

# Pointing Guns

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*The American gun debate is increasingly populated with scenes of people pointing and otherwise displaying guns. What is the legal regime governing gun displays, and how well can it address the distinct social and legal problems they pose? In this Essay, we argue that the current structure of criminal law does not supply clear rules of conduct sufficient to avoid the negative effects of gun displays, and that the rhetorical and expressive effects of Second Amendment debates threaten to make the situation worse. We also suggest how the legal rules might be improved, and how battles over norms—as much as criminal prohibitions and defenses—will continue to shape both social practice and law when it comes to displays of firearms in public and towards other persons.*

## Introduction

Threatening displays of guns in the United States appear to be on the rise in 2020. A man wearing a protective mask to guard against COVID-19 confronts an unmasked shopper in a Walmart in Royal Palm Beach, Florida, and they argue about masking in the store.<sup>1</sup> The unmasked man pulls a handgun out of his waistband and points it at the other shopper, who says the armed man threatened his life. Police investigate and, ten days later, charge the armed man with aggravated assault.<sup>2</sup> Prosecutors later drop the charges, stating that “all legally required elements of the crime” cannot be proven.<sup>3</sup>

A dispute in a Chipotle parking lot in Orion Township, Michigan, flares when a white couple backs out of a parking space as a black family is walking behind the vehicle.<sup>4</sup> The female passenger pulls out a handgun as the

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1. Kristina Webb, *Man Arrested After Pulling Gun in Mask Argument at Royal Palm Beach Walmart*, PALM BEACH POST (July 23, 2020, 10:21 AM), <https://www.palmbeachpost.com/story/news/coronavirus/2020/07/23/man-arrested-after-pulling-gun-in-mask-argument-at-royal-palm-beach-walmart/112345530> [https://perma.cc/UP4A-JXCY].

2. Austen Erblat, *Shopper Charged with Pulling Gun in Walmart During Mask Dispute Posts \$15,000 Bond*, S. FLA. SUN SENTINEL (July 24, 2020, 1:22 PM), <https://www.sun-sentinel.com/news/crime/fl-ne-walmart-gun-mask-arrested-charged-20200723-tma2ajnkoraodlhjcuqt2szcaa-story.html> [https://perma.cc/N6Z8-F4MM].

3. Wayne K. Roustan & Austen Erblat, *No Charges for Shopper Who Pulled a Gun in Walmart Mask Dispute*, S. FLA. SUN SENTINEL (Sept. 1, 2020, 10:10 AM), <https://www.sun-sentinel.com/local/palm-beach/fl-ne-walmart-gun-charges-dropped-20200901-dkkknwn5mbdtlkbd75fg46tjwe-story.html> [https://perma.cc/HL7Z-LFJD].

4. Jasmin Barmore & Sarah Rahal, *Two Arraigned After Gun Drawn over Bump at Orion Twp. Chipotle*, DET. NEWS (July 3, 2020, 6:13 PM), <https://www.detroitnews.com/story/news/local/oakland-county/2020/07/02/woman-pulls-gun-orion-township-michigan/5365854002/> [https://perma.cc/7AZN-T35S].

argument escalates. She and her companion are charged with felonious assault.

A white St. Louis couple standing in their front yard display a semi-automatic rifle and point a handgun at demonstrators protesting police use of force as the crowd moves along the road and sidewalk in front of their house.<sup>5</sup> The local prosecutor charges them with felony exhibition of a weapon. The President of the United States calls the criminal investigation “a disgrace,” the Attorney General of Missouri inserts himself into the litigation with an extraordinary amicus brief arguing that the charges chill gun rights and should be dismissed, and the Governor of Missouri announces that he will pardon the couple if they are convicted of a crime.<sup>6</sup>

Demonstrators clad in quasi-military gear and openly carrying sidearms and semi-automatic rifles appear on the streets in cities and towns across the nation. The spectacles range from heavily armed protestors storming the Michigan capitol building<sup>7</sup> to a man ordering a sandwich in a North Carolina restaurant with a rocket launcher strapped to his back.<sup>8</sup>

Sadly, these events have not all been bloodless gun-rights pageantry. A man carrying an AK-47 rifle during a Black Lives Matter demonstration in Austin, Texas, was shot and killed by a motorist who claimed that the victim pointed the rifle at him as he drove through the crowd.<sup>9</sup> In Kenosha, Wisconsin, a seventeen-year-old self-designated city defender openly

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5. Azi Paybarah & Aimee Ortiz, *Felony Charges Filed Against St. Louis Couple Who Pointed Guns at Protesters*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/20/us/mark-patricia-mccloskey-charges.html> [<https://perma.cc/KCF7-B2U7>]; see also Eric Ruben, *The Distortion of Self-Defense and the Second Amendment in Missouri*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (July 23, 2020), <https://firearmslaw.duke.edu/2020/07/the-distortion-of-self-defense-and-the-second-amendment-in-missouri/> [<https://perma.cc/3TJV-TY65>] (describing the couple’s actions and purported feelings upon seeing the protestors).

6. Paybarah & Ortiz, *supra* note 5. The couple later spoke at the Republican National Convention. Joan E. Greve, *St Louis Couple Who Threatened Black Lives Matter Protesters Speak at RNC*, GUARDIAN (Aug. 25, 2020, 12:31 AM), <https://www.theguardian.com/us-news/2020/aug/24/st-louis-couple-rnc-mark-patricia-mccloskey> [<https://perma.cc/R7WX-XSZZ>].

7. See Craig Mauger, *Protesters, Some Armed, Enter Michigan Capitol in Rally Against COVID-19 Limits*, DET. NEWS (Apr. 30, 2020, 8:16 PM), <https://www.detroitnews.com/story/news/local/michigan/2020/04/30/protesters-gathering-outside-capitol-amid-covid-19-restrictions/3054911001/> [<https://perma.cc/L9BR-58WH>] (describing the actions of protestors and noting that some were openly carrying firearms).

8. Thankfully, the rocket launcher was affixed with a sticker: “inert.” Justin Wise, *Armed Stay-at-Home Demonstrators Visit North Carolina Subway Shop*, THE HILL (May 11, 2020, 8:38 AM), <https://thehill.com/homenews/state-watch/497073-armed-demonstrators-protesting-stay-at-home-order-visit-north-carolina> [<https://perma.cc/R4MA-R94P>].

9. David Montgomery & Manny Fernandez, *Garrett Foster Brought His Gun to Austin Protests. Then He Was Shot Dead.*, N.Y. TIMES (July 26, 2020), <https://www.nytimes.com/2020/07/26/us/austin-shooting-texas-protests.html> [<https://perma.cc/86V6-NYL6>].

carrying an AR-15 rifle—and greeted warmly by the local police—killed two protesters and wounded a third.<sup>10</sup>

There have been many more such incidents, reported and unreported.<sup>11</sup> A reasonable observer might expect, at a minimum, that American criminal law would have a clear regime to guide and control not only the acquisition and firing of guns, but their display—a regime that accounts for both the Second Amendment and widespread private possession of firearms.

Traditional criminal law does govern here. Indeed, many prominent incidents (although not as many as one might expect) have resulted in arrests for brandishing, assault with a firearm, menacing with a firearm, and other related crimes.<sup>12</sup> But the traditional machinery of criminal law falls woefully short of effectively regulating gun displays in a society as saturated with firearms as the United States. It delivers neither clear rules of conduct to inform people what they are allowed to do, nor clear rules of decision to instruct police and prosecutors what to permit and when to intervene.<sup>13</sup>

The purpose of this Essay is to describe gun displays as a distinct social and legal phenomenon, to sketch the applicable legal rules, to explain why and how those rules fall short, and to identify some of the costs of the present legal regime. The lack of effective rules likely contributes to violence, terror, racial inequities, and costly legal uncertainty—including for gun owners themselves. We map the terrain and boundaries of this serious and growing problem with reference to social practices, criminal law, and constitutional law. We then conclude with some provisional thoughts about the possibilities and limits of legal reform and the critical importance of social norms if the country is to move toward a more stable and safer equilibrium.

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10. Graham Kates, *Homicide Charges Announced Against Kyle Rittenhouse, Accused of Killing 2 at Kenosha Protests*, CBS NEWS (Aug. 30, 2020, 7:22 AM), <https://www.cbsnews.com/news/kyle-rittenhouse-homicide-charges-kenosha-shooting-first-degree-homicide-jacob-blake-protest-wisconsin/> [https://perma.cc/T6ZJ-2NXN]; Haley Willis, Muye Xiao, Christiaan Triebert, Christoph Koettl, Stella Cooper, David Botti, John Ismay & Ainara Tiefenthäler, *Tracking the Suspect in the Fatal Kenosha Shootings*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/08/27/us/kyle-rittenhouse-kenosha-shooting-video.html> [https://perma.cc/EM8X-73SM].

11. See, e.g., Tom Batchelor, *Louisville Police Officer Filmed Giving Advice to Heavily-Armed 'Militia'*, NEWSWEEK (Sept. 24, 2020, 7:48 AM), <https://www.newsweek.com/louisville-police-officer-breonna-taylor-protests-militia-1534025> [https://perma.cc/AKF6-SLTP] (relaying an incident of gun-rights pageantry carried out by a self-styled “militia” in Louisville, Kentucky).

12. See *infra* subparts II(A)–(B).

13. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 648–49 (1984) (exploring the dual function of substantive criminal prohibitions in guiding both primary conduct and the conduct of legal actors).

