimination, there is usually a victim who can speak out. But the three competition scenarios described above involve consensual conduct: a doctor and a baseball player exchanging steroids and money; a political campaign paying a vendor for goods or services; an employer and an employee who agree (with obvious caveats about coercion and false consciousness) for the employee to forego his paternity leave. Without victims, the violator of a power rule may more easily evade detection.[28] Thus power rules, though often the only option for regulating competitions, may be difficult or costly to enforce. And this point can apply to some power rules outside of competition contexts: For example, if persons walking through secluded areas are required to carry whistles,[29] this rule could be violated with relative ease, because if vulnerable persons fail to comply there is no "squeaky wheel."

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agent because the agent is impersonal. For example, to protect persons whose homes are vulnerable to earthquakes, the law relies on building codes that regulate structural materials, because an earthquake cannot be held liable for the injuries it causes.

25. NLRB v. Gissel Packing Co., 395 U.S. 575, 616–20 (1969) (upholding National Labor Relations Board's finding of unfair labor practice where employer threatened economic retaliation if employees voted for union recognition).

26. See 42 U.S.C. § 1395ss(x)(2) (2006) (prohibiting collection of genetic information by medical insurers "prior to . . . enrollment" and "for underwriting purposes").

27. For discussion of power-decreasing rules, see supra Part I.

28. There are exceptions. Sometimes the people a power rule is meant to protect—such as economically disadvantaged political candidates, who benefit from some campaign finance power rules—will have an incentive to find violations. And sometimes the people a harm rule is meant to protect will have reasons to avoid speaking out, such as fear of social retaliation for filing a complaint. But as a general matter, when someone violates a power rule it is less likely that there will be an identifiable victim to spur enforcement.

29. See Can Whistles Help to Prevent Campus Rape?, N.Y. Times, Oct. 8, 1989, § 1 (Campus Life), at 45.

A final generalization is that when a power rule is predominantly expressive, its underenforceability might not prevent its success. In each of the competition and bargaining scenarios noted in this section, a power rule calls public attention to a problem: the problem of an advantage considered unfair, whether for athletes who use steroids, well-connected politicians, male employees, employers in union-recognition elections, or insurers who gather genetic information. (The very expressiveness of a power rule might prove counterproductive, however, where it further entrenches public perceptions of who is powerful and who is vulnerable.) Like laws that are unenforced or are merely default rules, an underenforceable power rule might still alter social norms.[30] In game-theoretical terms, it could establish a focal point for coordination;[31] it could change our perceptions of what other people expect, or think, or do. One use of power rules, therefore, is to reverse cultural subordination by regulating the apparently voluntary transactions that support and perpetuate it (a case in point would be mandatory paternity leave).[32] Thus power rules have tendencies toward paternalism.

B. *Power Rules as Complement: Maximizing Enforcement*

Power rules can also be a useful complement in the many situations where harm rules *are* workable. In these situations, a legal system relying only on harm rules might be inflexible, easily circumvented, filled with gaps. To prevent these weaknesses, power rules can complement harm rules in at least four ways.

1. *Prevention*. — Power rules can sometimes prevent the circumstances from arising in which a harm rule would be violated in the first place.[33] This is particularly true of harms that are unplanned or opportunistic. A prohibition on possession of firearms by felons, when obeyed, can reduce the risk of deadly violence when a felon is involved in an unplanned

30. See, e.g., Adam B. Badawi, Law Without Threat: The Theoretical and Empirical Case for the Passage and Subsequent Non-Enforcement of Smoking Bans 3 (unpublished manuscript, on file with the *Columbia Law Review*) (arguing that even "unenforced law[s]" can "produce . . . a dramatic shift in behavior"); see also Elizabeth F. Emens, Changing Name Changing: Framing Rules and the Future of Marital Names, 74 U. Chi. L. Rev. 761, 842 (2007) (concluding that even when law plays "a marginal role," it can give a "small push . . . to help individuals overcome the collective action problem involved in changing social meaning").

