RULE POROUSNESS
AND THE DESIGN OF LEGAL DIRECTIVES

Legal directives give effect to social policy. There has been extensive debate about how best to design the contours of the law to achieve that end.[1] However, this theoretical debate has generally overlooked one simple fact: rules are sometimes broken. Rules are not concrete walls that actively stop all the behavior they prohibit.[2] Rather, they are porous screens through which some prohibited conduct may pass. A rule's porousness is an essential element of the rule itself, and rulemaking should acknowledge and even exploit its contours.

A rule's porousness is often predictable and can be shaped through the design of the rule and its accompanying remedial regime — efforts to catch violators and penalties for violations.[3] Because rules can be porous and this porousness can be shaped, it is an underappreciated feature of legal directives that sorting between desirable and undesirable conduct happens not just at the level of deciding what conduct to prohibit, but also at the level of deciding how the directive is enforced or remedied, and ultimately at the level of people deciding whether to comply. Once it is recognized that selection occurs at several levels, it becomes apparent that there is a pervasive design choice about how much selection should happen at each level. Complex rules that are tailored to a purpose and perfectly followed are in some cases substitutable for seemingly overinclusive rules that are broken and thus accompanied by downstream selection effects. Some literature has acknowledged in particular contexts that rulebreaking may be an important feature of rule design, but there is little generalized discussion about this tradeoff as a matter of legal architecture.

This Note explores the phenomenon of rule porousness and its implications for the design of legal directives. Part I describes rule porousness and how such porousness may be shaped and harnessed. Part

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[1] *See, e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

[2] Rules may mandate behavior as well as prohibit it. However, for the purpose of simplicity, this Note generally refers to prohibitions.

[3] The practice of case-by-case discretion may also shape the conduct that follows from a rule. *See* Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1130 (1997) ("The content of law depends not merely on the statute books but also on prosecutorial practice . . . ."); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 20.3, at 588 (7th ed. 2007) (observing that "rule administration may bring balancing in through the back door" if enforcers, when deciding how to apply a rule, "appeal . . . overtly or covertly, to a standard thought to underlie or animate the rule"). Although case-by-case discretion can affect a rule's porousness, this Note is not intended to consider such tailoring.

II discusses the tradeoff between porous rules and tailored rules as a choice about costs and efficacy. Part III explores the tradeoff between porous rules and tailored rules as a choice about different conceptions of democratic values and the rule of law.

I. RULE POROUSNESS

A. Introduction to Rule Porousness

Rules are sometimes broken. As a result, there is often slippage between a rule and the conduct that follows from it. This slippage is so common as to be a fact of life. Everything from minor traffic regulations to the most serious of criminal laws and constitutional limitations are sometimes disregarded.

This slippage is generally not random. Rather, a rule's porousness may have a shape: some people are more likely to break a rule than others, and some situations are more prone to rulebreaking than others. Consider the reasons why people follow rules. The law and economics explanation is that directives are followed when the expected cost of noncompliance exceeds the expected benefit of noncompliance. Thus, compliance is a function of the benefit of breaking a rule, the probability that noncompliance will be detected, and the sanction for noncompliance.[4] This model is complicated by the effects of social norms[5] and moral commitment to following law.[6] These factors that drive compliance vary among different people and situations. Social norms influence people in distinct ways. For example, those occupying certain roles in society adhere more than other people to certain norms.[7] Some potential rulebreakers can more easily evade detection

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[4] *See* POSNER, *supra* note 3, § 7.1, at 218, § 7.2, at 219; Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). It is worth observing that a practice of case-by-case discretion may also shape the circumstances in which a formal rule is broken. *See supra* note 3. Although predictable uses of discretion certainly shape rule compliance, this Note focuses primarily on porousness created by decisions that do not merely examine the equities of individual cases.

[5] *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (describing mechanisms through which social norms influence behavior); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 905 n.196 (1999) (collecting sources); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2033–36 (1996) (collecting examples of norms affecting dangerous behavior); *cf.* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991) (describing the effect of social norms on behavior).

[6] *See* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 4 (1973) (describing well-meaning adherence to "a schema of rights, privileges, liberties, obligations, and duties"); FREDERICK SCHAUER, PLAYING BY THE RULES 125 & n.20 (1991) (collecting sources).

[7] *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 928, 939–40 (1996) ("Choices are pervasively a function of social role. A teacher might dress a certain way,

or punishment;[8] some rulebreaking is difficult to detect and prosecute,[9] and some rulebreakers can more easily conceal their actions.[10] Even similarly situated actors respond differently to rules because they *perceive* dissimilar risk of punishment or are differently risk averse.[11] Some rulebreakers respond differently to punishment itself. Monetary sanctions, for example, have little deterrent effect on insolvent people[12] and less deterrent effect on the wealthy than on the middle class.[13] Finally, and perhaps most importantly, the benefit of breaking a rule is higher to some people or in some situations than others. Even "drivers who ordinarily obey traffic laws may speed when they are in a big hurry."[14]

Thus, a rule's porousness often has a shape. In some instances, that shape can be predicted and manipulated. Most notably, this means that rules can act as remedial screening devices: violations by different groups or in different situations will be screened in or out depending upon the remedy for the violation, including the penalty and the expectation of being caught. The law affects conduct not just by prohibiting behaviors, but by imperfectly enforcing compliance, and, within the subset of cases in which enforcement happens, by imposing penalties from which some (but not all) actors will suffer less than they benefit from the violation. Consider the metaphor of walling off a city: The people who will find their way in are not a random group. They will tend to be those who most want to enter the city and who are most able to scale the wall. Perhaps this group will be tall and strong — useful traits for scaling walls — or good at certain jobs and thus able to benefit most from being in the city. And in situations in which there is a great need to enter the city, more people can be expected to enter.

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take a certain salary, or refuse to talk about the current President in class, because of what is (understood to be) entailed by the social role of teacher.").

[8] *See* Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 670, 690–93 (2003). In addition to evading punishment, people may also engage in "avoision," acting in a way that violates the rule's intent or purpose but does not actually break the rule. *See id.* at 692; *see also* LEO KATZ, ILL-GOTTEN GAINS 1–132 (1996).

[9] *See, e.g.*, William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1820 (1998) (describing the expense of detecting consensual crimes that occur on private property).

[10] *See* Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1352–63 (2006).

[11] *See, e.g.*, Becker, *supra* note 4, at 178; A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979).

[12] *See* POSNER, *supra* note 3, § 7.2, at 223, 224.

