

POWER RULES «preliminary draft»

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This Essay analyzes a way that law can protect a vulnerable person from a powerful one. Law's usual method is to penalize the powerful person if she harms the vulnerable person. But sometimes law turns its focus from regulating the infliction of harm to regulating the accumulation of power to inflict harm. Legal rules that reflect this shift in focus can be called "power rules," because they expressly restructure underlying relations of power and vulnerability. Power rules are attractive because they allow legal regulation of situations in which rules directly regulating harm ("harm rules") are not possible; in other situations, power rules can complement harm rules and improve their effectiveness. But power rules have drawbacks, too: they tend toward overbreadth, they encourage more use of expressive lawmaking, and they increase prosecutorial supremacy. The concept of power rules helps explain patterns in the use of legal rules, at least in the legal system of the United States, and it illuminates the trade-offs involved when lawmakers choose between different methods of protecting vulnerable persons.

I. Introduction

Political and jurisprudential theories often take as a starting point that powerful people harm vulnerable people, and that some mechanism is needed for protection.¹ This mechanism might be a social contract, the state, a leader, or the law. Whatever mechanism for protection is emphasized in theory, in actual practice the aim of protecting the vulnerable is ordinarily given concrete form in legal rules.² Rules to protect vulnerable persons abound in criminal and tort law; they can be found in labor law, family law, election law, tax law, health and safety regulations, and so on. Both the general starting point of vulnerability and the specific legal rules that ameliorate it are the subject of vast scholarly literatures, not only in

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¹ See, e.g., THOMAS HOBBES, LEVIATHAN (1651); H.L.A. HART, THE CONCEPT OF LAW 194-95 (2d ed., 1994).

² This Essay focuses on the legal system of the United States, but there are legal rules to protect vulnerable persons in perhaps every legal system.

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law but also in political theory and other disciplines. But in between 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 law has in protecting vulnerable people no matter what the specific kind of vulnerability—whether vulnerability to assault or car accidents 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, and what the advantages and disadvantages would be of each possible approach.

This Essay offers an initial step toward such a theory. It distinguishes between two 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 Essay focuses in particular on power rules. As a means of protecting the vulnerable, they 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, athletics, and the workplace), and in other areas they can improve the enforcement of harm rules (e.g., by making proof easier). But power rules have drawbacks, too. They tend toward overbreadth, encourage predominantly expressive laws, and strongly benefit prosecutors. Although the distinction between power rules and harm rules does not, by itself, generate a comprehensive theory of law’s options for protecting a vulnerable person, it is an important step. The distinction illuminates options that are available to lawmakers and it provides a

³ One analogy in current legal literature is prophylactic rules (e.g., the requirement of *Miranda* warnings), but that concept has been developed almost exclusively in the context of American constitutional law and is focused on preventing harm by state officials, not harm by one private individual against another. See, e.g., David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988). Although power rules are widely found throughout the law, within criminal law they overlap to a significant degree with possession offenses and with what Douglas Husak has called “nonconsummate offenses.” See Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151 (1995). In Canada a somewhat analogous concept in constitutional law is the indirect regulation of harm. See, e.g., Reference re Firearms Act, [2000] 1 S.C.R. 783, 2000 SCC 31, ¶ 40 (upholding restrictions on firearm possession under the federal criminal law power and noting that “Parliament may use indirect means to further the end of public safety”).

common grammar for legal scholars working on similar problems in quite different areas of the law.

II. Power Rules

No legal system tries to protect against every kind of harm, and no legal system concentrates exclusively on protecting the vulnerable. 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 clerks by signaling that it will penalize whoever harms them. 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 are punished more severely if the victim is a particularly vulnerable person, such as someone who is elderly.)⁴ A second approach is less direct. To prevent robbers from harming convenience store clerks, the law could alter their relative power and vulnerability.⁵ There could be 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 anywhere. Or there could be a legal rule that required convenience store clerks to wear body armor; or that required the owners of convenience stores to install bulletproof glass.

⁴ U.S.S.G. § 3A1.1(b)(1) (sentence enhancement when “defendant knew or should have known that a victim of the offense was a vulnerable victim”); *see also* United States v. Grimes, 173 F3d. 634, 637 (7th Cir. 1999); T. Murch, *Revamping the Phantom Protections for the Vulnerable Elderly: Section 3A1.1(B), New Hope for Old Victims*, 6 ELDER L.J. 49 (1998).