31. See Richard H. McAdams, Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law, 82 S. Cal. L. Rev. 209, 233–35 (2009).

32. On the regulation of choice and the regulation of social meaning, see generally Ian Ayres, Menus Matter, 73 U. Chi. L. Rev. 3 (2006); Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943 (1995); see also supra note 30.

33. This is the function of a prophylactic rule. See supra note 3.

altercation. Or a disclosure requirement for investment prospectuses might reduce investors' vulnerability to securities fraud by encouraging a culture of disclosure and perhaps promoting diversification. And even false disclosures might tip off savvy investors to an improbable history of high returns from nonvolatile investments à la Bernard Madoff.[34]

2. *Evidence*. — Power rules can also prevent the evasion of harm rules that are difficult to enforce. A power rule might shift the focus of police and prosecutors to the conduct or conditions that precede, accompany, or follow a harmful act, and this shift of focus might make it easier to catch people who cause certain harms.[35] Thus power rules might prohibit the possession of date rape drugs not only as a means of prevention but also as a means of ensuring the punishment of people who have already used them to facilitate rape.

3. *Punishment* .— When used in conjunction with harm rules, power rules allow for a broader range of punishments for the same conduct. In a bank robbery gone bad, numerous offenses may have been committed, including violations of harm rules (armed robbery, assault with a deadly weapon) and power rules (possession of firearms, possession of "burglar's tools" for breaking into the safe[36]). The prosecutor would have multiple options for charging a defendant: only for possession of burglar's tools, only for possession of a firearm, for both possession offenses, for possession of burglar's tools and armed robbery but not possession of a firearm, and so on. The combination the prosecutor chooses will radically affect the range of possible sentences. Of course, even without power rules the offense a prosecutor charges will affect the sentencing range (such as first-degree murder versus second-degree murder). But when a scheme of harm rules is in place, adding an overlay of power rules will ordinarily increase the options for charging and sentencing a defendant, as well as increase maximum sentences.[37] For lawmakers bent on increasing the number of criminal convictions and the severity of sentences, power rules are an

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34. Given the efficient market hypothesis, a prohibition on false disclosures could be considered a harm rule.

35. A similar shift in focus can be observed in the enforcement of "process crimes." See Erin Murphy, Manufacturing Crime: Process, Pretext, and Criminal Justice, 97 Geo. L.J. 1435 (2009).

36. See, e.g., Me. Rev. Stat. Ann. tit. 17-A, § 403 (2006) (criminalizing possession of "burglar's tools," i.e., "any tool, implement, instrument or other article that is adapted, designed or commonly used for . . . forcible breaking of safes or other containers or depositories of property").

37. An exception is cases where the violation of a power rule merges with the violation of a harm rule. In a jurisdiction where conspiracy merges with the completed crime, a power rule prohibiting conspiracy would lack this cumulative effect.

attractive option.[38]

4. *Third Parties*. — Power rules can also complement harm rules by authorizing or even requiring a third party to protect a vulnerable person. When reducing the power of a vulnerable person, such as a minor, to make self-harming contracts, the state often augments the power of some third party, such as a parent or legal guardian, thus offsetting one power rule with another. Many other examples of third-party power rules are possible, including the authorization of private attorneys general and qui tam suits, as well as historical statutes requiring private persons to carry weapons to help secure the peace.[39]

III. THE DRAWBACKS OF POWER RULES

Despite their attractions, and indeed in part because of them, there are potential drawbacks to using power rules. These drawbacks can be characterized as overbreadth, lower costs for legislative expression, and expanded discretion in enforcement.

A. *Overbreadth*

Power rules tend to be broad—sometimes very broad.[40] When law constrains a person's power (as through a power-decreasing rule that limits the power of a powerful person), it does so for all uses of that power, both good and bad.[41] If a hypothetical statute specified a maximum annual

38. This bent of legislators in the United States has been critiqued for decades by the academy, to no apparent effect. See, e.g., William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 508 (2001) [hereinafter Stuntz, Pathological Politics] (noting legislators' imperviousness to "normative arguments" and decrying how "American criminal law's historical development has borne no relation to any plausible normative theory—unless 'more' counts as a normative theory"). On power rules and enforcement discretion, see infra Parts III.C and IV.