[13] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 482 (2004).

[14] Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1530 n.16 (1984).

B. Alignment of Porousness with Policy and Purpose

Because a rule's porousness may have a shape — it may tend to screen for certain types of rulebreakers or situations of rulebreaking — a rule that does not have perfect compliance will lead to conduct different from that which it purports to require. The shape of a rule's porousness may have nothing to do with the rule's policy or purpose. For example, if wealthy people can easily afford speeding tickets and are thus most likely to speed, the slippage between the rule and conduct probably bears little relation to the purpose of the rule.[15] The shape of a rule's porousness may also be counterproductive to its underlying policy. If members of violent gangs know that witnesses are afraid to testify against them, then it is the most dangerous street criminals who can most confidently break the law. It is also possible for porousness to align with a rule's purpose if a rule is most likely to be broken when the case for prohibition is weakest. Imagine that a city's leaders want to allow in virtually no one in order to conserve the city's health care resources. To accomplish this, they surround the city with a wall. The class of people able to scale the wall may be particularly healthy and thus unlikely to tax the city's health care infrastructure.

In some cases, when porousness and purpose align, rulebreaking is not as bad as one might fear. This observation may assuage concerns about the prevalence of upscale illegal gambling, drug use, and prostitution. Professor William Stuntz argues that such vice crimes are especially difficult to detect in upscale markets, where crimes take place between consenting parties on private property.[16] Conversely, the more easily detected downscale markets cause relatively greater social harms, such as violence and disease.[17] Thus, if vice laws serve the function of limiting such social harms, the porousness of vice laws may align with their purpose, and even widespread violations may only minimally frustrate this policy.

Moreover, when porousness aligns with purpose, the conduct that a rule creates may in some cases be *better* than would be the case given

[15] Of course, any claim of this sort is debatable. For example, one might argue that wealthy drivers willing to pay speeding tickets are those least likely to be insolvent should they cause a crash and be sued for negligent driving.

[16] *See* Stuntz, *supra* note 9, at 1820. Again, discretion comes into play here; police choose to target low-end vice markets. However, that targeting is in part the application of a neutral criterion: it is cheaper to target vice markets on the street that are easily observed than high-end markets on private property that require undercover agents, warrants, and other resource-intensive tools.

[17] *See id.* at 1810–14, 1818. For prostitution, the harm is "the spread of disease, fraud and violence perpetrated on customers, and violence against the prostitutes by those who employ them." *Id.* at 1813. For drugs, the list of harms includes "impoverishment and neglect of families, unemployment, violence by dealers and customers alike, and theft to support addicts' habits." *Id.*

perfect compliance. Even though lawmakers rarely defend rules they create by identifying patterns of rulebreaking, many rules may in fact operate well in part because of their porousness. This section identifies possible examples. These examples are offered mainly as focal points for the implications for rule design. Whether and to what extent the pattern of rulebreaking aligns with the policy of each of these rules or is otherwise desirable are separate questions. Nonetheless, these examples serve as a starting point to consider the issue.

1. Coercive Interrogation. — A subject of recent debate is coercive interrogation or torture.[18] Some people believe that, given a significant and preventable harm, coercive interrogation is permissible.[19] Most commonly cited is the so-called "ticking-time-bomb" scenario in which a captured terrorist knows the location of a bomb that will kill many innocent people, but that can be easily disarmed if only he would give up its location. But even some who believe that exigent circumstances justify torture support a categorical ban, arguing that interrogators will defy the ban in appropriate circumstances, whereas even limited legalization would lead down a slippery slope.[20]

2. Physician-Assisted Suicide. — Some believe that when a terminally ill patient is in great pain and is in no way pressured, he should be able to choose to die.[21] However, the argument goes, physician-assisted suicide should remain illegal because those people who desperately want it, repeatedly ask for it, and are competent enough to seek out a willing doctor can likely find the help they want; but if physician-assisted suicide were legal, there might be collateral effects such as people being pressured to die.[22]

3. Contract Penalties. — The longstanding prohibition on contract penalties[23] may be justified as a means of protecting unsophisticated players, and there are good arguments for permitting penalty clauses

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[18] Although there are formal distinctions between these terms, they are used here more colloquially to refer to extreme forms of coercion used to extract information.

[19] *See, e.g.*, Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671 (2006); Richard A. Posner, *Torture, Terrorism, and Interrogation*, *in* TORTURE 291, 297–98 (Sanford Levinson ed., 2004).

[20] *See, e.g.*, RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 240–41 (2004); Gross, *supra* note 19; Posner, *supra* note 19, at 296–97.

[21] *See, e.g.*, Roger S. Magnusson, *"Underground Euthanasia" and the Harm Minimization Debate*, 32 J.L. MED. & ETHICS 486 (2004); *cf.* Washington v. Glucksberg, 521 U.S. 702, 750 (1997) (Stevens, J., concurring in the judgment) (suggesting a limited right to assisted suicide).

[22] *See, e.g.*, Yale Kamisar, *Physician-Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121, 1125–26 (1998).

[23] *See, e.g.*, Cal. & Haw. Sugar Co. v. Sun Ship, Inc., 794 F.2d 1433 (9th Cir. 1986); William H. Loyd, *Penalties and Forfeitures*, 29 HARV. L. REV. 117 (1915).

for knowledgeable, sophisticated parties.[24] However, sophisticated parties can evade the prohibition by disguising a penalty as an option to buy, an agreed-upon price of a future purchase, or a bonus clause.[25]

4. Immigration. — One criterion for desirable immigrants is the propensity to follow the law. Some argue that although it is difficult to predict who will commit crime, illegal immigrants who avoid contact with the criminal justice system can more easily avoid detection by immigration officials, whereas those who get arrested are more likely to be referred to immigration officials and removed.[26]

5. Commercial Vehicles and Illegal Parking. — Every day, commercial vehicles park illegally. If none could park, commerce might slow down. But parking is a limited resource. Arguably, those who risk fines internalize those fines as the cost of doing business,[27] and only those who get a great enough benefit from noncompliance park illegally;[28] thus, illegal parking spaces are rationed by productivity.