### I. Gun Displays as a Distinct Social and Legal Phenomenon

The American gun debate tends to focus on bodies and bullets<sup>14</sup>—if and how gun laws can help prevent some of the roughly 100,000 shootings every year, or the 40,000 or so deaths from gunshots (mostly by suicide).<sup>15</sup> This focus is sensible, as even a one-percent change in casualties could mean hundreds of lives saved. Of course, the answers are not empirically, legally, or politically easy. Although most Americans think guns should be more tightly regulated,<sup>16</sup> others argue that the carnage would be even worse with fewer guns.<sup>17</sup> And the Second Amendment precludes some policy options.<sup>18</sup>

But the social and legal lives of guns are much more complicated than the focus on bullets and bodies suggests. The vast majority of legally relevant gun-related activity, whether salutary, benign, or unwelcome, does not involve pulling a trigger. Most self-reported defensive gun uses, for example, involve the simple display of a gun, not its actual discharge.<sup>19</sup> Many gun-carriers emphasize the peace of mind, confidence, and concentration they feel carrying a gun,<sup>20</sup> and the positive externalities—including safety—they believe accrue to those around them.<sup>21</sup>

14. See Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS (SPECIAL SUPPLEMENT) 11, 15 (2020) (asserting that the scope of the American gun control debate is unduly limited to public safety concerns, ignoring other legitimate interests like the “freedom and confidence to participate in every domain of our shared life”).

15. *Web-Based Injury Statistics Query and Reporting System (WISQARS)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/injury/wisqars/> [<https://perma.cc/KX5Z-GE4U>] (to show recorded incidents of firearm deaths and injuries, filter data to show “firearms” as the “mechanism of death”).

16. Katherine Schaeffer, *Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017*, PEW RES. CTR. (Oct. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/> [<https://perma.cc/PM7K-D82F>].

17. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* 19 (1998) (inferring from an observed inverse correlation between gun ownership and crime that widespread gun ownership discourages criminal activity).

18. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”).

19. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 173, 184 tbl.2 (1995) (reporting between 2.2 and 2.5 million defensive gun uses per year, with only about 200,000 involving physical harm).

20. See Terrence D. Hill, Benjamin Dowd-Arrow, Andrew P. Davis & Amy M. Burdette, *Happiness Is a Warm Gun? Gun Ownership and Happiness in the United States (1973–2018)*, SSM - POPULATION HEALTH, Apr. 2020, at 1, 2 (noting and explaining “several ways that guns could promote happiness,” including freedom from fear and increased feelings of empowerment); Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 722 (1995) (“[I]f people feel safer because they carry a gun and in turn lead happier lives because they feel safer and more secure, then the carrying of guns makes a direct and nontrivial contribution to their overall quality of life.”).

21. See generally JENNIFER CARLSON, *CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE* (2015) (discussing common rationales for carrying firearms and demonstrating that these rationales are a product of our societal setting).

Some gun owners carry their guns in public to normalize conduct that others—even other gun owners—regard as irresponsible or threatening. When Texas “open carry” advocates took their rifles into fast-food restaurants in 2014, the NRA issued a statement saying that such activity “defies common sense . . . shows a lack of consideration and manners . . . [and] not only is . . . rare, it’s downright *weird*.”<sup>22</sup> The strong statement led to a backlash by those eager to change the norms surrounding open carry and the organization quickly retracted it.<sup>23</sup> This kind of norm entrepreneurialism by gun owners can, and is designed to, shift social practices so as to shape the law and the cultural perception of gun use.

Not all agree that this change in norms is necessarily for the better. Apprehension over what one former NRA president described as “the general promiscuous toting of guns”<sup>24</sup> appears to be broadly shared. Indeed, many gun owners express discomfort with a norm of carrying firearms anyplace a person happens to be.<sup>25</sup> Undoubtedly, gun displays can and do impose negative externalities. Some studies have found that most people report feeling *less* safe when others around them have guns.<sup>26</sup>

That feeling alone is not enough to make others’ conduct unlawful, however. In states where open carry is legal (nearly all of them), the mere act

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22. Eric Lach, *NRA Issues Amazing Statement Admitting Bringing AR-15s to Chipotle Is Dumb*, TALKING POINTS MEMO (June 2, 2014, 10:34 AM), <https://talkingpointsmemo.com/muckraker/nra-open-carry-texas-weird-statement> [<https://perma.cc/QEH7-7HXQ>].

23. Eric Lach, *NRA Apologizes for Calling Guns-in-Restaurants Crowd ‘Weird,’* TALKING POINTS MEMO (June 3, 2014, 6:35 PM), <https://talkingpointsmemo.com/muckraker/nra-apologizes-open-carry-texas> [<https://perma.cc/N37C-LERW>].

24. Michael S. Rosenwald, *The Forgotten NRA Leader Who Thought Carrying Guns Should Be ‘Sharply Restricted,’* CHI. TRIB. (Oct. 7, 2017, 11:45 PM), <https://www.chicagotribune.com/nation-world/ct-forgotten-nra-leader-gun-control-20171007-story.html> [<https://perma.cc/TG26-JVH3>]; see also Jacob Sullum, *When the NRA Opposed Open Carry*, REASON (June 17, 2014, 3:25 PM), <https://reason.com/2014/06/17/when-the-nra-opposed-open-carry/> [<https://perma.cc/V9CJ-BF9R>] (citing the NRA’s support of California’s Mulford Act, which banned open carrying of loaded firearms). Then-Governor Ronald Reagan, supporting a tightening of California’s gun laws after the Black Panthers entered the state legislature openly carrying firearms, said: “There’s no reason why on the street today a citizen should be carrying loaded weapons.” Cynthia Deitle Leonardatos, *California’s Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 972 (1999).

25. In a 2015 survey, gun owners were most supportive of carrying firearms into restaurants (59%) but least supportive of carrying firearms in bars (26%). Only 16% supported carrying firearms in a broad swath of public places such as schools, stadiums, churches, and government buildings. See Julia A. Wolfson, Stephen P. Teret, Deborah Azrael & Matthew Miller, *US Public Opinion on Carrying Firearms in Public Places*, 107 AM. J. PUB. HEALTH 929, 933 fig.2 (2017).

26. See, e.g., D. Hemenway, D. Azrael & M. Miller, *National Attitudes Concerning Gun Carrying in the United States*, 7 INJ. PREVENTION 282, 283 (2001); cf. *McDonald v. City of Chicago*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting) (“Your interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence.”).

of toting a visible weapon is not a crime.<sup>27</sup> But, as we explain below, small changes in *how* a weapon is carried can transform activity from legally protected to prohibited. Just as displaying weapons may be an underappreciated form of defensive gun use, there is every reason to think that displaying guns is also an underappreciated form of crime.

It is difficult to know how many Americans are illegally threatened with guns each year, in part because victims of such threats do not show up in hospital emergency rooms. It is not our purpose to make an original empirical claim comparing criminal gun displays with the number of justified defensive uses of guns. Defensive gun use is a matter of considerable dispute, with oft-cited estimates varying by a factor of ten or more.<sup>28</sup> There is already extensive scholarly literature on whether expansive public carry laws lead to more or less crime.<sup>29</sup> Instead, our point is that the gun debate's focus on *violent* crime, particularly homicide, tends to leave other risks and costs of gun displays unaccounted for in the empirical literature and unaddressed by the current legal rules.

In short, gun displays are a distinct and important social and legal phenomenon with very high stakes. Consider that some self-reported surveys indicate that, of the 2.2 to 2.5 million defensive gun uses annually, only about 200,000 involved physical wounding of the assailant.<sup>30</sup> (Both of these numbers appear to be overestimates, considering that only 100,000 shooting victims are treated in hospitals every year; for our purposes the ratio is what matters.)<sup>31</sup> But that does not mean that nothing legally relevant happens when no one is shot. Inevitably, some (likely significant) portion of these incidents involve false positives: mistaken apprehension of a threat, for example, leading the gun owner to brandish his weapon and the other person to flee. The gun owner leaves the scene thinking that he has successfully defended

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27. It might, however, be enough to support a stop and frisk. *See* United States v. Robinson, 846 F.3d 694, 701 (4th Cir. 2017) (en banc). *But see* United States v. Watson, 900 F.3d 892, 895–96 (7th Cir. 2018) (Barrett, J.) (holding that merely displaying weapons where lawful does not give rise to reasonable suspicion).

28. *See generally* *The Challenges of Defining and Measuring Defensive Gun Use*, RAND CORP. (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/essays/defensive-gun-use.html> [<https://perma.cc/Y8SJ-QH49>] (describing the measurement difficulties in estimating the incidence of defensive gun uses and the resulting large variation in estimates).

29. *Compare* LOTT, *supra* note 17, at 19–20 (concluding that citizen carry laws aid in reducing crime), *with* Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1201–02 (2003) (describing shortcomings in the statistical models used by Lott and asserting that “if anything, there is stronger evidence for the conclusion that [shall-issue] laws increase crime than there is for the conclusion that they decrease it”).