39. See, e.g., Militia Act of 1792, ch. 33, 1 Stat. 271; Statute of Winchester, 1285, 13 Edw., cc. 1, 4 (Eng.); Assize of Arms, 1181, 27 Hen. 2 (Eng.); see also Frederick Wilkinson, Those Entrusted with Arms: The Police, Post, Prison, Customs and Private Use of Weapons in Britain 9–13 (2002) (discussing laws in twelfth and thirteenth centuries that required English subjects to bear arms).

40. This point is widely recognized for prophylactic rules. See, e.g., Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1272 (2007) (using "overbroad" and "prophylactic" as effectively synonymous).

41. Thus each of the regulations of competition described above raises overbreadth concerns. See, e.g., Blasi, supra note 18, at 1314–16 (noting overbreadth issue for campaign spending limits); Jeffrey A. Black, Comment, The Anabolic Steroids Control Act of 1990: A Need for Change, 97 Dick. L. Rev. 131, 132 (1992) (criticizing steroids law as overbroad).

revenue for corporations, it would be constraining the accumulation of financial power, without respect to whether that power would be used to develop better methods of risk quantification or to establish a socially inefficient monopoly. Or consider the effect of an actual statute that forbids felons from possessing bulletproof vests:[42] If a former gang member serves a prison sentence and returns to his old neighborhood, the prohibition raises the marginal cost of wearing a bulletproof vest while robbing a bank, but it also makes him an easy target for old enemies who want to settle a score.[43] Given its rationale of protecting banks from robbers, the rule against felons' possessing body armor is overbroad.[44] In contrast to these examples of overbreadth, if the state uses a harm rule, it can tailor the sanction to the precise conduct considered harmful (such as the robbing of banks).[45]

Power-increasing rules also suffer from a kind of overbreadth: If a vulnerable person is required to maintain a certain power—such as firearms for convenience store clerks—that power could be misused with terrible consequences.

42. 18 U.S.C. § 931 (2006) (making it a federal crime for anyone convicted of a violent felony to "purchase, own, or possess body armor"); see also U.S. Sentencing Guidelines Manual § 2K2.6 (2009) (increasing federal sentence of anyone who used body armor in connection with another felony offense); Joseph Larkin, Offenses Against Public Order and Safety: Make Wearing Bulletproof Vests During Commission or Attempted Commission of Certain Offenses Unlawful, 20 Ga. St. U. L. Rev. 95 (2003) (detailing Georgia statute that "makes it unlawful to wear a bulletproof vest during the commission or attempted commission of certain offenses").

43. These facts are drawn from United States v. Patton, 451 F.3d 615, 618–20 (10th Cir. 2006).

44. If, however, the rationale is considered to be the protection of the state itself, the restriction would not be overbroad, though it might well be unnecessary or excessive. On power rules and the state, see infra note 53.

45. One could imagine harm rules that are overbroad: an example would be the rule that "no one may draw blood in the streets of Bologna" if applied to doctors engaged in the competent practice of medicine. And one could imagine power rules that are not overbroad, such as the ban on private possession of nuclear weapons noted below. So it is not necessary that power rules be overbroad relative to harm rules. But in actual use the tendency of power rules toward overbreadth is pervasive; it is also unsurprising, given power rules' less direct approach to preventing harm, see supra Part I.