6. Emergency Powers. — Many believe that in times of crisis, the government, and particularly the executive branch, may curtail individual rights. Nonetheless, they argue, courts should not interpret the Constitution too flexibly in times of emergency, because Presidents will violate constitutional limits if it is necessary to ensure the country's survival, but these limits will give Presidents pause and limit unnecessary expansion of governmental power.[29]

C. Shaping Rule Porousness

The shape of a rule's porousness tracks predictable differences in reasons for compliance. Thus, the optimal design of legal directives depends on the ways in which rule compliance may vary among people and situations. Here there are three interrelated questions: Who

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[24] *See, e.g.*, Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1288–89 (7th Cir. 1985) (observing that a "substantial corporation" can likely "avoid improvident commitments"); Avery Wiener Katz, *The Option Element in Contracting*, 90 VA. L. REV. 2187, 2230 (2004).

[25] It is not entirely clear whether contingent future promises that are not phrased as liquidated damage penalties are themselves legal or whether they are still illegal but courts are loath to look past the form of a deal. Nevertheless, at least some courts are willing to scrutinize contract terms to determine if they are "really" liquidated damages. *See, e.g.*, Blank v. Borden, 11 Cal.3d 963, 970 (1974) (looking at "substance rather than form" to determine a term's true nature).

[26] Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 845–47 (2007).

[27] *See* Glen Martin & Ramon G. McLeod, *The Art of Parking in S.F.*, S.F. CHRON., Jul. 7, 1998, at A1.

[28] *See* Cooter, *supra* note 14, at 1551.

[29] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring); Korematsu v. United States, 323 U.S. 214, 244–46 (1944) (Jackson, J., dissenting); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1052 (2003); Posner, *supra* note 19, at 297 (discussing habeas suspension by the executive).

can break the rule? Who *will* break the rule? Under what circumstances will they break the rule?

Although a rule's porousness may be influenced by many factors, the chief way that rule porousness can be used to sort desirable from undesirable conduct is through remedial screening: imperfectly enforcing compliance and imposing some penalty, usually a risk of punishment, that only desirable rulebreakers will choose to incur.

Remedial screening can be used to shape rule porousness in two different ways.[30] One method of remedial screening is familiar to many areas of law, including contract and tort: imposing costs that to some (but not all) actors exceed the benefit of the banned conduct. Expectation damages sort for promisors who value breach more than nonperformance.[31] Strict liability in tort is similarly understood as having the same effect — forcing potential tortfeasors to make a calculation in order to decide whether to take a precaution or impose a risk.[32] Some instances involve personal gain, such as when delivery drivers park illegally and accept fines as a cost of doing business. The same mechanism may operate in cases of social benefit. For example, in the debate about coercive interrogation, there is some belief that people will violate the prohibition in a ticking-time-bomb situation, even if they expect to be prosecuted, because the social benefit of preventing a catastrophe is large enough to make the cost worth bearing.

This form of remedial screening is similar to what Professor Robert Cooter describes as a "price" regime. According to Professor Cooter, some conduct, such as murder, is *forbidden*, and the accompanying penalty is a "sanction" meant to ensure compliance. Some conduct, such as contract breach, is *permitted*, and the accompanying penalty is a "price," a payment required to engage in the conduct.[33] Porous rules blur this line by purporting to forbid conduct but nonetheless intending the penalty to be a price that screens for desirable conduct.

Remedial screening also operates a second way, shaping a remedial regime so that some groups are less likely to be caught or more able to evade punishment by defeating prosecution. Some rules are meant to protect unsophisticated parties but can be easily broken by those able to jump through a variety of hoops. If the hoops and the metric for sophistication align, then such rules will tend to capture those for whom the rule is designed. For example, the ban on contract penalties is designed to protect unsophisticated parties and can accordingly be evaded by sophisticated repeat players who disguise penalties. Other

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[30] These two forms of screening are, in practice, not distinct. They are both ways in which different actors face different calculations when deciding whether to break a rule.

[31] *See* Cooter, *supra* note 14, at 1544–46.

[32] *See id.* at 1538–40.

[33] *See id.* at 1524.

rulebreakers can avoid detection only if they break the rule in a way that is least harmful. Examples include upscale vice crimes committed on private property and the continued presence of illegal immigrants who avoid run-ins with the law.

Remedial screening has implications for designing remedies. Lawmakers should design remedial regimes to best ensure that a rule's porousness aligns with its purpose. Imagine that a city can be quarantined either by building a high wall or by posting guards instructed to stop those who try to enter. Those most able to scale the wall will be those who are physically fit. Those most able to outwit the guards will be those who are especially persuasive. If the city wants athletes, it should build the wall, knowing that much of the rulebreaking that will occur will align with the purpose of the rule. If the city wants more lawyers, then it should post guards who will be outwitted by fast-talking rulebreakers.

The selection of a penalty will affect the shape of a rule's porousness. For example, there has been a resurgence of argument for alternative punishments such as public shaming in lieu of fines and other traditional sanctions.[34] Whether or not shaming is an appropriate punishment, it is important to note how the shift to this remedy might alter the shape of a prohibition's porousness. If wealthy and poor people have equal incentives to avoid shame but unequal ability to pay fines, a shame penalty will deter more wealthy actors relative to poor ones than will monetary sanctions. Some wealthy people may even have *more* of an incentive to avoid shame if the wealthy are those with strong community ties that could be disrupted by a shaming sanction. In designing a penalty for soliciting prostitution, this dynamic may matter if a rulemaker wants to optimize rulebreaking. Upper-end prostitution markets are those in which violence and disease are least likely.[35] Therefore, a shaming sanction for hiring prostitutes is most likely to deter those who are engaging in the least harmful crime, and least likely to deter those engaging in the most harmful crime. Thus, if a rulemaker accepts that any prostitution ban is porous, he should choose fines rather than shaming because the shape of that porousness better aligns with the goals of preventing disease and violence.

Porousness may be similarly relevant when selecting a penalty level. For example, where condemnation is ambiguous, as is often the

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[34] *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631–49 (1996); Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186 (2003).

[35] *See* Stuntz, *supra* note 9, at 1813–14 ("Higher-priced call girls are less likely to be carriers of disease . . . [and] less likely to have violent pimps or to be involved in serious drug abuse; and sexual transactions with call girls take place in settings where both call girls and customers are less at risk of being beaten or robbed.").

case with acts punished by fines,[36] companies will determine compliance based on the level of the fine, which is considered part of the cost of doing business. If lawmakers believe that the activity should occur when it is economically valuable, then fines might be set low enough to allow, in practice, some activity. If a fine is set high enough, it may deter the activity completely.

D. Porous Rules as Substitutes

Few rules are intentionally designed to be porous. Criticizing the assumption that interrogators will torture in necessary cases, Professors Eric Posner and Adrian Vermeule observe that "we don't normally . . . base the law on the assumption that agents will act heroically."[37] Rather, when faced with a situation in which we want "some" of an act, or some people to do it, or the act to occur only in some circumstances, the law tends to tailor rules full of exceptions.

