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PUBLIC CARRY AND CRIMINAL LAW AFTER BRUEN

Eric Ruben*

INTRODUCTION

Gun rights supporters appear to be on the cusp of achieving a decades-long goal: defanging licensing laws nationwide for carrying handguns in public. More than twenty states have removed all licensing requirements for concealed carry, and most of the others now require little more than a background check.¹ At oral argument in *New York State Rifle & Pistol Ass’n v. Bruen*, meanwhile, the Supreme Court seemed poised to strike down policies in the remaining states that limit licenses to those who can show a heightened need, or “proper cause,” to carry a gun.² If that happens, what comes next?

More people carrying guns in public³ can have negative consequences. Among other things, additional gun carriers might engage in more serious crimes than they otherwise would⁴ and might threaten the

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¹ See Matt Vasilogambros, *No Permit, No Problem: More States Allow Residents to Carry a Hidden Gun*, PEW STATELINE (Dec. 6, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/12/06/no-permit-no-problem-more-states-allow-residents-to-carry-a-hidden-gun> [<https://perma.cc/T5QX-FGS3>]; *Guns in Public: Concealed Carry*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry> [<https://perma.cc/NEN7-SGGU>].

² See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 141 S. Ct. 2566 (mem.) (2021) (granting certiorari on the question “[w]hether the State’s denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment?”); Adam Liptak, *Justices’ Questions Suggest New York Gun Control Law Is Unlikely to Survive*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/us/politics/supreme-court-guns-second-amendment.html> [<https://perma.cc/P85D-JXPG>].

³ A higher percentage of handgun owners carry their guns in states with less restrictive (or no) permitting requirements. Ali Rowhani-Rahbar et al., *Loaded Handgun Carrying Among US Adults*, 2015, 107 AM. J. PUB. HEALTH 1930, 1932 (2017) (finding that in states with more restrictive, New York-style laws, 9.1% of handgun owners carried their firearm in a 30-day period, whereas in states with shall-issue and permitless-carry laws, more than 20% of handgun owners did so). The number of concealed-carry permit holders grew from 2.7 million in 1999 to 14.5 million in 2016. *Id.* at 1930. By 2021, researchers estimated the number of Americans with a concealed-carry permit had risen to 21.52 million. JOHN R. LOTT, JR. & RUJUN WANG, CRIME PREVENTION RSCH. CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES: 2021 (Oct. 11, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3937627 [<https://perma.cc/9PJB-8TMX>].

⁴ When concealed-carry license holders engage in crime, research suggests their convictions “differ significantly from [those] of nonlicensees,” including a notably higher proportion of offenses involving weapons and deadly conduct. Charles D. Phillips et al., *When Concealed Handgun Licensees Break Bad: Criminal Convictions of Concealed Handgun Licensees in Texas, 2001–2009*, 103 AM. J. PUB. HEALTH 86, 88–89 (2013). Though subject to debate, looser concealed carry permitting requirements have been associated with meaningful increases in aggregate violent crime rates. See John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198, 198, 240 (2019).

public sphere in ways beyond deaths and injuries.⁵ Under those circumstances, regulation will remain a priority in much of the country. With strong licensing regimes off the table, a key focal point will be how criminal law otherwise governs gun carry and use.

This Essay highlights two intersections between criminal law and public carry beyond licensing: the “he was going for my gun” defense invoked in several recent, high-profile trials and the deadly weapon doctrine. These intersections show how criminal law can both grant legal benefits to and erect legal hurdles for those who chose to carry a gun in public. On one hand, the “he was going for my gun” defense advantages armed defendants with greater legal leeway to use deadly defensive force, lest they be disarmed. On the other hand, the deadly weapon doctrine disadvantages such defendants by allowing juries to infer requisite mens rea for murder from the use of a gun in a homicide. If the ability to restrict public carry directly through meaningful licensing regimes becomes politically or constitutionally infeasible, judges, policy-makers, and scholars will need to consider the propriety and efficacy of criminal law mechanisms like these to achieve optimal outcomes in a world where many more people will be armed.

I. THE “HE WAS GOING FOR MY GUN” DEFENSE

Criminal law can afford a doctrinal advantage to gun carriers as evidenced by what this Essay terms the “he was going for my gun” defense. Consider two hypotheticals.

In the first, an *unarmed* man decides to surveil racial justice protesters, so he parks his car near the scene of the protest and patrols a city’s streets on foot. After several hours, he decides to leave, and as he walks back to his vehicle, one of the protesters follows him. The man sees and correctly believes that the protester is unarmed. The man and the protester have a heated exchange about the protest, and the protester shoves the man against his car. At that moment, the man reaches through an open car window, retrieves a lug wrench off a seat, and swings it as hard as he can at the protester’s head with the purpose of killing him, which he does with a single blow.

The facts in this hypothetical would provide a strong case for a murder prosecution — the man, after all, purposely caused the death of another human being, the protester.⁶ As a defendant, however, the man

⁵ See generally 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. 139 (2021) (discussing how public carry can cause social, as well as physical, harms).

⁶ See, e.g., MODEL PENAL CODE § 210.1 (AM. L. INST. 1985) (“A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.”); *id.* § 210.2 (“[C]riminal homicide constitutes murder when . . . it is committed purposely or knowingly.”).

would almost surely assert the affirmative defense of self-defense. But a major weakness for the defendant relates to the self-defense element of proportionality.⁷ In a widely publicized 1806 case, *Commonwealth v. Selfridge*,⁸ the judge instructed the jury that “I doubt whether self-defense could in any case be set up, where the killing happened in consequence of an assault only, unless the assault be made with a weapon which if used at all, would probably produce death.”⁹ Today, “[a]ll authorities agree” that the use of deadly defensive force can only be lawful self-defense in response to a threat of unjustified “death or serious bodily injury.”¹⁰ The defendant in our hypothetical deployed deadly force,¹¹ and a jury could reasonably conclude that such force was disproportionate to the threatened harm.¹²

Now consider a second hypothetical, in which the man is *armed with a rifle*. The unarmed protester shoves the man, just as in the first hypothetical, but this time the man fires his gun with the purpose of killing the protester, which he does with a single shot.