Overbreadth is an important topic in multiple areas of legal scholarship, and only selective examples can be noted here. In criminal law scholars have emphasized overbreadth concerns in discussion of the overlapping categories of anticipatory, inchoate, strict-liability, and possessory offenses. See, e.g., George P. Fletcher, 1 The Grammar of Criminal Law 295 (2007) ("The major problem with possession offenses . . . is overbreadth."). In administrative law attention has been paid to overbreadth as a problem of the optimal specification of rules. See, e.g., Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65, 75 (1983). In various contexts scholars and courts have considered the conditions in which law should be defeasible, allowing individuals to show that a generally applicable legal rule should not apply in their cases. See, e.g., United States v. Engstrum, No. 2:08-CR-430 TS, 2009 WL 1683285, at *1 (D. Utah June 15, 2009) (Second Amendment), rev'd sub nom. In re United States, 578 F.3d 1195, 1197 (10th Cir. 2009); Jerry L. Mashaw, Richard A. Merrill & Peter M.

Power rules are more desirable, then, in circumstances where relatively little useful conduct is restricted. One private individual could kill another with a nuclear bomb or a chef's knife. If the state prohibits the private ownership or possession of nuclear bombs,[46] this power rule is unlikely to reach socially useful conduct: What legitimate reason is there for your neighbor to own a weapon of mass destruction? But if the state prohibits the possession of chef's knives, the prohibition would reach a great deal of socially useful activity. Indeed, this question—how much useful activity does a power rule prohibit?—is one way to understand the cultural divide over guns in the United States.[47] In hyperbolic terms, people who think firearms are like nuclear bombs want to regulate private possession with power rules; people who think they are like kitchen knives will prefer harm rules.

B. *Mere Expression*

Power rules have a paradoxical relationship to enforceability. They can improve enforcement when a harmful act is difficult to detect (for instance, the use of a date rape drug), or when they regulate the maintenance or acquisition of power that is difficult to conceal (e.g., the purchase of air time for a political ad). But because power rules often regulate consensual conduct, like a doctor's supplying steroids to a baseball player, it is not easy to enforce them when the conduct or condition in question is fleeting and hard to observe. This underenforceability raises another drawback for power rules: They lower the cost of legislative expression.

Because of their underenforceability, power rules allow a legislature to engage in "position-taking," endorsing a position without the consequences

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Shane, Administrative Law: The American Public Law System 464–66 (5th ed. 2003) (administrative law); R.A. Duff, Criminalizing Endangerment, 65 La. L. Rev. 941, 961–62 (2005) (criminal law); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1110–11 (1990) (Free Exercise Clause). Overbreadth is of course a distinct doctrine in constitutional law, see e.g., Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853 (1991), and questions of overbreadth and optimal specificity feature prominently in the massive literature on rules and standards, see generally Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991).

46. 18 U.S.C. § 831; see also id. § 175 (prohibiting possession of biological weapons); id. § 229 (prohibiting possession of chemical weapons); 42 U.S.C. § 2181(a) (2006) (restricting patents "useful solely . . . in an atomic weapon").

47. See generally Dan M. Kahan, The Gun Control Debate: A Culture-Theory Manifesto, 60 Wash. & Lee L. Rev. 3 (2003) (arguing that "cultural world views" inform "[b]eliefs about the causes [of] and effective responses to societal risks").

of real policy-making.[48] Members of Congress can talk tough on performance-enhancing drugs in professional sports, even though to date there have been more congressional speeches than prosecutions;[49] legislators can take a hard line against excessive campaign spending, even though in every election cycle there will be new ways to circumvent the limits; and a city council could take a strong stand in favor of private ownership of firearms by requiring every household to have one, all the while knowing that no one will ever be prosecuted for failure to comply.[50] This possibility of relatively enforcement-free lawmaking raises issues of diminished respect for the law, discriminatory enforcement, and legislative meddling. There are of course other ways to assess predominantly or purely expressive lawmaking. A cynic could commend it as a distraction for legislators, or a proponent of expressive laws might in some cases praise the efficiency of shaping social norms without the bluntness of actual enforcement.[51]