30. Kleck & Gertz, *supra* note 19.

31. *See* David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1442–44 (1997) (comparing Kleck and Gertz's estimates of assailants wounded by gun-carrying victims to the number of non-fatal firearm-related injuries treated in emergency rooms each year and analyzing issues in their estimates).

himself, but (depending on some of the factors we discuss in Part II) the *other* person may have been the victim of a crime. In one study, researchers summarized self-reported defensive gun uses from a survey and then sent the summaries to criminal court judges. Even taking the facts as true, and assuming the gun owner was legally armed and carrying, the judges concluded roughly half of the incidents to be potentially illegal.<sup>32</sup>

These costs do not fall on everyone equally. Recent headlines and cellphone recordings illustrate what research has long shown: Gun displays are likely to have racialized distributional effects, because threat perception is strongly correlated with various kinds of implicit racial bias.<sup>33</sup> This suggests African Americans are disproportionately likely to be victimized by crimes like brandishing and gun-related assault—incidents that gun owners may wrongly perceive as self-defense—because African Americans are more likely to be seen as threatening. Studies have found that identical behavior—an ambiguous shove, say—is many times more likely to be characterized as “violent behavior” when the person doing the shoving is black and the “victim” is white.<sup>34</sup> Even absent physical contact, studies have found that young black men are perceived as bigger (taller, heavier, more muscular) and more physically threatening (stronger, more capable of harm) than young white men,<sup>35</sup> and that higher implicit prejudice is associated with a greater

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32. D. Hemenway, D. Azrael & M. Miller, *Gun Use in the United States: Results from Two National Surveys*, 6 *INJ. PREVENTION* 263, 264–65 (2000); *see also* Otis Dudley Duncan, *As Compared to What? Offensive and Defensive Gun Use Surveys, 1973–94*, at 10–11 (Nat’l Inst. of Just., Working Paper No. 185056, 2000) (describing interpretive problems with surveys in which respondents are asked about their defensive use of guns and noting that the respondents may have been mistaken about the threat and whether they themselves committed an assault); Otis Dudley Duncan, *Gun Use Surveys: In Numbers We Trust?*, *CRIMINOLOGIST*, Jan./Feb. 2000, at 1, 1, 3 (providing examples of the misuse of survey data involving the defensive use of guns due to, among other things, confusion about whether the defensive gun use by survey respondents was actually lawful).

33. *See, e.g.*, Michael C. Gearhart, Kristen A. Berg, Courtney Jones & Sharon D. Johnson, *Fear of Crime, Racial Bias, and Gun Ownership*, 44 *HEALTH & SOC. WORK* 241, 242, 245–46 (2019) (reporting research findings indicating that gun owners are more vigilant in responding to perceived threats and more likely to direct their vigilance at racial and ethnic minorities).

34. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 *J. PERSONALITY & SOC. PSYCH.* 590, 595–97 (1976) (75% of participants characterized the shove as violent when the protagonist was black and the victim white, compared to only 17% when the races in the scenario were switched); *see also* Jody Armour, *Stereotypes and Prejudices: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 *CALIF. L. REV.* 733, 753 (1995) (describing a study of schoolchildren that found both black and white children perceive ambiguously aggressive behaviors of black individuals as more threatening than the same behaviors of white individuals).

35. *See, e.g.*, H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 *J. PERSONALITY & SOC. PSYCH.* 590, 590, 596 (1980) (“Cultural differences between subject groups were apparent in the greater tendency of the white children to read threat into ambiguously aggressive behaviors involving no physical contact and to assume that the perpetrators of such behaviors were stronger

readiness to perceive anger in black faces.<sup>36</sup> The “presumption of dangerousness” that corresponds with darker skin tones and stronger Afrocentric facial features<sup>37</sup> may not only lead to more gun displays against black people but also influence how jurors and other decisionmakers evaluate the lawfulness of the display.<sup>38</sup>

One particular scenario that might cause a gun owner (or for that matter, a police officer<sup>39</sup>) to pull his weapon in self-defense is the impression that the person he is confronting is also armed. Although they are not equally distributed, there are more than 300 million guns in private hands in the United States.<sup>40</sup> The more guns in a society, the more likely individuals will assume others are armed.<sup>41</sup> In any given encounter, however, that impression might be mistaken. And the mistakes also are not equally distributed; evidence shows that one form of threat-perception failure—mistaking innocuous objects for weapons—is especially likely when the other person is black.<sup>42</sup> One study found that participants primed with a white face were more likely to mistake a gun for a tool, while those primed with a black face

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than the recipients.”); John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59, 60 (2017) (pointing to seven different studies reaching this conclusion).

36. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 641–42 (2003).

37. Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 785 (2018) (“Repeated studies indicate Blacks with darker skin tones and stronger Afrocentric facial features ‘activate automatic associations with negative behavioral stereotypes of Black men, such as aggression, violence, and criminality.’” (internal citation omitted)).

38. Morgan A. Birck, *Do You See What I See? Problems with Juror Bias in Viewing Body-Camera Video Evidence*, 24 MICH. J. RACE & L. 153, 172 (2018).

39. Lois James, *The Stability of Implicit Racial Bias in Police Officers*, 21 POLICE Q. 30, 40–41 (2018) (“[O]fficers tended to have moderate (35%) to strong (37%) bias associating Black Americans with weapons. Approximately 12% of officers had slight anti-Black bias and a further 12% had no bias. Finally, a combined 3% of the sample had anti-White bias (associating White Americans with weapons).”).

40. Scott Horsley, *Guns in America, by the Numbers*, NPR (Jan. 5, 2016, 12:09 PM), <https://www.npr.org/2016/01/05/462017461/guns-in-america-by-the-numbers> [https://perma.cc/ZQU8-RNTN].

41. Cf. Jill Lepore, *The Long Blue Line*, NEW YORKER, July 20, 2020, at 64, 65 (noting that “[t]he difference [between the U.S. and other countries] is guns”—in Finland, the police fired six bullets in all of 2013, whereas in Pasco, Washington, three police officers fired seventeen in one day in 2015).

42. See Cynthia Lee, *Race, Policing, and Lethal Force: Remediating Shooter Bias with Martial Arts Training*, 79 L. & CONTEMP. PROBS., no. 3, 2016, at 145, 157–58 (summarizing a 2012 shooter bias study in which both civilians and police officers were quicker to identify black individuals as carrying a firearm than individuals of any other race).



were more likely to mistake a tool for a gun.<sup>43</sup> Others have confirmed a direct (and bi-directional) link between blackness and guns.<sup>44</sup>

Because threat perception is thoroughly racialized, African Americans are more likely to be victimized by gun crimes like brandishing and assault when the gun-bearer wrongly believes himself to be engaged in self-defense. And that, in turn, means African Americans will suffer disproportionately when the machinery of criminal law is insufficient to address these encounters.

Another set of concerns are not specifically about race, but about guns more generally. Some studies have concluded that the mere presence of a firearm can prime people to behave more aggressively—a phenomenon known as the “weapons effect.”<sup>45</sup> People in possession of a gun are more likely to classify other objects as guns and to engage in threat-induced

43. D. Lisa Cothran, *Facial Affect and Race Influence Threat Perception*, 30 IMAGINATION COGNITION & PERSONALITY 341, 348 (2011); see also B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181, 190 (2001) (“Results of this research strongly support the hypothesis that the race of faces paired with objects does influence the perceptual identification of weapons. . . . Harmless distracters were more likely to be classified as guns when primed by a Black face than when primed by a White face.”).

44. Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 878 (2004). Professor Eberhardt and her coauthors describe a study yielding such results as follows:

In Study 1, we demonstrate that merely exposing people to Black male faces lowers the perceptual threshold at which they detect degraded images of crime-relevant objects (e.g., guns and knives). In Study 2, we show that exposing people to crime-relevant objects prompts them to visually attend to Black male faces, suggesting that the association of Blacks and criminality is bidirectional.

*Id.* See generally Charles M. Judd, Irene V. Blair & Kristine M. Chapleau, *Automatic Stereotypes vs. Automatic Prejudice: Sorting Out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J. EXP. SOC. PSYCH. 75, 75 (2004) (“In an extension of Payne’s procedure, we show that African-American faces facilitate the categorization of both handguns and sports-related objects, but not the categorization of insects or fruits.” (analyzing Payne, *supra* note 43)).

45. See, e.g., Arlin James Benjamin, Jr. & Brad J. Bushman, *The Weapons Priming Effect*, CURRENT OP. PSYCHOLOGY, Dec. 2016, at 45, 45 (describing multiple studies analyzing the “weapons effect” and its possible cognitive underpinnings); Craig A. Anderson, Arlin J. Benjamin, Jr. & Bruce D. Bartholow, *Does the Gun Pull the Trigger? Automatic Priming Effects of Weapon Pictures and Weapon Names*, 9 PSYCH. SCI. 308, 312 (1998) (proposing based on two experiments that the simple identification of weapons increases the accessibility of aggressive thoughts); see also Arlin J. Benjamin, Jr., Sven Kepes & Brad J. Bushman, *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-Analytic Review of the Weapons Effect Literature*, 22 PERSONALITY & SOC. PSYCH. REV. 347, 359 (2018) (summarizing a study which showed “merely seeing a weapon can increase aggressive thoughts, hostile appraisals, and aggressive behavior”); Brad J. Bushman, *The “Weapons Effect,”* PSYCH. TODAY (Jan. 18, 2013), <https://www.psychologytoday.com/us/blog/get-/psyched/201301/the-weapons-effect> [https://perma.cc/DJB2-W9F8] (“Several studies have replicated the weapons effect.”). But see GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 29 (1991) (doubting the weapons effect studies, arguing that the “protection gun owners feel safer because they have a gun in their home . . . . [T]he net effect of home gun possession on gun owners is to reduce fear of crime”).

behavior, like raising their own gun to fire.<sup>46</sup> Further, the presence of a gun has been linked to aggressive responses<sup>47</sup>—in particular, from men who have already been subject to aggression-eliciting stimuli.<sup>48</sup>

These empirical findings suggest that the social practice of gun displays is unlikely to settle into a desirable equilibrium in which beneficial displays of guns outweigh the costs, or that any such social practice will avoid undesirable and inequitable distributional effects. In these circumstances, and faced with such harms, it makes sense to ask whether the criminal law is regulating, or can effectively regulate, this kind of behavior.

## II. Criminal Law's Deficiency in Regulating Gun Displays

One might reasonably hope for the law to draw a clear line between defensive and criminal gun displays. And yet, as we explain below, that line is both thin and blurry. It is thin because small factual differences separate acts of self-defense from crime—the angle of the gun barrel, the precise location of the incident, the appearance of the perceived attacker, and so on. It is blurry because the legal standards that define the line themselves turn on hazy concepts like reasonableness, proportionality, and intent that are nearly impossible to clearly articulate *ex ante*.