Nevertheless, when a rule's porousness aligns with its underlying purpose and policy, a seemingly simple and overinclusive rule can create a far more nuanced and tailored pattern of conduct than the rule purports to mandate. As a result, seemingly overinclusive rules with downstream selection effects are in some cases substitutable for tailored rules that are perfectly followed.[38]

Consider again the metaphor of trying to insulate a city. Perhaps city leaders want more construction workers. The city might instruct its guards only to let in people who are well suited to construction projects. This system would be a standard. Alternatively, the city could tell its guards to let in those who can lift a thirty-pound block. This would be a rule tailored to a purpose. Or the city could simply build a wall and recognize that those strong enough to scale it will be able to aid in construction. This would be a porous rule.

Those few rules that are openly described as porous could in theory be replaced with perfectly enforced, tailored rules. For example, expectation damages sort for promisors who value breach more than nonperformance. Therefore, expectation damages might be viewed as

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[36] Fines are "often understood as merely attaching a 'price' to misconduct." Kahan, *supra* note 5, at 384.

[37] Posner & Vermeule, *supra* note 19, at 694–95. Of course, whether this is an intentional tool of rule designers is something that is empirically difficult to verify. As discussed below, it may be politically unpalatable to publicize the intent that certain rules are porous; and if rules were adopted with the intention that they be violated in predictable ways, that intention might not be stated for fear of causing more rulebreaking than intended.

[38] This possible substitution parallels Professor Robert Cooter's observation that if lawmakers have perfect information, they can induce socially desirable behavior by either charging people prices that make them exactly internalize the costs of their behavior or creating a legal standard and backing it with a sanction that induces conformity. *See* Cooter, *supra* note 14, at 1532.

substituting for a negligence liability rule that would impose damages only on inefficient breachers.

As suggested above, there are many seemingly simple rules that actually create a complex pattern of conduct such as more vice committed in private, a certain amount of physician-assisted suicide, illegal parking by profitable businesses, and the possibility of coercive interrogation when truly necessary. These seemingly porous rules could instead operate as strongly enforced tailored rules. For example, Professors Posner and Vermeule argue that coercive interrogation should be regulated through a regime of complex rules accompanied by extensive training, prospective warrants when feasible, immunity for officers who "act reasonably," punishment for those who act unreasonably, and regular analysis by "commissions of experts."[39] Similarly, elaborate guidelines and/or tribunals could decide when physician-assisted suicide is permissible. Contract doctrine could create categories of permissible penalty clauses such as those involving contracts or parties of a certain size. Although immigration law is already heavily tailored, porous borders could theoretically be replaced with impenetrable barriers and a complex investigatory regime aimed at admitting only immigrants with job prospects and the lowest possible crime risk. Similarly, parking spaces could be allocated by a commission that assesses which businesses have the greatest need or by auctioning off special parking permits.

II. COST AND ACCURACY

As may be apparent from these examples, the choice of porous rules or tailored rules presents several tradeoffs. Most notable among these is a tradeoff between costs and accuracy. Precise, tailored rules are difficult to design and enforce. It is sometimes hard to identify and describe the desired conduct, apply the rule on an ongoing basis, and ensure that the tailored rule is obeyed. Perfectly accurate design and enforcement and perfect compliance may be theoretically impossible; at the very least, they are expensive endeavors. In contrast, the advantage of porous rules is that a minimal amount of tailoring or enforcement can yield a complex pattern of conduct produced by downstream sorting. However, it may be costly if not impossible to predict the exact porousness of any given rule, and porous rules shift costs onto parties following the rule.

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[39] *See* Posner & Vermeule, *supra* note 19, at 699–703.

A. Designing and Administering a Directive: Information

A challenge for designing and administering legal directives is obtaining information. It is costly — or sometimes even impossible — for rule designers to identify and describe the class of cases that should be prohibited, and for enforcers to apply those categories, if they want to select for traits that are not immediately visible. Porous rules offer a possible means of obtaining information and thus shaping conduct more accurately or more cheaply. However, they require a great deal of information about exactly what the porousness will look like: who will break the rule and when will they break it?

Identifying and describing the desired conduct is an information-intensive process. Take for example the policy that contract penalty clauses should be permitted only for sophisticated contracting parties. How would lawmakers decide how sophisticated the party must be or design a legal directive to implement that policy? If they tried to tailor a rule, how would they describe or identify sophisticated parties?

Furthermore, poorly tailored rules may invite "avoision," technically legal conduct that nonetheless undermines the rule's purpose.[40] They might invite ill-intentioned parties to skirt the law by using the carved-out zones of legality as shields. In theory, a porous rule may solve that problem if the porousness aligns with the underlying policy more closely than a rule that identifies and labels. Moreover, if lawmakers rely on poor proxies to identify undesirable conduct, the rule may just create substitution. If, for example, legislators concerned with the externalities of downscale gambling had attempted to craft a relevant rule, they would probably have banned some games but not others. But as Professor Stuntz observes, "that strategy would have had limited effect, for the downscale market could simply have shifted from illegal games to legal ones."[41]

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[40] *See supra* note 8; *see also* Dan M. Kahan, *Is* Chevron *Relevant To Federal Criminal Law?*, 110 HARV. L. REV. 469, 493–95 (1996) (describing the "loopholing" problem: that "a potential offender can readily identify and exploit gaps between what the law should cover and what it actually does"). And "the more exact and detailed a rule, the more likely it is to open up loopholes — to permit by implication conduct that the rule was intended to forbid." POSNER, *supra* note 3, § 20.3, at 587. This possibility of avoision may be especially troubling where the most dangerous parties are those most able to weave their way around a complex set of rules. Highly complex, tailored rules carry a cost for actors to learn the rules and how their conduct relates to those rules. *See* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 151 (1995). Although avoision by parties that are able to carefully work within complex rules can be a virtue if sophisticated parties are the ones that should be immunized from a prohibition, it is a vice if sophisticated parties are the most dangerous. For example, the Enrons of the world are better able to conduct undesirable accounting than are the mom-and-pop businesses, but are potentially able to do more harm.

[41] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 575 (2001).