C. *Enforcement Discretion*

A final drawback of power rules is the expanded authority, and thus expanded discretion, that they give to the people charged with enforcing the law. As noted above, power rules can be used to prevent the evasion of harm rules. Power rules perform this function in the criminal law, for example, because they tend to have lesser evidentiary requirements. Consider a harm rule that prohibits the use of a firearm to harm another

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48. On position-taking, see generally David R. Mayhew, Congress: The Electoral Connection (1974); James M. Snyder, Jr. & Michael M. Ting, Why Roll Calls? A Model of Position-Taking in Legislative Voting and Elections, 21 J.L. Econ. & Org. 153 (2005) (developing a "rationale for roll call voting and position-taking in legislatures"). See also Neal Devins, Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade, 51 Duke L.J. 435, 461–62 (2001) (arguing Congress has increasingly favored symbolic messages over effective legislation).

49. Cf. Black, supra note 41, at 132 (noting only one indictment under Anabolic Steroids Control Act of 1990 in the year or two following its passage). But see United States v. Shortt, 485 F.3d 243, 244 (4th Cir. 2007) (upholding one-year sentence for doctor prescribing anabolic steroids and human growth hormone to bodybuilders and professional football players).

50. See Philip J. Cook, The Technology of Personal Violence, 14 Crime & Just.: Rev. Res. 1, 61 (1991) (describing ordinance in Atlanta, Georgia suburb "requiring every household in the city to keep a firearm in their home"); cf. supra note 39 and accompanying text (noting historical statutes requiring private persons to carry weapons to help secure the peace).

51. See generally Badawi, supra note 30 (suggesting that purely expressive laws allow governments to realize "efficiency gains . . . with little or no enforcement costs"). For entry points to the substantial literature on law and social norms, see generally Eric A. Posner, Law and Social Norms (2000); Richard H. McAdams, The Origin, Development and Regulation of Norms, 96 Mich. L. Rev. 338 (1997).

person: It usually requires that a prosecutor prove that an act took place, and that the actor had the requisite mental state (e.g., purpose, knowledge, or recklessness). But a power rule that prohibits possession of a firearm will ordinarily require much less proof. The mere existence of the firearm in a person's car or house may be sufficient, and if a mental state for the offense must be established, it is often only negligence.[52] These lessened burdens on prosecutors might make sense when the power in question is always or nearly always harmful, but they are troublesome if the power rule is especially overbroad.[53] This combination of easy proof and overbreadth can lead to arbitrariness or discrimination in enforcement, or to a lack of congruence between the expected and actual applications of the rule.[54]

Power rules also expand the authority of prosecutors in plea bargaining negotiations. As described above, the use of power rules in conjunction with harm rules will increase the number of offenses with which a defendant can be charged and (in most cases) the maximum possible punishment. Both of these increases can affect plea bargaining. First, the greater number of offenses gives prosecutors more options and more control. As Bill Stuntz has noted, substantive criminal law "create[s] a menu of options for prosecutors," and "[i]f the menu is long enough—and it usually is—

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52. See, e.g., Aya Gruber, Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense, 52 Buff. L. Rev. 433, 492 (2004) ("Many courts and legislatures have defined the *mens rea* element in possession crimes as something like negligence."). For a broadside against possession offenses in the criminal law, see Markus Dirk Dubber, Policing Possession: The War on Crime and the End of Criminal Law, 91 J. Crim. L. & Criminology 829, 855–934 (2001).

53. On the distinction between overbreadth and redundancy in criminal law, see Darryl K. Brown, Democracy and Decriminalization, 86 Tex. L. Rev. 223, 230–31 (2007). The desirability of overbroad power rules in the criminal law will of course depend on many other facts, including the institutional characteristics of prosecutors' offices, see Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869 (2009); Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959 (2009), and the constraints on official conduct that may be imposed by constitutional rights and the legal rules that give them practical force (e.g., the exclusionary rule, 42 U.S.C. § 1983 (2006)). Although this Essay focuses on power rules that protect one private person from another, the concept might be applied to the interactions of branches of government (e.g., separation of powers prevents the concentration of power by any one branch). The concept might also be applied to the interactions of citizens and the state. Some legal rules limit the power of the state vis-à-vis citizens (e.g., the Fourth Amendment), and others make the state vulnerable to its citizens (e.g., the Freedom of Information Act, exceptions to sovereign immunity). This is not to suggest that states seek an equality of vulnerability with their citizens—exceptions to sovereign immunity are exceptions to the general rule.