⁵ 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 convenient: *power* and *vulnerability* are correlative: power is the ability to harm another person; vulnerability is susceptibility to being harmed by another person. Power may involve resources and opportunities of almost any imaginable kind, including commodities (e.g., money, weapons) or methods of influence (e.g., advertising and threats). Contrast Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 44 (1913) (treating *power* as legal power 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. *See infra* note 41.

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Or, to make a robber vulnerable to a convenience store clerk, there could be legal rules requiring 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—assault, rape, securities fraud, race discrimination, intentional infliction of emotional distress. Power rules regulate conduct (or a condition) that is not perceived to be harmful in itself. A law might regulate the purchase or possession of a commodity, such as steroids, handguns, or large vehicles that are hazardous to other drivers.⁶ Or it might require the purchase or use of a commodity, such as bulletproof glass in convenience stores, seatbelts in cars, early warning systems for ships in pirate-infested waters, or whistles for college students walking in secluded parts of campus; or a power rule might require that someone avail himself of a contractual power (e.g., requiring new fathers to take paternity leave). A power rule might grant someone a power (e.g., standing to sue, Patriot Dollars to spend on political campaigns), or set a maximum limit on someone's power (e.g., spending limits for political candidates). None of the acts or conditions that these power rules regulate—from the mere purchase of steroids by a baseball player to the fact that a convenience store lacks bulletproof glass—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 not by prohibiting or otherwise regulating the harmful act itself but rather by “evening the odds” in relations of power and vulnerability, by reshaping the contexts in which harmful acts can occur.

Power rules could be further divided into two categories. *Power-down rules* cap the power of a powerful person (e.g., limiting campaign expenditures by political candidates, limiting possession of firearms in convenience stores, requiring store owners to install bulletproof glass). *Power-up rules* give the vulnerable person the power to strike back (e.g., public funding for relatively poor political candidates, arming convenience store clerks). In somewhat overstated language drawn from international relations, when the state chooses power-down rules it is imposing on

⁶ A regulation of possession might be limited to certain people (e.g., felons) or certain places (e.g., schools).

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powerful and vulnerable persons a regime of disarmament; when it chooses power-up rules it is imposing a regime of mutually assured destruction. One more distinction is helpful: usually power rules are directed at the powerful person or the vulnerable person, but *third-party power rules* are also possible.⁷

This distinction between harm rules and power rules is not absolute.⁸ And which category a rule falls into depends on societal perceptions of harm, and thus can vary between societies and within a single society over time. A prohibition of sexual relations between a more powerful person and less powerful person (e.g., 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 certain powerful persons obtaining a greater measure of power over those who are vulnerable to them. Is trespass perceived as a per se harmful act or instead as a not intrinsically harmful act that often leads to harms, such as damage to property? In certain cases, then, these two categories contend with one another. In many other cases, however, a legal rule falls into one category or the other. This Essay purposefully focuses on these relatively clear cases to show the usefulness of the distinction.

III. 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, the attraction of power rules arises in two cases: (1) situations in which power rules are the only viable means of regulation; and (2) situations in which power rules can complement harm rules.

⁷ For discussion of third-party power rules, see *infra* Part III.B.

⁸ 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 is in whether the act (or condition) being regulated is perceived to be per se harmful. One reason the distinction is not absolute is the nebulosity of *harm*. See JOEL FEINBERG, HARM TO OTHERS 31-36 (1987) (noting its vagueness and ambiguity); see also Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113 (1999) (“Claims of harm have become so pervasive that the harm principle has become meaningless”). This Essay relies on ordinary usage of the term in lieu of technical definition.

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A. Power rules instead of harm rules: regulating competitions

In certain contexts power rules may be necessary because harm rules are difficult or impossible to formulate and apply. This is true, for example, in competitions, such as baseball games, political elections, and the workplace.

First, 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.”⁹ If a Major League Baseball player injects himself with steroids, when is a rival player or team or “the sport” injured? When the player hits a home run that he otherwise would not have hit? Which ones are those? Or only home runs that decide games? Or that decide which teams make the playoffs? No one has any idea what the answer to these questions is. The legislative response, then, is to focus not on what is impossible to measure—the incidence of injury to rivals 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 the commonplace problem of a legal rule having borderline cases.¹⁰ The problem in this competition scenario is much deeper; it is having no way, even in the ordinary case, to know when the regulated conduct has actually caused injury.