Even if lawmakers can identify and describe the category of undesirable conduct, parties wishing to evade a rule will represent themselves as falling within the category of excepted actors or actions. Those administering the rule may not be able to distinguish, and if they can, the necessary information may be costly. For example, Professors Adam Cox and Eric Posner argue that when the government decides whether to admit an immigrant, many criteria relevant to the admission decision are unknown to decisionmakers (and even to immigration applicants).[42] More precision would come at a cost. Consider Professors Posner and Vermeule's proposed torture regime. Assuming that such a regime works, it will probably be expensive to operate. Thus, it may be a practical option for deciding when torture is permissible, but may be less useful for allocating parking spaces.

Porous rules may in some instances solve the problems of identification, description, and enforcement by harnessing private information that lawmakers and courts cannot easily obtain. This is how strict liability rules in contract and tort operate: if a party actually internalizes all the costs of its actions, it will use its own information about the benefits of acting to obtain the efficient outcome cheaply and accurately.[43] Although few porous rules can so perfectly harness private information, they can operate using a similar mechanism. To the extent that rulemakers want an activity to occur only when it is valuable, porous rules utilize what economists describe as costly screening: the cost of undertaking an action — usually the risk of punishment — makes less beneficial acts unlikely to occur.[44] For example, when the law imposes a serious risk of severe punishment, investigators will torture only if they believe the need is great enough. When a city imposes a moderate fine for illegal parking — and one that does not increase for reoffenders — drivers with a great enough need will park illegally.[45]

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[42] Cox & Posner, *supra* note 26, at 824 & nn.73–74.

[43] Judge Guido Calabresi and Douglas Melamed suggest information harnessing as a reason to select liability rules over property rules. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1119–20 (1972).

[44] This phenomenon is described in many areas of law. For example, some argue that the cost to police of obtaining a warrant makes police unlikely to seek warrants unless they believe a search will reveal useful evidence. *See* Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 926 (1986). Similarly, there is a body of scholarship arguing that the cost of the administrative process screens out less important regulations. *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 755 & n.2 (2006) (collecting sources).

[45] Professor Robert Cooter argues that "judges treat parking tickets as if their purpose were to internalize the cost of parking congestion," suggesting that "[p]erhaps lawmakers and judges allow individuals to balance the cost of compliance against the benefits of noncompliance because the legal officials do not have good information about these benefits." Cooter, *supra* note 14, at 1551.

Although the traditional understanding of costly screening is that all actors pay the same cost and thus the remedy screens for greater benefits, porous rules can also harness private information by varying the costs. For example, the cost of engaging in consensual vice crimes is lower in one's home than in public, where police can easily detect the crime. Thus, less harmful vice crimes are screened in because the cost of less harmful, upscale vice is lower.

However, porous rules are not as efficient as they may appear. Although porous rules may be cheaper to administer, they shift costs onto citizens. Those who pay parking fines as the cost of doing business incur the cost of fines. Those who evade detection incur the costs of doing so. And the possibility of an otherwise desirable action resulting in punishment leads to suboptimal reliance. For example, illegal immigrants who fear possible deportation will not make as many country-specific investments as would be ideal.[46]

Moreover, costly screening only works if there is enough information to devise a good screen. Although tailored rules may be inaccurate or expensive, particularly at the point of enforcement, porous rules may also be inaccurate and expensive, though mainly at the point of rule design. It is difficult to predict when people will do things they are explicitly told not to do. Professors Posner and Vermeule, who support torture in some cases, argue that if a blanket ban "does happen to produce optimal deterrence, it will be but a lucky coincidence."[47]

Because rulebreaking creates a potential for legal and social sanction, information about rulebreaking is often sparse and unreliable. When those deciding whether to break rules fully internalize the costs, as is the case in contract breach or strict liability, the lack of information is not a problem. But when designers must predict the shape of a rule's porousness, their lack of information is a problem. However, Professors Posner and Vermeule's objection may be asking the wrong question — whether people will act optimally — not whether they will act *closer* to optimally than they would under a different legal directive. Given the many imprecisions involved in designing a legal directive, although a porous rule is unlikely ever to be optimal, it may still be second best.

B. Compliance and Line Flirting

Even when designers can identify and describe desired conduct, the rule they formulate may not be followed. Tailored rules are especially

[46] *See* Cox & Posner, *supra* note 26, at 827–30.

[47] Posner & Vermeule, *supra* note 19, at 695.

prone to this problem because even well-meaning parties may have difficulty judging on what side of the line their conduct falls.[48]

On the one hand, actors may incorrectly fear their conduct is illegal and be overdeterred. To anticipate this problem, penalties must be lowered enough to avoid chilling desirable conduct — which will then invite more undesirable conduct as well. Or a system must be established to give prospective notice such as warrants or declaratory judgments. But although prospective notice may be feasible for searches, it is quite costly and thus infeasible for certain kinds of directives.

On the other hand, actors faced with a complex scheme may legitimately but incorrectly believe their conduct is legal. In some cases, once an act is "permitted under any conditions, the temptation to use it increasingly [is] very strong."[49] Conversely, where something is not a legally permissible option, there must be an especially strong reason even to place it into an actor's option set. Thus, porous rules potentially solve this problem, most notably where the intent is to set a "high bar."

There are three primary mechanisms by which actors incorrectly believe illegal conduct is legal. First, people who can potentially achieve a significant good or avert a significant disaster are likely to overestimate benefits and underestimate costs,[50] especially if the illegal conduct comes at a low cost to themselves. A soldier permitted to torture captured suspects when there is an imminent and certain threat, if faced with a rumor of a ticking time bomb, will tend to believe incorrectly that *this* is an instance in which he may try to coerce out information.[51] A seemingly overinclusive but porous rule will restrain the impetus to fold to these sorts of pressures by not leaving the option formally on the table.[52]

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[48] This is most likely if there is a complex, tailored rule that imposes a cost on actors to learn the rule and how their conduct relates to it. *See* POSNER, *supra* note 3, § 20.3, at 588; Kaplow, *supra* note 40, at 151.

[49] Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 141 (1978). Justice Souter was probably describing a similar phenomenon when he observed that legalized physician-assisted suicide may create a slippery slope "because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not." Washington v. Glucksberg, 521 U.S. 702, 785 (1997) (Souter, J., concurring in the judgment).

[50] *See, e.g.*, Gross, *supra* note 19, at 1507–12.

[51] One reason for this is what psychologists label the bias of imaginability: when forced to imagine scenarios such as a bomb going off, people will tend to dwell on those scenarios and thereby overestimate their likelihood. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 12–13 (Daniel Kahneman et al. eds., 1982).