54. See Diver, supra note 46, at 67–71 (discussing congruence as one aspect of the optimal precision of rules). On discretion and rule enforcement, see generally Steven Shavell, Optimal Discretion in the Application of Rules, 9 Am. L. & Econ. Rev. 175 (2007).

prosecutors can dictate the terms of plea bargains."[55] Second, using both power rules and harm rules to govern the same course of conduct means that a prosecutor can credibly threaten to charge a defendant with *all* possible offenses, with the resulting high maximum sentence.[56] It does not seem to be a coincidence that the rise of plea bargaining and the related ascendancy of prosecutors in the United States are roughly correlated with the rise of power rules directed at possession of drugs and firearms, though of course other causal factors are involved.[57]

Enforcement discretion is closely tied to the other drawbacks of power rules. The officials who enforce any legal rule will have some discretion, but the officials enforcing power rules will often have greater and more dangerous discretion because of the rules' tendency toward overbreadth. And recall the paradox of enforceability: Power rules can enhance enforceability and yet nevertheless they are often unenforced, and thus purely expressive. In other words, power rules can expand enforcement discretion in *both* directions, in the direction of more enforcement (because proof is easier) and in the direction of less (when they are used instead of harm rules, because no victim demands enforcement). Thus power rules, not harm rules, are likely to populate the extremes of enforcement.

IV. TOWARD A NORMATIVE THEORY OF POWER RULES

The optimal mix of harm rules and power rules is not a purely technical question. It undoubtedly depends on normative theories about the role of the state, views of predominantly expressive lawmaking, and perceptions of what constitutes harm. Nevertheless, several general

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55. William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2548 (2004); see also Stuntz, Pathological Politics, supra note 38, at 519–20 (describing consequences of prosecutors having a greater number of charging options). Another way of making this point is to say that power rules tend to increase the amount of delegated criminal lawmaking. On the latter, see generally Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345 (arguing "historic underenforcement of lenity" reflects a "rule of criminal law: that Congress may delegate criminal lawmaking power to courts" (emphasis omitted)).

56. For qualification, see supra note 37 (noting exception where violation of a power rule merges with violation of a harm rule). The complementary use of power rules also increases the options available to juries. When a prosecutor does charge a defendant with multiple offenses, and the case goes to trial, jurors could convict on charge one but not charges two and three, and so on.

57. See generally Albert W. Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1, 16–26 (1979) (describing rise of plea bargaining); Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2469–96 (2004) (describing structural influences on plea bargaining, such as federal Sentencing Guidelines).

observations can be made about when power rules should and should not be used.

One way to approach the question is to think about how harm rules and power rules make different line-drawing demands. Harm rules will be more attractive when we are confident that we can distinguish between harmful and non-harmful conduct (as is usually the case for murder). When we cannot make this distinction—as in the steroids example, where we do not know when a player's injection with steroids has caused a competitive harm—a power rule will be an attractive proxy for the unworkable harm rule.

Some situations will call for both kinds of rules. For example, contract law prohibits fraud (a harm rule). But there are scenarios where we suspect that fraud is likely but hard to prove:[58] Richard Epstein offers the example of prisoners of war who, upon returning home, received a large sum in back pay and were then pursued by "experienced salesmen who proceeded to sell them unattractive municipal bonds."[59] Epstein argues that unconscionability doctrine should be applied to make these sales voidable, thus limiting the power of the predatory sellers (and effectively limiting, at least in the next iteration, returning prisoners' power to make contracts).[60] Here a power rule is feasible, because we can demarcate a class of cases where a powerful person is likely to harm a vulnerable person. Mere feasibility is not enough, though, in deciding whether to use a power rule.