Second, consider spending limits in political campaigns. Set aside the explanations of campaign-spending limits as incumbent protection¹¹ or as solving a collective-action problem for candidates who would under-

⁹ See, e.g., CONG. REC. H3662 (June 2, 2004) (statement of Rep. Osborne, previously a highly successful college football coach) (“the use of steroids and precursors threatens the integrity of athletic competition”); see also Matthew J. Mitten, *Drug Testing of Athletes—An Internal, not External, Matter*, 40 NEW ENGLAND L. REV. 797, 801 (2006) (“Pharmacological performance-enhancing substances are banned because of their adverse effects on both athletes’ health and competitive integrity.”). On federal criminal law and steroids, see generally Colin Laitner, *Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution*, 3 DEPAUL J. SPORTS L. & CONTEMPORARY PROBLEMS 192, 196-197 (2006); Adrian Wilairat, *Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. & POL’Y 377 (2005).

¹⁰ See generally TIMOTHY A. O. ENDICOTT, *VAGUENESS IN LAW* (2000); see also Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. (forthcoming 2010).

¹¹ *Randall v. Sorrell*, 548 U.S. 230, 249, 126 S. Ct. 2479, 2492 (2006).

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standably like to spend less time raising money.¹² Instead, see them in the terms of some proponents: as protecting fair competition by keeping a powerful candidate from excessive spending that hurts a weaker candidate.¹³ A harm rule would be impossible: imagine trying to decide exactly when a particular ad buy was unfair competition that injured another candidate.¹⁴ Here a power rule shifts the lawmakers' task from specifying harm to specifying power, and in particular specifying power as measured in dollars spent.¹⁵

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 maternity leave than male employees are to take paternity leave. In such circumstances, male employees may gain an advantage in hiring and promotion: the employer might assume that a male employee is, from an *ex ante* perspective, less likely to take leave. To prevent male employees from unfairly competing with female employees, the law 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.¹⁶

¹² 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, 1282-1283 (1994).

¹³ See, e.g., Keith D. Ewing, *Promoting Political Equality: Spending Limits in British Electoral Law*, 2 ELECTION L.J. 499, 499 (2003) ("spending 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).

¹⁴ Cf. Blasi, *supra* note 12, at 1282 (noting that "[d]isproportionate influence," one of the harms that campaign finance regulation seeks to avert, "is hard to measure").

¹⁵ A power-up rule in election law is the Millionaires' Amendment in the Bipartisan Campaign Reform Act; it allowed a candidate with a wealthy rival to receive larger campaign donations and greater coordinated party expenditures. See *Davis v. Fed. Election Comm'n*, 128 S.Ct. 2759 (2008) (holding the Millionaires' Amendment unconstitutional on First Amendment grounds). Other power-up rules might include constitutional requirements to have majority-minority districts and Bruce Ackerman and Ian Ayres's notion of patriotic dollars. On the latter, see BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002).

¹⁶ See, e.g., Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LABOR & EMPLOYMENT L. 293, 301 &

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These examples suggest several generalizations. One is that for regulating competitions, power rules will sometimes be the only option; in all three contexts a harm rule is impossible. Outside competition scenarios, harm rules will also be impossible when law cannot reach the agent of the harm. This might be because the agent is not susceptible to the enforcement apparatus of domestic law. Thus a state might require that domestic corporations take defensive cyber-security measures because a harm rule could not reach hackers who resided in a hostile country. Or reaching the agent might be impossible because the agent is impersonal. To protect persons whose homes are vulnerable to earthquakes, the law relies on power rules, such as building codes, because an earthquake cannot be held liable for the injuries it causes.

Another generalization is that power rules that regulate competitions 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 (especially power-down 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,¹⁷ and it regulates the ability of medical insurers to collect DNA for more accurately calculating an insured person’s health risks.¹⁸ In both of these examples there is concern that a certain power is *too* powerful and thus must be restricted in order to prevent the harm of unfair bargaining (again, a harm difficult to precisely identify).