In contrast with, for example, possession-based gun crimes (like those prohibiting felons from having firearms), this lack of clarity is a significant deterrent for prosecutors and police and demands much of judges and juries. The haziness also makes it hard for people to know their legal rights: Criminal law does not provide clear guidance to either the citizen who wonders when she can display her weapon or the citizen who wonders if she has been victimized by such a display.

### A. Offenses

Is it a crime to point a gun at a person? As with all American criminal law, the specifics vary by state. But, in general, yes.

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46. Jessica K. Witt & James R. Brockmole, *Action Alters Object Identification: Wielding a Gun Increases the Bias to See Guns*, 38 J. EXP. PSYCH 1159, 1165 (2012).

47. See generally David Hemenway, Mary Vriniotis & Matthew Miller, *Is an Armed Society a Polite Society? Guns and Road Rage*, 38 ACCIDENT ANALYSIS & PREVENTION 687 (2006). This study's abstract characterizes its methods and results as follows:

Data come from a 2004 national random digit dial survey of over 2400 licensed drivers. Respondents were asked whether, in the past year, they (1) made obscene or rude gestures at another motorist, (2) aggressively followed another vehicle too closely, and (3) were victims of such hostile behaviors. . . . Similar to a survey of Arizona motorists, in our survey, riding with a firearm in the vehicle was a marker for aggressive and dangerous driver behavior.

*Id.* at 687.

48. Leonard Berkowitz & Anthony LePage, *Weapons as Aggression-Eliciting Stimuli*, 7 J. PERSONALITY & SOC. PSYCH. 202, 203 (1967).

Consider the jurisdictions governing some of the incidents described in the introduction. In Florida (the masking argument in the Walmart), misdemeanor assault is “an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.”<sup>49</sup> This crime is a felony if committed “[w]ith a deadly weapon without intent to kill.”<sup>50</sup> In addition, it is a misdemeanor in Florida for any person carrying a firearm to, “in the presence of one or more persons, exhibit the same in a rude, careless, angry, or threatening manner, not in necessary self-defense.”<sup>51</sup> Thus, Florida makes it a crime to point an actually or apparently loaded firearm at another person during most hostile encounters. Police initially filed charges in the Walmart incident on this theory.

In Michigan (the confrontation in the Chipotle parking lot), assault with a firearm is a felony.<sup>52</sup> Michigan does not define assault by statute but rather has incorporated the state’s common law of assault into its statutes.<sup>53</sup> The relevant decisions unfortunately are not a model of clarity. But it is plain that Michigan law treats as assault some kinds of threatening behavior that involve no physical contact.<sup>54</sup>

Michigan courts have defined simple assault as “an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery”; as “any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote at the time an intention to do it, coupled with a present ability to carry such intention into effect”; and as “any unlawful physical force partly or fully put in motion creating a reasonable apprehension of immediate injury to a human being.”<sup>55</sup>

Plainly, pointing a firearm at another person and at a range that could inflict injury would satisfy these definitions of assault—as long as something about the circumstances, including but not limited to the words or behavior of the person doing the pointing, would cause a reasonable person to fear that

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49. FLA. STAT. ANN. § 784.011 (West 2020).

50. *Id.* § 784.021; *see also* *Cambell v. State*, 37 So. 3d 948, 950 (Fla. Dist. Ct. App. 2010) (“Nowhere does either statute require as an element of the crime that the accused had to intend to do physical harm to the victim.”).

51. FLA. STAT. ANN. § 790.10.

52. MICH. COMP. LAWS ANN. § 750.82(1) (West 2019).

53. *See* *People v. Gardner*, 265 N.W.2d 1, 7 (Mich. 1978) (adopting the common law majority rule for the definition of assault).

54. *People v. Carlson*, 125 N.W. 361, 362 (Mich. 1910).

55. *People v. Reeves*, 580 N.W.2d 433, 435–36 (Mich. 1998); *Gardner*, 265 N.W.2d. at 7; *Carlson*, 125 N.W. at 362.

the gun might imminently be fired. Presumably that is the prosecutor's theory behind the charges brought for the incident in the Chipotle parking lot.<sup>56</sup>

Michigan's code also criminalizes, as misdemeanors, "recklessly or heedlessly or willfully [handling] any firearm without due caution and circumspection for the rights, safety or property of others"<sup>57</sup> and "intentionally but without malice point[ing] or aim[ing] a firearm at or toward another person."<sup>58</sup>

In Missouri (the St. Louis couple with guns in front of their home), misdemeanor assault consists of "purposely plac[ing] another person in apprehension of immediate physical injury."<sup>59</sup> Felony assault requires causing actual physical injury.<sup>60</sup> However, it is a separate felony in Missouri to "knowingly . . . [e]xhibit[], in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner."<sup>61</sup> This firearm offense includes an explicit (and probably unnecessary) exception that cross-references Missouri's self-defense statute.<sup>62</sup> Thus, the pointing of an actually or apparently loaded firearm at another person is, in most hostile circumstances, at least facially both a misdemeanor and a felony under Missouri law.

In addition, Missouri's "licensed concealed carry" statute states that a licensee "may briefly and openly display the firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense."<sup>63</sup> Florida's criminal firearm statutes contain an identical provision.<sup>64</sup> Thus, Missouri's and Florida's criminal codes could be read as implying that some forms of display are lawful, even if direct pointing may not be.

In Texas (where the Austin confrontation involving mutual display escalated to a shooting), the bar is set higher for an assault charge, requiring either the causing of physical injury or at least an intentional or knowing "threat" of "imminent" injury.<sup>65</sup> It seems unlikely that a display amounting to an intended warning could satisfy this definition. However, Texas

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56. *See supra* note 4.

57. MICH. COMP. LAWS ANN. § 752.863a (West 2019).

58. *Id.* § 750.233(1). At least one Michigan prosecutor expressed concern that the addition of an intent requirement makes the brandishing prohibition duplicative of the general prohibition on assault. Alex Mitchell, *Legal Uncertainties About Openly Carrying Guns in Michigan Present Challenges for Law Enforcement*, MLIVE (Jan. 20, 2019), [https://www.mlive.com/news/kalamazoo/2014/05/open\\_carry.html](https://www.mlive.com/news/kalamazoo/2014/05/open_carry.html) [<https://perma.cc/4FAC-4LST>].

59. MO. ANN. STAT. § 565.056 (West 2019).

60. *Id.* § 565.054.

61. *Id.* § 571.030.

62. *Id.* § 571.030(5).

63. *Id.* § 571.037.

64. FLA. STAT. ANN. § 790.053(1) (West 2020).

65. TEX. PENAL CODE ANN. § 22.01(a)(1–2) (West 2020).

separately criminalizes “deadly conduct,” defined, at the misdemeanor level, as recklessly placing another in “imminent” danger of serious injury. The deadly conduct statute creates a presumption of both recklessness and danger “if the actor knowingly pointed a firearm at or in the direction of another.”<sup>66</sup> Texas law further defines as misdemeanor disorderly conduct “display[ing] a firearm or other deadly weapon in a public place in a manner calculated to alarm.”<sup>67</sup> The Court of Criminal Appeals has clarified that not every alarming gun display qualifies; to violate the statute, “a person must intentionally and knowingly display a firearm in a public place in a manner that he knows is likely, under an objective standard of reasonableness, to frighten the average, ordinary person.”<sup>68</sup> Thus, pointing a gun at another person in Texas is likely a misdemeanor crime in many circumstances, but Texas law also leaves room in at least some situations for rebutting a prosecutor’s arguments that the actor had a reckless state of mind and placed the other person in imminent danger.

### B. Defenses

Of course, virtually any situation in which a gun owner points a firearm at another person in a hostile encounter in a public place will generate a self-defense claim by the gun owner. Not only is that the most obvious basis on which to defend against any allegation of assault or related firearm offense, but the concept of self-defense is at the very core of contemporary American gun (especially handgun) culture.<sup>69</sup>

Again, consider the applicable rules in the jurisdictions previously discussed, which are fairly typical of the progression of self-defense law in states that have attempted to accommodate, in whole or in part, the agendas of gun-rights advocates. It should first be noted that self-defense, which eventually merged into the ancient common law defense of justification, is a general defense in most or all American jurisdictions. That is, while the elements of the defense can be demanding, one can at least assert a self-

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66. *Id.* § 22.05; *Amaro v. State*, 287 S.W.3d 825, 829 (Tex. App.—Waco 2009, pet. ref’d) (“[M]erely pointing a firearm in another’s direction can place that person in imminent danger of serious bodily injury.”).

67. TEX. PENAL CODE ANN. § 42.01(a)(8) (West 2020).

68. *State v. Ross*, 573 S.W.3d 817, 825 (Tex. Crim. App. 2019).