[52] Professor Frederick Schauer gives the example of *Korematsu*, noting that "[t]he mere fact that courts will fold under pressure . . . does not dictate that they should be *told* that they may fold under pressure, because the effect of the message may be to increase the likelihood of folding

A second mechanism is the desire to save effort, expand one's sphere of authority, or otherwise alter the directive for one's own benefit. A hurried driver told he may speed on "relatively empty roads" will be tempted to believe a road is "relatively empty." Those charged with capturing terrorists may be drawn to the utility of torture;[53] General Jacques de Bollardière referred to this in the aftermath of the Battle of Algiers as the "mortal temptation of instantaneous efficacity."[54] An overinclusive but porous ban is a means of fighting the temptation to expand power or do what is easy.[55]

A third mechanism is pressure from third parties. The problem is that options invite pressure — it is the cashier with a key to the safe who is more likely to be robbed.[56] Under a tailored rule, third parties can more comfortably suggest an action, knowing it is at least plausibly an option. Moreover, when actors wish to resist third-party pressures, a tailored rule makes it more difficult to argue that the proposed conduct is illegal.[57] Some rules intend decisions to be made free from pressure. For example, many argue that under a regulated euthanasia regime, there will be situations in which patients are pressured into choosing to die or doctors are pressured into helping them die.[58]

Combating these pressures is not easy. Because a tailored rule — such as a prohibition on torture in some circumstances but not in others — may create only a weak norm against prohibited actions rather

even when the pressure is less." Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1084 n.11 (1986).

[53] *See* Gross, *supra* note 19, at 1509; Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 319 (2003).

[54] Kreimer, *supra* note 53, at 319.

[55] For example, Judge Posner contends that although Lincoln's suspension of habeas corpus was both unconstitutional and "probably right to do," "it does not follow that the Constitution should be amended to authorize the president to suspend habeas corpus," arguing that "[t]he fact that Lincoln was acting illegally must have given him pause." Posner, *supra* note 19, at 297.

[56] Professor Sunstein draws a comparison to antidiscrimination law, arguing that a ban on racial discrimination protected restaurants from pressures to discriminate. *See* Sunstein, *supra* note 3, at 1143 n.95.

[57] *See* Kreimer, *supra* note 53, at 322. That concern is especially salient when group decisionmaking involves positions of authority and thus saying no is difficult. For example, advocates of a torture ban argue that "[u]nder a rule of official prohibition, a functionary who declines to abuse a suspect can defend her actions by announcing that she is following the law." *Id.*

[58] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 730–35 (1997); Magnusson, *supra* note 21, at 492. Third-party pressures may also weigh on judges administering a tailored rule and thus may further reduce compliance with a precisely defined directive. For example, one might worry that judges will be pressured into wrongly declaring a course of action to be legal because it is popular or has short-term benefits. *Cf.* Scalia, *supra* note 1, at 1180 (observing that clear rules "can embolden" judges who "are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will"); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 975–76 (1995).

than a strong taboo,[59] the law cannot rely on the generally cost-effective tool of rules shaping social norms that in turn deter undesirable conduct.[60] And because those governed by such a rule will be more likely to believe their actions are legal, they are more difficult to deter with penalties.

One solution is to use processes that help actors decide in advance where their conduct lies. Another solution is to have constant enough enforcement and high enough penalties to educate would-be violators and chill potential line flirting. For example, Professors Posner and Vermeule respond to the many concerns about a tailored torture ban being prone to line flirting by proposing a complex regime of rules, warrants, training, and review.[61] However, such a regime, including the role for warrants, is prone to error for many of the same reasons that decisions by individuals are.[62] Even should it work, the regime would likely be expensive. And in some instances, without strong taboos, there may be no penalty that can deter line flirting.

In theory, porous rules can more effectively and cheaply control line flirting. Because porous rules are generally simple, clear prohibitions, they are less subject to various biases that lead actors to misunderstand whether their conduct is legal. If actors know whether their conduct is legal, action is better shaped by a sense of moral duty to follow the law. Moreover, porous rules may better harness social norms. Because rules can shape norms[63] and norms influence behavior, a rule that creates a strong norm against an action operates at lower cost.[64] One might imagine that a clear, simple ban, such as a categorical ban on all torture, would create a strong norm or taboo.[65] Thus, if the goal

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[59] *See* Gross, *supra* note 19, at 1507; Kreimer, *supra* note 53, at 278. *But see* Posner & Vermeule, *supra* note 19, at 688–93.

[60] *See* Kahan, *supra* note 5, at 351.

[61] *See* Posner & Vermeule, *supra* note 19, at 699–703.

[62] Judge Posner argues, for example, that neutral judges asked to issue "torture warrants" with limited information and the specter of a calamitous attack will be unlikely to restrain interrogators. POSNER, *supra* note 20, at 240. Of course, the mere need to apply for a warrant may itself serve as a costly screening device. *See* Dripps, *supra* note 44, at 926.

[63] *See* Sunstein, *supra* note 7, at 923 ("[R]oles and norms can be fortified by legal requirements; they may even owe their existence to law.").

[64] *See* Kahan, *supra* note 5, at 351.

[65] *See, e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1723 (2005) (arguing that a categorical ban on torture creates a "legal archetype" that expresses "the spirit of a whole structured area of doctrine, and does so vividly, effectively, and publicly, establishing the significance of that area for the entire legal enterprise"). Moreover, some norms relate explicitly to a social role. People are particularly resistant to violating norms that form part of their social roles, making such norms especially useful in regulating behavior. *Cf.* Sunstein, *supra* note 7, at 940. Indeed, if tailored rules do not align with a role's specific norms, they may confuse those norms, causing other, undesirable behavior. For example, some argue that the limited legalization of euthanasia might confuse the norms and role of physicians. In the extreme, some suggest it "would make doctors more willing to hasten death whether

is to have coercive interrogation only in a narrow set of circumstances, but it is impossible or costly to ensure compliance with the tailored rule, the blanket rule may be preferable.