Another generalization is that these power rules are all relatively easy to evade. If a harm rule regulates assault, fraud, or racial discrimination, there is usually a victim who can speak out. But in these three competition scenarios a power rule regulates consensual conduct: a doctor and a baseball player exchanging steroids and money; a political campaign and a vendor exchanging money for goods or services; an employer and an employee who are both willing (with obvious caveats about coercion and

n.34 (2007); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 773-775 (2000).

¹⁷ *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 616–620 (1969) (upholding the National Labor Relations Board’s finding of an unfair labor practice where employer threatened economic retaliation if a union was recognized).

¹⁸ See 42 U.S.C. § 1395ss(x)(2) (prohibiting the collection of genetic information by medical insurers “prior to . . . enrollment” and “for underwriting purposes”).

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false consciousness) for the employee to forego his optional paternity leave. In each of these contexts a power rule would cap the power of a relatively powerful person. Also consider power rules that might decrease the vulnerability of a vulnerable person, such as a requirement that convenience store clerks wear bulletproof vests or that persons walking through secluded areas carry whistles:¹⁹ these rules can be evaded, too, because if the vulnerable person fails to comply there is no “squeaky wheel.”

A final generalization is that because these power rules are strongly expressive, their underenforceability might not prevent their success. In each of the competition and bargaining scenarios noted in this section, a power rule serves to call public attention to a problem: the problem of an advantage considered unfair, whether for athletes who use steroids, for well-connected politicians, for new fathers, for employers in union recognition elections, for insurers who gather genetic information. (The very expressiveness of a power rule may prove counterproductive, however, if it further entrenches public perceptions of who is powerful and who is vulnerable.) Like other laws that are unenforced or merely default rules, an underenforceable power rule might still alter social norms.²⁰ In game-theoretical terms, it could establish a focal point for coordination;²¹ 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 (e.g., making paternity leave mandatory).²² Thus power rules have tendencies toward paternalism.

¹⁹ See *Campus Life: New Hampshire; Can Whistles Help to Prevent Campus Rape?*, N.Y. TIMES § 1, p. 45 (Oct. 8, 1989).

²⁰ See, e.g., Adam B. Badawi, *Law Without Threat: the Theoretical and Empirical Case for the Passage and Subsequent Non-Enforcement of Smoking Bans* (work in progress); see also Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 842 (2007) (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”).

²¹ See Richard McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. 209, 233-35 (2009).

²² 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 20.

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B. Power rules in support of harm rules: 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.

INTERCEPTION Power rules can sometimes prevent the circumstances from arising in which a harm rule would be violated in the first place. 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 altercation. Or a disclosure requirement for investment prospectuses might reduce investors' vulnerability to securities fraud by encouraging a culture of disclosure, promoting diversification, and tipping off savvy investors to an improbable history of high returns from non-volatile investments *à la* Bernard Madoff.

PROOF Power rules also can prevent 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.²³ Thus power rules might prohibit the possession of date rape drugs not only as a means of interception but also as a means of ensuring the punishment of people who have already used them to facilitate rape. Or a power rule might prohibit the sale of eagle feathers in order to catch people who kill eagles:²⁴ although such a prohibition would not change someone's power *before* the person killed the eagle, it would restrict the power that someone might expect to *acquire from* committing the act (i.e., valuable eagle feathers) as well as serving an evidentiary function.

PUNISHMENT When used in conjunction with harm rules, power rules allow for a broader range of criminal punishments for the same conduct. In a drug deal gone bad, with shots fired on both sides, numer-

²³ A similar shift in focus can be observed in the enforcement of "process crimes." See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, __ GEO. L.J. (forthcoming).

²⁴ Cf. *Andrus v. Allard*, 444 U.S. 51, 58 (1979) (discussing the Eagle Protection Act and the Migratory Bird Treaty Act).