Two other considerations are crucial to power rules' proper use: overbreadth and the enforcing institution. Overbreadth will vary sharply between power rules,[61] and in a particular context there may be several possible power rules, some more overbroad and some less so. Consider the problem of a corporation engaging in business transactions with its directors. A rule that all transactions between a corporation and its directors are voidable would be significantly overbroad, constraining the corporation's power and prohibiting a substantial number of profitable transactions.[62]

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58. Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293, 304 (1975) (noting that in some cases, "[p]roof of fraud is apt to be difficult . . . even if the fraud itself is likely").

59. Id.

60. Id. Epstein distinguishes the situation in which the returning prisoner of war sought out the municipal bond seller—there unconscionability should not be applied to make the transaction voidable. Id.

61. Intriguingly, the degree of overbreadth might not be correlated with a power rule's ability to make law enforcement more efficient through prevention, proof, and punitive flexibility.

62. See Jesse H. Choper, John C. Coffee, Jr. & Ronald J. Gilson, Cases and Materials on Corporations 111–12 (7th ed. 2008) (describing development of law on transactions with interested directors). Such a rule does obtain in the United Kingdom, but it operates as a

Here the obvious strategy is narrower drafting. In the context of power-increasing rules, other strategies for addressing overbreadth are possible.[63] One strategy would be to include a condition about the purposes for which the power may be used (e.g., public campaign funds must be used for electoral purposes; or a power may not be exercised maliciously).[64] Another strategy would be to separate the person who exercises the power from the person with decisionmaking authority about whether it should be exercised (for instance, a rule could require that ships carry arms for fighting off pirates, while also forbidding use of these arms without authorization from corporate or public officials who are not on board).[65]

The institution that is responsible for enforcement will also vary between power rules, as well as among different substantive areas of law. Enforcing officials are of course subject to the usual human constraints, including "incomplete knowledge, imperfect vision, and selfish desires."[66] Where these constraints are especially strong, it will be undesirable to use a power rule. But where they have less bite—where for whatever reason the enforcing officials are marked by integrity and competence and their incentives are reasonably well-aligned with the public good—it will make more sense to use power rules. With sound enforcement, there will be more congruence between the expected and actual applications of a power rule,

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penalty default rule: A transaction with a director is voidable if the director fails to make disclosures required by Companies Act, 2006, c. 2, § 177.

63. For a systematic analysis of how law can constrain fiduciary power, with special attention paid to the powers of trustees and corporate directors, see generally R.C. Nolan, Controlling Fiduciary Power, 68 Cambridge L.J. 293 (2009).

64. See id. at 297–304 (discussing "improper purposes doctrine"). On the tacit condition that legal rights may not be used for purely malicious reasons, see Joseph M. Perillo, Abuse of Rights: A Pervasive Legal Concept, 27 Pac. L.J. 37, 37 (1995); see also Sarah Worthington, Equity 142–47 (2d ed. 2006) (detailing equitable methods of regulating abuse of power by decisionmakers). Any conditions that accompany power-increasing rules should be intuitive and straightforward; otherwise they would prevent vulnerable people from being confident that they could exercise the power. Cf. Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 651, 668–73 (1984) (concluding that clarity and accessibility matter more for conduct rules than for decision rules); Diver, supra note 45, at 76–77 (concluding that transparency is more important for external rules than for internal rules); Paul H. Robinson, Rules of Conduct and Principles of Adjudication, 57 U. Chi. L. Rev. 729, 732 (1990) ("[E]ffective . . . rules of conduct must be simple, based on objective criteria with easily communicable and comprehensible standards.").

65. See Malcolm Thorburn, Justifications, Powers, and Authority, 117 Yale L.J. 1070, 1072–74 (2008) (discussing "division of labor between those who have the legal power to decide what conduct is . . . legally justified in the circumstances and those who carry out that conduct"). Note that Thorburn uses "power" in the Hohfeldian sense of legal power rather than the sense in which it is used in this Essay. Compare id. at 1073 n.1, with supra note 7.