The efficiency of a simple blanket rule, however, may suffer from two problems. First, if a rule is clearly out of line with good policy, "prohibiting what is both desirable and inevitable," then its value in shaping norms or deterring pressure will diminish.[66] Second, any benefit in shaping a norm or appearing to exclude the prohibited conduct from one's option set will be undermined by pervasive rulebreaking.[67] However, symbolic benefits and rulebreaking do not have to be in tension. There may be "acoustic separation"[68] between the rulebreakers and those deciding whether to obey a rule: if rulebreakers conceal their activity, then others may be unaware of the rulebreaking, and the symbolic value of a blanket ban is not eroded. If, however, the rule fosters a regime in which rulebreaking occurs in the open, then the symbolic role of a prohibition will diminish. The possibility of acoustic separation further turns on the question of between whom there must be separation. If the benefit of a prohibition is a message sent to the general public, and only a group of insiders knows the truth, then the message is not severely affected. Yet if the message must be sent to insiders as well, then rulebreaking may erode the symbolic benefits of the rule. For instance, there is tension between the argument that euthanasia should be prohibited to ensure that doctors maintain a clear professional norm favoring life and the fact that doctors themselves will likely know that euthanasia is occurring.

To the extent that rulebreaking does weaken the symbolic function of the rule, however, porous rules may still prove beneficial. Even if people realize a law is often broken, the symbolic value of a ban may still preserve the social norm. Moreover, a symbol can be slightly weakened without being eviscerated. People who know about rulebreaking may still believe or even hope that it is rare and instead focus on the formal prohibition. At the very least, even those symbols that are well-known myths can still "provide goals and ideals, and as such . . . channel our thinking."[69] For example, one might argue that a

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or not this is actually the patient's choice" or "encourage physicians to make personal or cost-benefit judgments that disserve many patients' interests." Sunstein, *supra* note 3, at 1145–46.

[66] *See* Schauer, *supra* note 52, at 1084.

[67] *See* Kahan, *supra* note 5, at 350, 354–59.

[68] The term "acoustic separation" was famously used by Professor Meir Dan-Cohen to explain how it is possible for the general public to believe there are strict criminal laws but for those who enforce criminal law to be more lenient. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

[69] Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 439 (1985). As Professor Schauer notes, "This country and this world might very well be a different place without Santa Claus, even though no one I know seriously expects him to visit our homes at Christmastime." *Id.*

ban on torture, even if not always followed, still maintains some taboo. Finally, although rulebreaking may undermine symbols, those symbols may not collapse suddenly but rather erode slowly. When only a few people violate a law, the taboo may remain strong. As more people do so, the rule may slowly become more porous. Although such unraveling rules may not map onto policy goals for very long, they do provide a mechanism for gradual change, particularly with regard to acts that are heavily influenced by social norms.[70]

III. DEMOCRACY AND THE RULE OF LAW

Setting aside for a moment concerns such as efficacy and cost, the choice between a porous rule and a perfectly enforced tailored rule results in tradeoffs between different democratic values and conceptions of the rule of law.

A. Democratic Values

While perfectly enforced tailored rules make clear what conduct is desirable, porous rules label conduct "illegal" that is nonetheless desirable and will in fact occur. In some cases, if acoustic separation is possible, many will not know of this technically illegal conduct or the frequency with which it occurs. In other cases, the porousness may be well known. These features of porous rules highlight tradeoffs between the democratic values of political preference satisfaction and transparency, responsibility, deliberation, and majority rule.

1. Hiding From Ourselves. — Some porous rules, such as the prohibitions against torture and euthanasia, purport to ban activity that is unpleasant but that many people in society nonetheless need or want.[71] The choice of these porous rules represents a choice between different conceptions of democracy.

On the one hand, democracy is a means of creating good policy and maximizing preference satisfaction, and this sometimes entails hiding information from voters.[72] Porous bans may do exactly that in three interrelated ways. First, there seem to be norms that limit the selectivity that can be explicitly built into rules but that do not limit the selectivity that results, even predictably, from porousness. For example, most states would not tolerate an explicit rule that only rich people can hire prostitutes; but these regimes are effectively created using porous

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[70] Judge Calabresi argues that "in situations of uncertainty," it may be good for the law "to slow down change until we are sure we want it." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 178 (1982). Thus, he asserts, "the use of absolute or categorical language, even when it is inaccurate and leads to inaccurate results, may have substantial merit." *Id.*

[71] *See* David A. Strauss, Do It But Don't Tell Me (Feb. 15 2008) (unpublished manuscript, on file with the Harvard Law School Library).

[72] *See* Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556 (2008).

rules. Porous rules thus enable designers to create selectivity that would be otherwise unpalatable. Second, if selectivity can be adequately hidden, porous rules may satisfy people with mutually exclusive preferences. For example, Professor Stuntz observes that gambling and prostitution are "things that a large portion of the public wants" but that also create "intense disapproval among another large slice of the population."[73] So long as there is acoustic separation, a porous ban satisfies those who want vice to be illegal but also satisfies those who want their vice of choice. Thus, porous rules might be especially useful when confronting an issue on which there is a deep ideological divide. Third, Professor David Strauss argues that such regimes "create[] a relatively comfortable situation in which the official norm is an appealing one, but at the same time people can feel secure in the belief that cases in which that norm will produce unacceptable results will be dealt with appropriately."[74] Porous rules thereby protect, in the words of Professor Leo Katz, "open secrets, treasured hypocrisies."[75] In contrast, tailored rules allowing such unpleasantries would "say[] aloud what society would rather leave unsaid."[76]

On the other hand, democracy requires that people take responsibility for the law. Hiding unpleasantness undermines this value. As Professor Oren Gross vehemently argues, "[w]e must not be allowed the luxury of sitting on the clean green grass in front of our houses, while beneath the refuse is washed away in the sewer pipes, without assuming responsibility for such unpleasant actions."[77] When citizens are "allow[ed] . . . to avert their eyes and minds from the crude reality surrounding them[, t]hey are not pushed to take any affirmative moral, legal, or political action" on issues that deserve attention.[78]

2. *Hiding from Democratic Processes.* — Law is shaped by democratic processes such as legislation and litigation. Because it is not obvious what conduct follows from a porous rule, and because laws are often broken secretly, porous rules hide information and rallying points from the democratic process. Moreover, for such rules that only function given some degree of acoustic separation, policymakers cannot openly discuss the intent that those rules be porous.

On the one hand, hiding information may promote democracy by limiting excessive interest-group influence. Professor Strauss argues

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[73] Stuntz, *supra* note 41, at 573.

[74] *See* Strauss, *supra* note 71, at 24. Professor Strauss compares this to the fact that people accept cost-benefit analysis but do not want to know precisely the tradeoff for one life, and the fact that the Supreme Court permits race-based government decisions but only when they are not too obvious. *See id.* at 7, 25.

[75] LEO KATZ, BAD ACTS AND GUILTY MINDS 54 (1987).

[76] *Id.*

[77] Gross, *supra* note 29, at 1128.