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ous offenses may have been committed, including violations of harm rules (assault with a deadly weapon) and power rules (possession of drugs; possession of firearms). For charging a defendant, the prosecutor would have multiple options: charge only for possession of drugs, only for possession of a firearm, for both possession offenses, for possession of drugs and assault but not possession of a firearm, and so on. Which combination the defendant is charged with could radically affect the range of possible sentences. Of course, even without power rules, what offense the prosecutor charges the defendant with will affect the sentencing range: first-degree murder, 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 increasing maximum sentences. For lawmakers bent on ever more severe punishments for crime, power rules are therefore an attractive option.²⁵

THIRD-PARTIES Power rules can also complement harm rules by authorizing a third party to protect a vulnerable person. Take for example the power of a minor to make contracts. Statutes and common law doctrines restrict the enforceability of contracts with minors; these are power rules that take away from vulnerable people a power—the power to make binding contracts—because of concern about misuse. (Again, power rules consort with paternalism.) In return, the state often augments the power of a third party, such as the parent or legal guardian, thus offsetting one power rule with another. And 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.²⁶

²⁵ This bent of legislators in the United States has been critiqued for decades by the academy, to no apparent effect. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001) (noting legislators' invulnerability 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 prosecutorial supremacy, see *infra* Part IV.C.

²⁶ See, e.g., The Militia Act of 1792, 1 Stat 271; The Statute of Winchester (1285); The Assize of Arms (1181); see also FREDERICK WILKINSON, THOSE ENTRUSTED WITH ARMS: THE POLICE, POST, PRISON, CUSTOMS AND PRIVATE USE OF WEAPONS IN BRITAIN 9–13 (2002).

IV. The Drawbacks of Power Rules

Despite their attractions, and in part because of them, there are drawbacks to using power rules. These can be summarized as (1) overbreadth, (2) lower costs for legislative expression, and, (3) in criminal law contexts, prosecutorial supremacy.

A. *Overbreadth*

Power rules tend to be very broad. When law constrains a person's power (as through a power-down rule), it does so for good uses and for bad ones.²⁷ If a statute specified maximum annual 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 a statute that forbids felons from possessing bulletproof vests:²⁸ 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 whenever he leaves his house.²⁹ Given its rationale, the rule against felons' possessing body armor is thus overbroad.³⁰ In contrast to these examples of over-

²⁷ Thus each of the regulations of competition described above raises overbreadth concerns. See, e.g., Blasi, *supra* note 12, at 1314-1316 (noting overbreadth issue for campaign spending limits); Jeffrey A. Black, Comment, *The Anabolic Steroids Control Act of 1990: A Need for Change*, 97 DICKINSON L. REV. 131, 132 (1992) (criticizing steroids law as overbroad). Power-up rules also suffer from a kind of overbreadth: if a vulnerable person is required to maintain some power—such as firearms for convenience store clerks—that power could be misused with terrible consequences.

²⁸ 18 U.S.C. § 931 (making it a federal crime for anyone convicted of a violent felony to “purchase, own, or possess body armor”); see also U.S.S.G. § 2K2.6 (increasing the 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) (state prohibition on wearing bulletproof vests while committing certain offenses). These facts are drawn from *United States v. Patton*, 451 F.3d 615 (10th Cir. 2006).

³⁰ Overbroad rules are of course not necessarily unconstitutional or even unwise. There is a substantial literature on overbreadth in constitutional law. See, e.g., Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

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breadth, if the state uses a harm rule it can tailor the sanction to the precise conduct considered harmful.

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,³¹ 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.³² 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. Just expression

Power rules have a paradoxical relationship to enforceability. They can improve enforcement when a harmful act is difficult to detect (e.g., the killing of eagles), or when they regulate the maintenance or acquisition of power that is difficult to conceal (e.g., storing a large missile or buying time for a television ad). But because power rules often regulate consensual conduct, like a doctor's supplying steroids to a baseball player, it can be hard 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.

With power rules, 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,³³ legislators

³¹ 18 U.S.C. § 831; *see also* 42 U.S.C. § 2181 (restricting patents “useful solely . . . in an atomic weapon”); 18 U.S.C. § 175 (biological weapons); 18 U.S.C. § 229 (chemical weapons).

³² *See* Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3 (2003).

³³ *Cf.* Black, *supra* note 27, at 131 (noting only one indictment under the Anabolic Steroids Control Act of 1990 in the year or two following its passage); *United States v. Shortt*, 485 F.3d 243 (4th Cir. 2007) (upholding one-year sentence for doctor prescribing anabolic steroids and human growth hormone to bodybuilders and professional football players).