69. David Yamane, Paul Yamane & Sebastian L. Ivory, *Targeted Advertising: Documenting the Emergence of Gun Culture 2.0 in Guns Magazine, 1955–2019*, PALGRAVE COMM’NS, Apr. 15, 2020, at 1, 2, <https://doi.org/10.1057/s41599-020-0437-0> [<https://perma.cc/QQK4-S5TQ>] (describing the shift in gun culture towards “Gun Culture 2.0,” which “centers on home and personal protection through armed citizenship, notably the legal carrying of concealed weapons, mostly handguns, in public by ordinary Americans”); Kate Masters, *Fear of Other People Is Now the Primary Motivation for American Gun Ownership, a Landmark Survey Finds*, TRACE (Sept. 19, 2016), <https://www.thetrace.org/2016/09/harvard-gun-ownership-study-self-defense/> [<https://perma.cc/Z42T-GNA7>].

defense claim against any charge whatsoever as long as force was plausibly necessary for self-protection.<sup>70</sup>

Florida's self-defense regime, which gained national attention following George Zimmerman's killing of Trayvon Martin, begins with the longstanding principle inherited from the common law—that “[a] person is justified in using or threatening to use force . . . against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force.”<sup>71</sup>

Florida's principal statutory innovation in the law of self-defense, like that of many other “stand your ground” states, is to modify the longstanding rules of retreat in self-defense law, which were designed to ensure that only strictly necessary uses of force would be legally justified. Whereas the common law and many older statutes deprived an actor of a self-defense claim if she could have avoided the threat to her safety by moving to another location (especially if she was not already in her home), the Florida regime states that the actor asserting self-defense has no duty to retreat and “has the right to stand his or her ground” and meet force with force if the actor is attacked in “a place where he or she has a right to be” (as, for example, in a store or public parking lot).<sup>72</sup> Florida law further contains provisions that (1) create a presumption of the actor's reasonable belief in imminent harm if a person is unlawfully entering the actor's dwelling or vehicle,<sup>73</sup> and (2) confusingly provide “immunity” from prosecution to persons whom the police conclude after investigation acted in self-defense.<sup>74</sup>

Texas, like Florida, is a “stand your ground” state. Its criminal code provides that: (1) common law retreat principles do not apply if the actor has “a right to be present at the location where the force is used”;<sup>75</sup> (2) the factfinder may not consider whether the actor did not retreat in determining

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70. See *United States v. Peterson*, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973) (providing a classic and thorough explication of the common law of self-defense).

71. FLA. STAT. ANN. § 776.012(1) (West 2020).

72. *Id.* § 776.012(2).

73. *Id.* § 776.013(2)(a).

74. *Id.* § 776.032(1–2). The oddity of Florida's immunity provision is that in American criminal procedure, a claim of immunity is raised in a motion to dismiss before trial or sometimes, if the legal question of immunity turns on a factual dispute, before a jury at trial. Florida's law appears to direct the police to make an extraordinary legal determination of immunity, in addition to the ordinary determination of probable cause, before deciding whether to arrest in the first instance. See Elliott C. McLaughlin, *Prosecutor Overrules Sheriff, Charges Florida Man in 'Stand Your Ground' Case*, CNN (Aug. 14, 2018, 6:22 PM), <https://www.cnn.com/2018/08/13/us/stand-your-ground-florida-shooting-charges/index.html> [<https://perma.cc/3YYW-77UA>] (quoting the Pinellas County sheriff, who stated: “To arrest, it must be so clear that, as a matter of law, ‘stand your ground’ does not apply in any way to the facts and circumstances that you're presented with”).

75. TEX. PENAL CODE ANN. § 9.31(e) (West 2020).

whether the actor's belief in the necessity of force was reasonable;<sup>76</sup> and (3) when the use of force would otherwise be justifiable under the state's self-defense law, the threat to use force is also lawful.<sup>77</sup>

In Michigan, a slightly different statutory scheme also establishes a version of the right to "stand your ground." Michigan's self-defense statute provides:

An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.<sup>78</sup>

Again, the "right to be" principle provides that there is no duty to retreat from a hostile encounter with another citizen in a public place, even if a safe retreat is possible.<sup>79</sup> Judicial decisions explain that the obligation to retreat persists in Michigan only for persons who are initial aggressors in a confrontation, who are participants in agreed "mutual combat," or who reinitiate hostilities after parties to a confrontation have retreated to safety.<sup>80</sup>

Missouri law also begins from the basic common law principle of necessity, authorizing the defensive use of force when an actor "reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use

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76. *Id.* § 9.31(f).

77. *Id.* § 9.04.

78. MICH. COMP. LAWS ANN. § 780.972(2) (West 2019).

79. The concept is freighted with some gendered normative significance, even in its alternative title of the "true man" defense. *See Erwin v. State*, 29 Ohio St. 186, 199–200 (1876) ("[A] true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."); *see also* Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1102 (2014) (arguing that Stand Your Ground laws, while purporting to benefit women, "actually reinforce and exacerbate existing gender divides in self-defense law that disproportionately harm women"); Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 240 (2008) ("[T]he modern Castle Doctrine leverages the subordinated woman into a general model of self-defense rooted in the imperative to protect the home and family from attack.").

80. MICH. COMP. LAWS ANN. §§ 780.973–.974 (West 2019); *see also* *People v. Riddle*, 649 N.W.2d 30, 42, 42 n.25 (Mich. 2002) (explaining that Michigan law imposes an affirmative duty to retreat only "when the defendant was the voluntary participant in mutual combat" and that one who is the initial aggressor is generally not entitled to claim self-defense at all); *People v. Montgomery*, No. 309993, 2013 WL 2662378, at \*2 (Mich. Ct. App. June 13, 2013) (per curiam) (finding that the evidence did not support an instruction for self-defense when the defendant "chose to return and confront [the complainant] with a gun" after the initial aggressor had abandoned the fight and both parties had retreated to safety).

of unlawful force by such other person.”<sup>81</sup> Missouri is also a “stand your ground” state, providing that a person has no duty to retreat while “in any . . . location such person has the right to be.”<sup>82</sup> (To see the contrasting approach, consider the Model Penal Code, drafted in the 1960s, which imposes an obligation to retreat, even in the face of an unlawful demand to refrain from legally protected conduct, so long as the actor does not have a “duty” to be in the place in question.)<sup>83</sup>

In Florida, Texas, Michigan, and Missouri, as in many other states, the burden of proof further favors claims of self-defense. The defendant need only meet a burden of production by introducing some evidence to inject the question of self-defense into the litigation, after which the prosecutor must disprove the affirmative defense beyond a reasonable doubt.<sup>84</sup> Burdens of proof can be decisive in resolving the lawfulness of many violent encounters, as was likely the case in the prosecution and acquittal of George Zimmerman, if there are no eyewitnesses or video or audio records of the encounter.

### C. *Shortcomings*

While criminal law in many American jurisdictions is reasonably clear that pointing a firearm at a person during a confrontation in public *can* be a crime (at least at the misdemeanor level), it is extremely opaque—indeed, even intentionally noncommittal—about when such conduct *will* be a crime. This is so for two reasons, the second of which presents the greater problem. First, assault definitions often turn on difficult factual questions about the actor’s intent and the victim’s perceptions. Key to this difficulty is that, during a confrontation, both defensive pointing of a firearm and threatening pointing of a firearm generate reasonable fear in those at whom the gun is pointed. The difference in legality between the two scenarios may then turn on the beliefs and intentions of the person pointing the weapon.

That leads to the second, more troublesome problem. Because all such encounters will, if treated as criminal cases, involve claims of self-defense, liability will almost always pivot on the actor’s “reasonable belief” in the necessity of displaying or pointing the gun. Some states, like Florida, make this a subjective inquiry for all practical purposes.<sup>85</sup> Coupled with the

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81. MO. ANN. STAT. § 563.031 (West 2019).

82. *Id.* § 563.031(3).

83. MODEL PENAL CODE & COMMENTARIES § 3.04(2)(b) (AM. LAW INST. 1962).

84. MO. ANN. STAT. § 563.031(5) (West 2019); TEX. PENAL CODE ANN. § 2.03(c–d) (West 2020); *Mosansky v. State*, 33 So. 3d 756, 758 (Fla. Dist. Ct. App. 2010) (per curiam); *People v. Dupree*, 788 N.W.2d 399, 408–09 (Mich. 2010).

85. See Elizabeth Esther Berenguer, *The Color of Fear: A Cognitive-Rhetorical Analysis of How Florida’s Subjective Fear Standard in Stand Your Ground Cases Ratifies Racism*, 76 MD. L. REV. 726, 741 (2017) (“Although the reasonable person standard is the majority rule for most Stand Your



increasingly common rule that no person rightfully in a location is obliged to retreat to retain the defense, this means that the legality of pointing guns in public places is almost entirely a situational matter. To be sure, American self-defense law retains its commitment to the principle of proportional use of force as a subsidiary principle to necessity. Firing, and perhaps even pointing, a gun to ward off being jostled in a crowd, for example, should not give rise to any valid claim of self-defense. But proportionality itself turns on blurry notions of reasonable belief: pointing or even firing a gun might be reasonable if one person *believes* another to be armed or (as Zimmerman apparently argued with success) believes it necessary to fend off a manual attack that might end in a deadly blow.

Adding to the opacity of current law, stand-your-ground statutes elide questions of time and place when they impose no duty to retreat if the actor has “a right to be” in the place. How far can one go in placing oneself in a location and for a duration of time, fully armed, with the expectation or hope that a “necessity” to use deadly force might develop (as, for example, in the events preceding the deadly violence in Kenosha<sup>86</sup>)? To be sure, even newer statutes purport to deny “stand your ground” rights, as the older “castle doctrine” does, to individuals who provoke the threat necessitating self-defense or who are found to be the “initial aggressor.” But whether a person who has “a right to be” in a place could also be found to be a provoker or aggressor because they hoped to find a confrontation that might justify self-defense remains an entirely open question.<sup>87</sup>

American criminal law provides exceedingly little *ex ante* guidance on how lawfully possessed firearms can and should be carried, displayed, brandished, pointed, and referred to in verbal statements. In broad terms, the conduct rule for firearm pointing amounts to something like: “[I]t will be lawful if a prosecutor cannot prove to a jury beyond a reasonable doubt that you did not reasonably believe that you were in danger of being harmed.” In a country pervaded with guns, intense political hostilities, racial fears and divisiveness—and, at the moment, a frightening pandemic involving a deadly virus—what does it even mean to be “reasonable” in how one forms one’s fears, as an argument escalates on the sidewalk in front of a house or in a store parking lot?

The increasing phenomenon of dozens and sometimes hundreds of armed individuals converging in one place exposes just how inadequate the

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Ground laws, Florida’s codified Stand Your Ground laws call for a subjective analysis.”); *id.* at 727 (arguing that “subjective standards not only absolve negative race-based behaviors but actually ratify, condone, and perpetuate implicit biases and racist beliefs”).