[78] *Id.* at 1127.

that it is hard for interest groups to organize around the need to prohibit something that is formally prohibited and occurs in secret.[79] Likewise, if the best rule is one that selectively impacts a minority interest group, a porous rule that obscures this selectivity may be hardest for such a group to oppose politically.

On the other hand, opacity may interfere with valuable democratic processes in three ways. First, Professor Strauss may be incorrect that opacity retards interest group influence. Minority interest groups overcome majorities through a comparative advantage in obtaining, processing, and communicating information.[80] It is thus when information is readily available that a majority can most easily overcome a well-organized minority. Because tailored, perfectly enforced rules are so transparent, information is very accessible and thus majorities may prevail. Porous rules limit information and thereby create more opportunity for minority control. Second, not all interest group influence is bad; opacity may retard an important process. Bad laws often change when interest groups able to overcome collective action problems react to laws that they find burdensome. If groups can more cheaply avoid punishment or pay a penalty than change the law, they will not advocate for change.[81] Third, opacity is damaging to general democratic processes as well. Democracies, at least in theory, make laws on the basis of widespread understanding of problems and debate about possible solutions. However, porous rules, particularly those that encourage clandestine rulebreaking, hide problems from voters and make it difficult to evaluate the effects of a regime. For example, if a category of permissible euthanasia were carved out, it could be monitored and evaluated, enabling future deliberation about values and empirical study of effects in a way that a porous rule that creates identical conduct cannot.

[79] *See* Strauss, *supra* note 71, at 35–36.

[80] *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 39–40 (1991).

[81] *See* Wu, *supra* note 8, at 695–704; *cf.* ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970). This may be true of any theoretical group with a common interest. For example, Professor Yale Kamisar observes that the informal availability of assisted suicide, "especially in the most compelling cases, reduces the pressure to legalize these practices formally." Kamisar, *supra* note 22, at 1126 (emphasis omitted). This is true for judicially created rules as well. Take the penalty clause doctrine as an example. Although some argue that the doctrine makes more sense for ignorant or nonrepeat players, one might argue that the entire doctrine should be abolished. *See* Alan Schwartz, *The Myth that Promisees Prefer Supercompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 370 (1990). However, those in the best position to make this case in courts are the very sophisticated, repeat players who can simply disguise penalty clauses to avoid detection.

B. The Rule of Law

"The rule of law" is itself a vague term that for some may invoke the adage that "I know it when I see it." However, there are several commonly invoked rule-of-law principles[82] that suggest tradeoffs between porous rules and tailored rules.

1. Lawlessness. — Although legal rules are commonly viewed as a set of penalties that induce a pattern of behavior, a law has independent normative value that is separate from the attached threat of penalty and the resulting behavior.[83] Thus, porous rules operate by virtue of lawlessness: people are told that certain conduct is against the law, but it is covertly intended that some people do what is supposedly prohibited.[84] It seems illegitimate to purport to condemn something if the intent is that the prohibited practice occur. That is especially troubling given that "actors will often face . . . sanctions despite their correct — or at least reasonable — belief that their proposed conduct is socially desirable."[85]

2. Transparency and Fair Notice. — A common rule-of-law principle is that the law must give fair notice and guidance to citizens through clear statements laid down in advance of actual applications.[86] If actors rely on the formal rules, independent of remedial regime, then porous rules do not pose a problem: people prospectively know how to act and for what they can be punished. In fact, porous rules might in some cases offer more notice than tailored rules. If a tailored rule is sufficiently complex, it may be difficult to understand exactly what is prohibited and shape one's actions accordingly.[87] In contrast, many porous rules are simpler and thus provide clearer notice.

However, if actors are guided not by the stated rule but rather by an expectation of punishment, porous rules may give inadequate guidance. Consider a doctor who sees his colleagues aid terminally ill patients with palliative care that is intended to bring about a speedy and painless death. One day, he has a terminal patient in terrible pain, who is completely lucid, and despite the prohibition on physician-assisted suicide, continues to ask for assistance in dying. That doctor

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[82] *See, e.g.*, Scalia, *supra* note 1; Sunstein, *supra* note 58, at 979.

[83] *See* Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837 (1997).

[84] The transparency problem is particularly acute when policymakers cannot openly discuss the intent that a rule be porous and must claim to be passing a rule that is more inclusive than actually intended.

[85] Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 317 (1993).

[86] *See, e.g.*, Scalia, *supra* note 1, at 1175, 1179; Sunstein, *supra* note 58, at 956.

[87] *See* Kaplow, *supra* note 40, at 151.

helps his patient with a high dose of pain medication and is charged with murder. He knew his actions were illegal, but one might claim the doctor did not really intend to risk or accept punishment.

3. Equal Treatment. — A third rule-of-law concern is that laws should treat similarly situated people the same.[88] Porous rules that impose different costs on similar people, such as rules that some people can break without being detected, likely violate this equality condition. Porous rules that impose a uniform cost for rulebreaking may be less problematic; after all, those who followed the rule probably cannot complain about those who broke the rule and were punished. However, if the penalty is low enough that some people can choose to break a rule while others cannot, that may give rise to concerns of inequality. For example, if wealthy people regularly park illegally and pay their fines, those who cannot do so may claim that they are treated unequally.

Interestingly, the choice between porous and tailored rules creates a tradeoff regarding at what level people are treated unequally. As discussed above, porous rules make it easier to craft laws that treat different groups differently. These selective rules lack the protection that "law which officials would impose upon a minority must be imposed generally"[89] and thus, at the level of design, are more prone to unfairly burdening a minority. However, because porous rules utilize self-sorting, there is more "automatic" application of such rules, as opposed to the fallible and potentially corrupt discretion inherent in the enforcement of more precisely tailored rules.

CONCLUSION

The observation that rules are sometimes broken raises implications for the design of legal directives. Remedies should be crafted with the goal of aligning a rule's porousness with its purpose, and in some cases, overinclusive but porous rules may be a preferable form of legal directive. This brief examination suggests that rule porousness is something that lawmakers can use as a tool when crafting law.

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[88] Justice Scalia makes this point when describing the problem of setting one rule for one child and a different rule for another child. "Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions — no television in the afternoon, or no television in the evening, or even no television at all." *Id.* at 1178. However, Justice Scalia adds, "try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed." *Id.*

[89] Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring); *see also id.* at 111–17 (arguing that laws tailored to particular classes pose problems because the equal application of law to all is a guarantor of the rule of law); Sunstein, *supra* note 58, at 979.