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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.³⁴ This possibility of relatively enforcement-free lawmaking raises issues of 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.³⁵

C. Prosecutorial supremacy

A final drawback of power rules, when they appear in the criminal law, is prosecutorial supremacy. As noted above, power rules can prevent the evasion of harm rules. This happens because power rules tend to have lesser evidentiary requirements. Consider a harm rule that prohibits the use of a commodity to harm another 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 the same commodity will ordinarily require much less proof: the mere existence of the commodity in a person's car or house may be sufficient, and often no mental state beyond negligence need be shown.³⁶ These lessened burdens on prosecutors might make sense when the power in question is always or nearly always

³⁴ See Philip J. Cook, "The Technology of Personal Violence," in 14 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 61 (Michael Tonry, ed. 1991) (describing Kennesaw, Georgia ordinance "requiring every household in the city to keep a firearm in their home"); cf. *supra* note 26.

³⁵ See generally Badawi, *supra* note 20. For entry points to the substantial literature on law and social norms more generally, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 *MICH. L. REV.* 338 (1997).

³⁶ 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). 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).

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harmful, but they are troublesome if the power rule is especially overbroad.³⁷

Power rules also strengthen the hand 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 that a defendant can be charged with and 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—prosecutors can dictate the terms of plea bargains.”³⁸ Second, the use of both power rules and harm rules that govern the same course of conduct means that prosecutors can credibly threaten to charge a defendant with *all* possible offenses, with the resulting high maximum sentence.³⁹ Other causal factors are of course involved in the rise of plea bargaining and the related ascendancy of prosecutors,⁴⁰ but it does not seem to be a coincidence that

³⁷ The desirability of power rules in such cases will of course depend on many other facts, including the institutional characteristics of prosecutors’ offices 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, § 1983). Although this Essay focuses on power rules that protect one private person from another, the concept might also be applied to interactions between citizens and the state. Certain legal rules limit the power of the state vis-à-vis citizens (e.g., constitutional rights). Other legal rules 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 willingly seek mutual vulnerability with their citizens—exceptions to sovereign immunity are always exceptions.

³⁸ William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004); see also Stuntz, *supra* note 25, at 519-520. 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 (1994).

³⁹ The complementary use of power rules also increases the power of juries: when a prosecutor does charge a defendant with multiple offenses, and the case goes to trial, jurors often have a greater range of options (convict on charge 1 but not charges 2 and 3, etc.).

⁴⁰ See generally Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Stuntz, *supra* note 38; see also Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

these trends are roughly correlated in the United States with the rise of power rules directed at possession of drugs and firearms.

V. Conclusion

Understanding power rules and their tradeoffs is useful for several different enterprises. Consider people who draft legislation. A person drafting a securities statute should be skilled not only in the substantive law but also in the art of drafting. And artful drafting requires a sense of what the options are. Some options are obvious—should the rule be civil or criminal?—but a choice between a power rule and a harm rule will often be made unawares, without any sense of what is gained and lost. If drafters are aware of the distinction, they can achieve a closer fit between their purposes and the statutory text.

Awareness of this distinction may also help legal scholars by providing a common grammar for describing legal rules in otherwise disparate areas of law.⁴¹ An analysis of one or more power rules in campaign finance might produce useful insights about power rules more generally, insights that could then be borrowed by scholars of substantive criminal law and drug policy. And vice versa. With all of the centrifugal pressures in modern legal scholarship, it would be beneficial to have one more way of bringing insights from our subspecialties on the periphery back to a central conversation.⁴²

⁴¹ The concept of power rules may also be useful to scholars in disciplines other than law who write about power and vulnerability. Almost any scholarly conception of power and vulnerability might yield insights for and draw insights from describing and critiquing power rules in the law. For example, a theory of power that emphasized commodification and the role of tangible things in defining personal identity might have much to say about a legal regime that emphasized the regulation of things over the regulation of acts. Or consider the implications of a theory of freedom as non-domination. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997). In Pettit's theory, freedom is incompatible with virtual domination, i.e., one person's having the capacity to interfere with another's choices. Such a theory might critique power-up rules: they protect the vulnerable person by making *both* persons subject to virtual domination (thus achieving safety by sacrificing freedom). Alternatively, if power-up rules are an important way of protecting vulnerable persons, they might support a critique of Pettit's theory: by increasing virtual domination the state can prevent actual domination.

⁴² Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).