66. Diver, supra note 45, at 98; see generally id. at 97–106 (offering standard explanations for the gap between public interest and decisions of administrative officials).

and there will be less danger from overbreadth and discretion. How much bite these constraints have for particular enforcing officials is a judgment to be made in each context.[67]

For some power rules, though, there may be little or no enforcement, due to legislative design or some other circumstance. Here it matters what kind of power rule is at issue. An unenforced power-decreasing rule can be pernicious, especially in competitions. Those who follow the unenforced rule will have their power reduced, and those who do not comply with the law will secure a competitive advantage.[68] The same problems may not be caused, however, by an unenforced power-increasing rule. Some power-increasing rules merely *permit* a person to accumulate or exercise power (such as a rule authorizing self-defense). For these rules, there is nothing for a public official to "enforce." Other power-increasing rules *require* the accumulation or exercise of power (an example would be the rule that ships in waters frequented by pirates must carry arms). These rules can be enforced by public officials, but enforcement may not be necessary. The rule itself indicates official authorization, and depending on the contours of the rule, this may be enough to establish a new social norm or focal point for coordination.[69] Put differently, some power-increasing rules enforce themselves.[70]

The considerations of overbreadth and the institutional capacity of the enforcing institution should be taken together, suggesting a decisional rule for the drafters of statutes and regulations: *Where overbreadth and institutional concerns are both high, power rules should be disfavored; where neither set of concerns exists, power rules should be readily used; and where only one of these concerns is present, the question is a closer one*.

Any normative theory of power rules should also recognize their relationship to two political realities.

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67. For suggestions about how this judgment can rest on systematic evaluation of enforcing officials, see Mariano-Florentino Cuéllar, Auditing Executive Discretion, 82 Notre Dame L. Rev. 227 (2006).

68. For a description of this comparative advantage in baseball, see Doug Glanville, Seeing is Disbelieving, Opinionator, Jan. 21, 2010, at http://opinionator.blogs.nytimes.com/2010/01/21/seeing-is-disbelieving/ (on file with the *Columbia Law Review*).

69. See supra notes 30–31 and accompanying text.

70. See Armour, Hansmann & Kraakman, supra note 9, at § 2.3.1 (noting that enforcement institution is "only of second-order importance" for "principal-empowering strategies" in corporate law). Because power-increasing rules can decentralize enforcement, they raise a number of questions. Who is better positioned to avoid the harm: the state or the newly empowered vulnerable person? And would a power-increasing rule foster individual responsibility and elevate vulnerable persons? Or would it signal a lack of protection from the state and encourage a culture of blaming those who suffer injury?

First, as a matter of political economy, legislators and agency officials are likely to use more than the optimal number of power rules. Power rules promise something that lawmakers generally want: greater and more effective legal regulation. In contrast, the costs of power rules are often externalities to lawmakers. Overbreadth may be imperceptible, or it may burden only those not represented by an organized political lobby. Cheap legislative expression will hardly seem to be a bad thing to lawmakers. The same is true of discretionary enforcement, for it will often work to lawmakers' own advantage.

Second, the virtue of power rules is an instrumental one. They can improve the efficiency of a legal system, but they do so without regard to whether that system is more just or less just. They could be used for good. Or they could be used to make tyrannical laws more effective, to make vulnerable persons more vulnerable still.

CONCLUSION

To protect a vulnerable person from a powerful one, a lawmaker can choose a harm rule or a power rule, or a combination of both. The advantages of each approach can be elaborated within the framework provided by this Essay. This framework is not the only way to look at the rules referenced above. Nor is it an adequate or useful way of describing every legal rule. What this framework does offer, though, is a common language that can be used by scholars, in many different areas of the law, to describe and analyze how a vulnerable person is protected.