86. *See supra* note 10.

87. *See generally* Kimberly Kessler Ferzan, *Stand Your Ground*, in *THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND CRIMINAL LAW* 731 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019) (examining possible moral justifications for “Stand Your Ground” laws).

criminal law is in policing the boundary between protected gun use and prohibited gun crime. Whether these armed individuals assemble to protest, to protect, or just because they can, the presence of so many private firearms generates volatility that existing criminal law is incapable of reducing *ex ante*.

All of these armed individuals can claim that they are in a place they have a right to be. Any of these individuals can claim that he brought a weapon in anticipation that counter-protestors or others would be similarly armed. And any one of them, if he points a weapon at another, can argue he is responding proportionately to the actual or apparent threat of other armed individuals. That these conflicts tend to be adjudicated only after someone pulls a trigger highlights the deficiencies of the existing criminal legal regime.

In sum, the criminal law's lines around gun displays are both thin and blurry. The prospects that this regime could even punish people in a principled manner, much less establish viable rules for the handling of firearms at a protest, on the road, in a parking lot, and at a store, are extremely dim. This worrying picture emerges simply from the face of the applicable laws and a few recent examples. The problem looks even worse in light of the chronically capricious and racialized exercise of discretion in police departments and prosecutors' offices in fifty states and hundreds of cities and counties.

Just as we noted that threat perceptions are themselves racialized and prone to bias, so too are law enforcement's attempts to crack down on crime, particularly gun crime. The enforcement disparities are stark with easily proven gun possession charges, where African Americans are far more likely to be charged with unlawful possession than white Americans.<sup>88</sup> Given the added difficulty of charges for gun-pointing offenses, it stands to reason that systematic biases will systematically favor white Americans over African Americans. Recent events involving white, armed, self-proclaimed militias allowed to operate freely in public support this hypothesis.<sup>89</sup>

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88. See, e.g., Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173, 2194–97 (2016) (recounting statistics of racial disparities in weapons-offense arrests but adding the caveat that we do not have good data on the underlying number of offenses that are not charged).

89. For example, none of the gun carriers who stormed the Michigan legislature in April 2020 were arrested, despite broad acknowledgement that some of their actions were threatening and intimidating. See Sarah Rahal & Craig Mauger, *Armed Protesters in Michigan Capitol Have Lawmakers Questioning Policy*, *DET. NEWS* (May 3, 2020, 12:24 AM), <https://www.detroitnews.com/story/news/local/michigan/2020/05/02/armed-protesters-michigan-capitol-have-lawmakers-questioning-policy/3071928001/> [<https://perma.cc/Z6B2-KXW3>] (quoting Michigan State Senate Majority Leader Mike Shirkey as condemning armed protestors who “used intimidation and the threat of physical harm to stir up fear and feed rancor”); see also Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, *BRENNAN*

### III. The Shadow of the Second Amendment

The previous Part canvassed the relevant rules of criminal law and showed how they are inadequate to fully manage public interactions that seem increasingly to involve gun displays. But any discussion of guns in the United States must also ask to what extent the right to keep and bear arms shapes behavior and influences the contours of criminal law. In the context of gun displays, this could happen in two ways: (1) doctrinal rules that restrict the state's ability to punish conduct, and (2) constitutional rhetoric that shapes ancillary doctrines and public understanding. There is no freestanding constitutional right to threaten another person with a gun. However, criminal law's indeterminacy is compounded by constitutional law, which is rapidly making the norms and laws surrounding arms display and bearing unstable and hotly contested.

#### A. *The Second Amendment's Limited Doctrinal Role*

In *District of Columbia v. Heller*,<sup>90</sup> the Supreme Court struck down a D.C. law banning handgun possession in the home. The law had been passed at a time of skyrocketing firearm violence that was chiefly affecting the District's large black community.<sup>91</sup> In response to endemic underenforcement of violent crimes involving black victims, the D.C. law was designed to show, in James Forman's words, that "at least in D.C., the killing of black men mattered."<sup>92</sup> But the mores and discourse around firearms changed considerably between the city council's decision in 1975 and the Supreme Court's decision in 2008.<sup>93</sup>

Writing for the Court in *Heller*, Justice Scalia concluded that the Second Amendment protects an individual right to keep and bear arms unconnected to service in a militia. And the "*central component*" of that right is the interest

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CTR. FOR JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [https://perma.cc/V5FB-KRBZ] (citing FBI counterterrorism policy documents and other sources documenting "active links" between militia and white supremacist groups and law enforcement officers).

90. 554 U.S. 570 (2008).

91. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 57 (2017) (observing that in 1975, "85 percent of those killed by guns in the District of Columbia were black, and so were a similar percentage of murder suspects"); *see also* Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1148 (2018) ("African Americans bore the brunt of a crime wave sweeping D.C. and much of the nation. Handguns made the crisis lethal, threatening black communities—especially the poor among them—in ways that made the turn to criminal law irresistible." (internal citations omitted)).

92. FORMAN, *supra* note 91, at 74.

93. *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008) (arguing that "*Heller's* originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism").

in self-defense.<sup>94</sup> D.C.’s law violated the Constitution because it banned the firearm most frequently chosen for self-defense and extended into the home, “where the need for defense of self, family, and property is most acute.”<sup>95</sup> So did D.C.’s separate requirement that other firearms be kept locked or disassembled at all times; notably, the Court refused to accept the District’s argument that the statute retained a self-defense exception that would allow a person to unlock her weapon when faced with a threat.<sup>96</sup>

But the majority opinion in *Heller* also emphasized that the right to keep and bear arms has limits, and that a potentially wide range of “longstanding” gun regulations are constitutionally permissible.<sup>97</sup> The Court invoked Blackstone, for example, as support for the government’s power to ban “dangerous and unusual” weapons.<sup>98</sup> And so it is worth noting that in the cited passage, Blackstone concluded that “riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”<sup>99</sup> That theme of protecting “the good people” from terror became a focus of early American gun laws as well, as manifest in the brandishing laws adopted—and still on the books—throughout the United States.<sup>100</sup>

*Heller*, then, seemed to tie the Second Amendment to notions of self-defense, albeit in an odd way. The Court did not purport to change or augment the traditional doctrine of self-defense, but to vindicate that doctrine by limiting regulations on a technology used in its performance. But, as Eric Ruben has shown, the common law doctrine of self-defense is cabined in ways that gun-rights advocates and activists, not to mention *Heller* itself, seldom acknowledge.<sup>101</sup> The doctrine traditionally requires the force used to be necessary and proportional and, as a procedural matter, the defense is adjudicated during a criminal trial, not through *ex ante* immunities from arrest or prosecution.<sup>102</sup> There’s a noticeable tension between *Heller*’s focus

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94. *Heller*, 554 U.S. at 599.

95. *Id.* at 628–29.

96. *Id.* at 630.

97. *Id.* at 626–27.

98. *Id.* at 627 (“We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”).

99. 4 WILLIAM BLACKSTONE, COMMENTARIES 149 (emphasis omitted).

100. See Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 55, 63 (describing early American brandishing laws); see also Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. (forthcoming 2021) (manuscript at 27–28), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3764258](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3764258) (discussing the longstanding and broadly enacted laws against brandishing weapons).

101. Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 67 (2020).

102. *Id.*

on ready handgun access and the ultimate goal of self-defense law to “shepherd conflicts away from lethal violence.”<sup>103</sup>

A federal district court in Illinois recently confronted *Heller*’s ambiguous relationship with the traditional rules of armed self-defense.<sup>104</sup> There, a Chicago police dispatcher sued the City after she was fired for shooting another motorist during an off-duty altercation. She claimed that the City’s action violated the Second Amendment because she was engaged in lawful self-defense. Rejecting that connection, the court held that “historical legal commentary and custom indicate that the question of whether a particular actual use of a gun constitutes self-defense is a question left to criminal and tort law, about which the Second Amendment is silent.” It therefore dismissed the claim that the firing constituted retaliation for the exercise of a constitutional right.<sup>105</sup>

Although *Heller* addressed a home handgun ban, the Supreme Court declared that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>106</sup> As a result, the Constitution may impose limits on a state’s authority to criminalize carrying firearms in public. In *Moore v. Madigan*,<sup>107</sup> the Seventh Circuit held just that.<sup>108</sup> *Heller* unmistakably implied, said Judge Richard Posner, that “the constitutional right of armed self-defense” extends beyond keeping a gun in one’s house.<sup>109</sup> And perhaps the Constitution has something to say about *how* firearms can be carried in public.<sup>110</sup>

*Heller*, then, clearly does take “certain policy choices off the table.”<sup>111</sup> Given current doctrine, a state likely cannot attack the destabilizing presence of guns in public by keeping them all homebound, though a wide range of time, place, and manner-type restrictions are still available, as are some

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103. *Id.* at 68.

104. *Calderone v. City of Chicago*, No. 18 C 7866, 2019 WL 4450496, \*3 (N.D. Ill. Sept. 17, 2019), *aff’d* No. 19-2858, 2020 WL 6500933 (7th Cir. Nov. 5, 2020).

105. *Id.* at \*1–4; *see also id.* at \*4 (“The Court is unaware of any authority indicating that the Second Amendment is relevant to the question of under what circumstances violent action is legally justified as self-defense.”).

106. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

107. 702 F.3d 933 (7th Cir. 2012).

108. *Id.* at 942.

109. *Id.* at 935.

110. *See* Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth Century Second Amendment*, 123 YALE L.J. 1486 (2014) (articulating historical constitutional understandings of the right to both the open and the concealed carry of firearms outside the home). *But see* *Young v. Hawaii*, No. 12-17808, 2021 WL 1114180, at \*3 (9th Cir. Mar. 24, 2021) (en banc) (holding that there is no unregulated right to carry firearms in public).

111. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

criminal sanctions on their unlawful display.<sup>112</sup> Despite the widening sphere of protected activity, there has been to date no major constitutional challenge to laws that criminalize conduct such as assault with a deadly weapon, brandishing, or other threatening gun displays.<sup>113</sup> The few cases thus far do not suggest these laws are in constitutional jeopardy. For example, in *Quigley v. City of Huntington*,<sup>114</sup> the court quickly rejected a claim that the state's brandishing statute violated the Second Amendment.<sup>115</sup> Nor was the statute unconstitutionally vague, because "[b]randishing a weapon is commonly understood as holding or waving a weapon in the presence of someone in an intimidating manner."<sup>116</sup> Another federal court similarly rejected the claim that a landowner's displaying a weapon to warn her neighbor not to trespass was protected conduct: "neither *Heller* nor *McDonald* forbids any State from imposing reasonable restrictions on the use of weapons to eject or prevent trespassers."<sup>117</sup> State courts interpreting their own constitutional arms-rights provisions have likewise rejected challenges to these types of laws.<sup>118</sup>

### B. *The Constitution's Rhetorical Power and Expressive Effect*

Laws regulating brandishing and similar conduct present no formal conflict with the right to keep and bear arms—at least under *Heller's* logic and the lower courts' jurisprudence to date. But the Second Amendment supplies more than just a formal constitutional barrier to gun regulation; it serves as a powerful rhetorical weapon. The Second Amendment is often

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112. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (striking down Illinois' statewide prohibition on public carry—the only such statewide law in the country). *But see* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1297 (2009) (arguing that a homebound right is consistent with *Heller*).

113. David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1129 (2010) (stating, in an article defending strong gun rights, that criminalizing conduct such as brandishing a weapon "would not violate the Second Amendment"). *Cf.* Reid Golden, *Loaded Questions: A Suggested Constitutional Framework for the Right to Keep and Bear Arms*, 96 MINN. L. REV. 2182, 2202 n.117 (2012) (arguing in favor of a First Amendment framework for Second Amendment questions and stating: "Firing or even brandishing a firearm in a public place, without the rare justification presented in a legitimate self-defense scenario, is of course lawless and not an individual right within the meaning of the Second Amendment.").

114. No. 3:17-CV-1906, 2020 WL 1527792 (S.D. W. Va. Mar. 30, 2020).

115. *Id.* at \*5.

116. *Id.* at \*6.

117. *Saldinger v. Santa Cruz Cty.* Super. Court, No. C 10-3147 SBA PR, 2010 WL 3339512, at \*4 (N.D. Cal. Aug. 24, 2010).

118. *See Ex parte Poe*, 491 S.W.3d 348, 355 (Tex. App.—Beaumont 2016, pet. ref'd) ("We conclude that although there clearly are constitutional rights to bear arms and to express oneself freely, there is no constitutionally protected right to display a firearm in a public place *in a manner that is calculated to alarm.*"); *State v. Spencer*, 876 P.2d 939, 942 (Wash. Ct. App. 1994) (rejecting challenge to law that "only prohibits the carrying or displaying of weapons when objective circumstances would warrant alarm in a reasonable person"); *State v. Daniel*, 391 S.E.2d 90, 97 (W. Va. 1990) (rejecting constitutional challenge to brandishing statute).

invoked by lawmakers—and understood by private actors—to protect gun-involved activities (including displays) that *Heller* would permit to be regulated.<sup>119</sup>

Probably the most prominent constitutionally inflected criminal statutes are the growing number of stand-your-ground laws. When Florida kicked off the recent spike in such laws in 2004, its supporters—including most notably the National Rifle Association—expressly invoked the constitutional right to armed self-defense. As discussed above, stand-your-ground laws typically eliminate the duty to retreat even when safe to do so, lower the bar to the use of deadly force, and invert the normal rules of criminal defenses, putting the onus on the state to *disprove* that the person was acting in reasonable self-defense before even making an arrest.<sup>120</sup> Advocates for such laws—and sometimes the laws themselves—invoke the language of the right to armed self-defense. By including a confusing “immunity” provision in its law, and tying it to Second Amendment rights, Florida signaled its willingness to cloak in constitutionally inflected language what might have formerly been criminal conduct involving guns.

These laws have a tangible effect on citizens’ actions and responses.<sup>121</sup> Take the case of Texan Joe Horn. In 2007, Horn shot and killed two men stealing property from his neighbor’s home. Horn had seen the men burglarizing the house and called 911 to report the theft. Despite the emergency dispatcher’s admonition that he stay in his home and await police, and that property theft is not worth shooting someone over, Horn insisted he would not let the men get away. Citing a change in Texas’s self-defense law just two months earlier, Horn declared: “the laws have been changed . . . since September the first, and I have a right to protect myself.” He stepped

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119. See, e.g., JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 3–4 (2018) (noting that political and rhetorical discussions of the Second Amendment are often erroneously overbroad as compared to current constitutional doctrine); Jacob D. Charles, *Securing Gun Rights By Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. (forthcoming 2022) (manuscript at 1–4), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3789216](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789216) (charting the ways that legislatures have invoked the Second Amendment to expand statutory protection for gun-related conduct); Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 253 (2018) (stating that “[t]here is a Judicial Second Amendment comprised of court decisions interpreting the provision, and there is an Aspirational Second Amendment that is used in political dialogue . . .,” which “is far more hostile to gun laws than the judicial one,” “overtaking the Judicial Second Amendment in American law”).

120. CAROLINE E. LIGHT, *STAND YOUR GROUND: A HISTORY OF AMERICA’S LOVE AFFAIR WITH LETHAL SELF-DEFENSE* 161–62 (2017).

121. See, e.g., Brandon W. Barnett, *Misunderstanding Stand Your Ground and the Castle Doctrine*, OPEN CARRY TEX. (Jan. 20, 2016), <https://opencarrytexas.wordpress.com/2016/01/20/misunderstanding-stand-your-ground-and-the-castle-doctrine/> [<https://perma.cc/7L9B-6AHK>] (describing “a common misunderstanding” of stand-your-ground laws created by news reports is that “the law grants the average citizen complete freedom to use any type of force, including deadly force, as a self-help remedy, whenever one feels threatened”).

out, confronted the men, and shot and killed them both, later saying “I had no choice.” Police arrived just seconds later, but Horn was not arrested or indicted by a grand jury that later evaluated the case, so there was never a need for him to claim self-defense or invoke the state’s new stand-your-ground law.<sup>122</sup> But he apparently believed that the law authorized—maybe even encouraged—him to initiate an armed confrontation, which ultimately resulted in two deaths.

As Mary Anne Franks observes, the influence of stand-your-ground and other similar laws “cannot be fully captured only by the outcomes of specific cases.”<sup>123</sup> The public imagination, shaped and informed by media reporting, advocacy, and constitutional rhetoric, gives such laws a life beyond the four corners of a statute.<sup>124</sup> As in the killings by Horn and George Zimmerman, “[t]he promotion of a shoot-first mentality has deadly consequences even if individual defendants fail to raise or succeed on” such a defense in a particular case.<sup>125</sup> We might say the same for a mentality that focuses on the prerogatives of public gun-bearers to the detriment of others. A brandish-first mentality may be just as toxic because the mental barriers to such actions are much lower than to pulling a trigger, but the trauma it inflicts and the chilling effect it imparts can be real and lasting.

The St. Louis couple’s actions illustrate well this concern. When Circuit Attorney Kimberly M. Gardner announced charges against the couple displaying their guns to passing protestors in July 2020, she invoked the state’s law criminalizing waving weapons in a threatening manner.<sup>126</sup> “We must protect the right to peacefully protest,” Gardner said, “and any attempt to chill it through intimidation or threat of deadly force will not be tolerated.”<sup>127</sup> State Attorney General Eric Schmitt shot back, “this is a case where the prosecutor contends that exercising the right to keep and bear arms

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122. See Patrick Michels, *Joe Horn and Five Years with the Texas Castle Doctrine*, TEX. OBSERVER (May 8, 2012, 7:29 PM), <https://www.texasobserver.org/joe-horn-and-castle-doctrine-shootings-in-texas/> [https://perma.cc/A32T-RX5S] (describing Joe Horn’s armed encounter with burglars in his neighborhood).

123. MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 97 (2019).

124. See Pamela Cole Bell, *Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood*, 46 U. MEM. L. REV. 383, 427 (2015) (criticizing opponents of stand-your-ground laws for characterizing them as “shoot first” and “license to kill” laws and contending that “[c]ritics who continue to make these deliberate misrepresentations run the risk of creating the very effect they decry”).

125. FRANKS, *supra* note 123, at 97.

126. See Paybarah & Ortiz, *supra* note 5 (explaining that, according to the Circuit Attorney’s Office in St. Louis, exhibiting a semiautomatic rifle in “an angry or threatening manner” was sufficient to charge Mark and Patricia McCloskey with unlawful use of a weapon).

127. Tom Jackman, *St. Louis Couple Who Aimed Guns at Protesters Charged with Felony Weapons Count*, WASH. POST (July 20, 2020, 7:33 PM), <https://www.washingtonpost.com/nation/2020/07/20/st-louis-couple-who-aimed-guns-protesters-charged-with-felony-weapons-count/> [https://perma.cc/B22L-GSXA].



in self-defense—one of Missouri’s most fundamental freedoms—is *itself* a crime.”<sup>128</sup> He explicitly connected the couple’s statutory and constitutional rights. The “castle doctrine,” Schmitt wrote, “is not merely a creature of statute, but is deeply rooted in—and implements—the constitutional right to keep and bear arms” in the state constitution.<sup>129</sup> And it need not be vindicated in response to a criminal charge, he argued, because “[e]xhibiting a weapon in an act of valid self-defense *is not a crime at all*.”<sup>130</sup>

The St. Louis case has echoes of a 2004 case in Florida that set off the spread of stand-your-ground laws across the country. In that earlier Florida case, a man who shot an intruder faced legal uncertainty for several months as police investigated the incident.<sup>131</sup> (They ultimately cleared him.)<sup>132</sup> Lawmakers, however, were outraged at this state of legal limbo, and concluded that only a blanket immunity from arrest, prosecution, and trial would adequately protect the right of “law-abiding citizen[s]” to threaten, display, and ultimately fire weapons when they perceive a threat.<sup>133</sup>

The Constitution’s role in the debate over laws criminalizing gun-pointing is more expressive than doctrinal. There is nothing in the text, history, judicial interpretation, or scholarly commentary concerning the Second Amendment to suggest it prevents a state from outlawing brandishing or assault with a deadly weapon. A self-defense exception might be constitutionally required, but it is entirely possible such a defense would be required without the Second Amendment.<sup>134</sup> The rhetorical reliance on the Second Amendment nonetheless imbues these arguments with powerful symbolic force.

The central problem of the Second Amendment in this expressive sense is that it has the potential to aggravate the risk of dangerous norm cascades under the banner of a constitutional right. We have discussed how an optimal equilibrium on gun display is unlikely given the behavioral data on how individuals identify (and misidentify) threat and risk. And the machinery of criminal law is not currently geared to arrest the slide into a sub-optimal outcome or address the distributional effects of gun displays. Second

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128. Amicus Brief of Attorney General Eric Schmitt Supporting Dismissal of the Case, at 4, *Missouri v. McCloskey*, No. 2022-CR01300 (Mo. July 20, 2020).

129. *Id.* at 8.

130. *Id.* at 10.

131. LIGHT, *supra* note 120, at 156–57.

132. *Id.* at 157.

133. *Id.*

134. See Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1821 (2007) (arguing that, under Supreme Court doctrine, “a right to self-defense (though potentially limitable by gun control laws) should be recognized even without reliance on the Second Amendment”); see also *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (stating in dicta that a right for a jury to consider self-defense may be “fundamental”).

Amendment politics seem to exacerbate the risks. Even if nothing prevents a state from prohibiting, for example, guns at protests, the mere idea that the Second Amendment not only permits but *encourages* their display can lead to the very kind of lethal gun use that occurred in Austin and Kenosha, and which the criminal law can only practically address after bullets have flown.

### Conclusion

Existing criminal law is not up to the challenge of regulating gun displays as they are increasingly practiced in public spaces in the United States. The Second Amendment does not mandate this state of affairs as a matter of legal doctrine, but does likely contribute—through its rhetorical and expressive power—to broad misunderstandings about the legal status and social value of gun displays. The more expansive the right to keep and bear arms becomes, the more pressure it will place on the existing criminal law to mitigate the costs of detrimental gun-related behavior—a task that it is not currently equipped to do. For example, the more places persons have rights to congregate with guns, the more public policy will have to rely on menacing, breach of the peace, or criminal trespass. The greater the range of the weapon, the more the law enforcement regime will have to lean on crimes like terrorizing, inducing panic, or assault.

What, then, can be done?

One possibility is to revisit criminal rules and attempt to make them clearer—not only so that people can feel more secure, but so that gun-bearers can better understand the extent of their legal rights. Some of the complications here are unavoidable, such as the need for a self-defense exception and the attendant fact- and situation-specific inquiries into reasonableness of threat perception, *mens rea*, and the like. But more bright-line rules about when and how a gun can be employed in those situations would certainly be desirable. Perhaps some lessons could be learned from ongoing police reform efforts: While it is far from clear that there is anything like a standard rule about when police officers can unholster their weapons,<sup>135</sup> there have been efforts in the past to require such a rule,<sup>136</sup> and the current national debate about police violence might put such regulations back on the agenda.

A second way to rein in undesirable gun displays would be to encourage the role and power of private actors like business owners. It is notable, and not surprising, that many reported gun displays happen in parking lots

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135. Rhonda Fanning, *Are There Rules for When Officers Unholster Their Firearms? Pt. 1*, TEX. STANDARD (Aug. 11, 2015, 10:47 AM), <https://www.texasstandard.org/stories/are-there-rules-for-when-officers-unholster-their-firearms/> [<https://perma.cc/V6VU-WXEE>].

136. William K. Rashbaum, *Police Will Review Policy on When to Draw Guns*, N.Y. TIMES (Mar. 31, 2000), <https://www.nytimes.com/2000/03/31/nyregion/police-will-review-policy-on-when-to-draw-guns.html> [<https://perma.cc/6MFK-G4TU>].

and stores—places where strangers come into contact with one another, and tempers may flare. As private property owners are exempt from the Second Amendment and largely free to set their own rules regarding firearms,<sup>137</sup> businesses and employers can—and many do—prohibit the carrying of weapons on their property. Indeed, an increasing number of prominent retailers, from Walmart to Dick’s Sporting Goods, have announced gun-restrictive policies in recent years.<sup>138</sup> This “private gun regulation” is among the most important current developments shaping the practice of gun carrying in the United States.

The third possibility—the most important and most difficult—is to wage directly the battle over social norms with the objective of reaching a new and safer equilibrium. Public debate about social practices, more than changes in legal doctrine, has the potential to either normalize or limit the spread of socially undesirable gun displays.<sup>139</sup> That debate is playing out against a complex mix of social forces, not all of them gun-specific. At a time when anxiety is at unprecedented levels,<sup>140</sup> gun sales are at all-time highs,<sup>141</sup> fear of others has eclipsed recreation and hunting as the primary reason for gun ownership,<sup>142</sup> and there is a concerted effort to expand the legality and practice of open carry,<sup>143</sup> the social expectations about when it is acceptable to display a weapon are changing in complicated ways.

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137. We say “largely” because some states do impose rules regarding signage and the like. *See, e.g.*, TEX. PENAL CODE ANN. §§ 30.06–07 (West 2020).

138. *See* Dominic Rushe, *Walmart and Dick’s Sporting Goods Put New Limits on Gun Sales*, GUARDIAN (Feb. 28, 2018, 10:16 AM), <https://www.theguardian.com/us-news/2018/feb/28/dicks-sporting-goods-guns-assault-rifle> [<https://perma.cc/L8AY-Q5DR>].

139. Robert VerBruggen, *Does Kyle Rittenhouse Have a Self-Defense Claim?*, NAT’L REV. (Aug. 28, 2020, 11:14 AM), <https://www.nationalreview.com/2020/08/does-kyle-rittenhouse-have-a-self-defense-claim/> [<https://perma.cc/CNL8-T337>]. VerBruggen explained:

The outcome for each shooting will depend on whether Rittenhouse reasonably feared for his life, which in turn might depend on broader context we lack thus far—and even if all three shootings were justified, there are still firearms and reckless-endangerment charges for him to contend with. Where the f\*\*\* were this kid’s parents?

*Id.*

140. Linda Searing, *60 Percent of U.S. Adults Are Feeling Daily Stress and Worry*, *New Gallup Poll Shows*, WASH. POST (Apr. 20, 2020, 7:30 AM), [https://www.washingtonpost.com/health/60-percent-of-us-adults-are-feeling-daily-stress-and-worry-new-gallup-poll-shows/2020/04/17/13ce9d8a-7ffd-11ea-a3ee-13e1ae0a3571\\_story.html](https://www.washingtonpost.com/health/60-percent-of-us-adults-are-feeling-daily-stress-and-worry-new-gallup-poll-shows/2020/04/17/13ce9d8a-7ffd-11ea-a3ee-13e1ae0a3571_story.html) [<https://perma.cc/V6YX-4546>].

141. Brakkton Booker, *Amid Protests and Virus Fears, Firearm Background Checks Hit All-Time High*, NPR (July 2, 2020, 3:28 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/02/886545589/amid-virus-fears-and-protests-firearm-background-checks-hit-all-time-high> [<https://perma.cc/BDV9-HSSK>].

142. Art Swift, *Personal Safety Top Reason Americans Own Guns Today*, GALLUP (Oct. 28, 2013), <https://news.gallup.com/poll/165605/personal-safety-top-reason-americans-own-guns-today.aspx> [<https://perma.cc/5JPY-JKKX>] (“[T]hose who already own firearms mention personal safety/protection most frequently as a reason for ownership (60%), followed by hunting, at 36%.”).

143. *See supra* notes 17–19 and accompanying text.

Of course, those social baselines are themselves shaped by law and how officials use their discretion to enforce law, including the loosening of public carry restrictions and the expansion of no-retreat self-defense rules that privilege the use of guns and might—as in the case of Joe Horn—encourage violent activity. Our point is that the social norms, shaped as they are by public and private actors, may in turn have important implications for case outcomes precisely because the applicable legal standards involve questions like whether one person’s fear of another’s gun was “reasonable” in the circumstances. The charging discretion of even the most careful enforcers, in all but the clearest of cases, will inevitably be influenced by the social and political forces bearing on virtually any case that has drawn media attention.

We are skeptical that the invisible hand of the market will lead to an optimal or equitable equilibrium concerning gun displays.<sup>144</sup> Absent a better and more stable legal regime concerning gun display, the United States is edging toward hazardous norm cascades with respect to public weaponry and the realization of catastrophic tail risks with their presence in everyday life. Law cannot be the ultimate solution in this story. But it needs updating, as a brake on a gun-carrying society that feels, to many, more coarse and menacing by the day.

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144. See *supra* Part I; see also BLOCHER & MILLER, *supra* note 119, at 151–59 (exploring the notion of a Second Amendment “marketplace of violence” akin to the First Amendment’s “marketplace of ideas”).