The only thing that has changed is the man’s choice to arm preemptively with a rifle. But that fact has profound legal implications because it converts the threat presented by the protester from a likely nonlethal threat to an arguably lethal one. In particular, the defendant can argue that he feared he would be disarmed and shot with his own gun. He might be able to point out that the risk of, and the need to

⁷ See 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(b) (2d ed. 2003) (“[T]he amount of force which [one] may justifiably use must be reasonably related to the threatened harm which [one] seeks to avoid.”); MODEL PENAL CODE AND COMMENTARIES § 210.1, at 47 (AM. L. INST. 1985) (noting the “common law principle that the amount of force used by the actor must bear a reasonable relation to the magnitude of the harm that he seeks to avert”).

⁸ 2 Am. St. Trials 544 (Mass. 1806).

⁹ *Id.* at 696.

¹⁰ MODEL PENAL CODE AND COMMENTARIES § 210.1, at 47 (AM. L. INST. 1985).

¹¹ See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1229 n.40 (D.C. Cir. 1973) (“When we speak of deadly force, we refer to force capable of inflicting death or serious bodily harm.”); *State v. Rice*, 159 A.3d 1250, 1257 (N.H. 2017) (“‘Deadly force’ means any assault or confinement which the actor commits with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily injury.” (quoting N.H. Rev. Stat. Ann. § 627:9, II (2016))).

¹² See, e.g., *People v. Hawthorne*, 692 N.W.2d 879, 887 (Mich. Ct. App. 2005) (noting the use of a gun was a disproportionate response to a challenged fist fight and the trial court did not err in excluding voluntary manslaughter jury instruction), *rev’d on other grounds*, 713 N.W.2d 724 (Mich. 2006); *People v. Lauderdale*, 967 N.E.2d 939, 946 (Ill. App. Ct. 2012) (noting use of a deadly weapon in response to a punch in the jaw is a disproportionate response).

prevent, disarmament was a component of gun-carry training he received.¹³ Indeed, ill-intentioned people take others' guns with some frequency.¹⁴ A jury is more likely to find the defendant's deadly force proportional in hypothetical two than in hypothetical one.

And to be sure, the "he was going for my gun" defense has been deployed in several recent cases. George Zimmerman, the neighborhood watchman who shot and killed an unarmed teenager, Trayvon Martin, in 2012, claimed that Martin appeared to reach for his gun at the time he pulled the trigger.¹⁵ Travis McMichael, who shot and killed Ahmaud Arbery, an unarmed man out for a jog, similarly said that Arbery was going for his gun.¹⁶ Kyle Rittenhouse likewise shot an unarmed man, Joseph Rosenbaum, which he explained by pointing to the risk of disarmament. "If I would have let [Rosenbaum] take my firearm from me,

¹³ A National Rifle Association publication, the *NRA Guide to the Basics of Personal Protection Outside the Home*, has sections on "Recognizing and Avoiding Situations in Which Handgun Retention Is Threatened" and "Be[ing] Aware of Any Attempt to Disarm You." NAT'L RIFLE ASS'N OF AM., *NRA GUIDE TO PERSONAL PROTECTION OUTSIDE THE HOME* 226, 228 (2006); *see also id.* at 228 ("Be especially wary of persons exhibiting suspicious behavior, such as those who try to approach too close or who seem, by their body language, to be positioning themselves for a lunge or a grab."); *id.* ("In a crowded corridor, you may mentally dismiss such a touch as incidental contact, but it actually may represent a criminal's effort to determine if you are wearing a gun or just a pager."). In a recent case in which this issue came up, an attorney recounted his client's Coast Guard training: "Never lose your weapon. And that's why he shoots." Russ Bynum, *Attorneys Present Jurors with Dueling Portraits of Arbery*, NBC15.COM (Nov. 5, 2021, 12:58 AM), <https://www.nbc15.com/2021/11/05/trial-ahmaud-arberys-death-scheduled-begin-georgia> [<https://perma.cc/E5GR-B95U>]; *see also id.* ("He has no choice because if this guy gets his gun, he's dead or his dad's dead."); *cf.* Tim Kirkpatrick, *4 Simple Rules Every Infantryman "In the Suck" Should Obey, WE ARE THE MIGHTY* (Jan. 15, 2021), <https://www.wearethemighty.com/lists/4-simple-rules-every-infantryman-in-the-suck-should-obey> [<https://perma.cc/YN5X-6X4K>] ("Never lose your weapon — ever.").

¹⁴ *See* John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198, 207 (2019) ("The most frequent occurrence each year involving crime and a good guy with a gun is . . . the theft of the good guy's gun . . ."); *see also id.* at 207 n.19 (quoting Larry Keane, senior vice president of the National Shooting Sports Foundation) ("There are more guns stolen every year than there are violent crimes committed with firearms.").

¹⁵ Transcript of Defense's Opening Statement, *State v. Zimmerman*, No. 12-CF-1083-A (Fla. Cir. Ct. 2013) (suggesting that "it appear[ed] that Trayvon Martin may have been reaching for" Zimmerman's handgun).

¹⁶ McMichael testified, "I'm gonna have to stop him from doing this, so I shot." Bill Chappell, *Travis McMichael Says in His Murder Trial that He Felt Threatened by Ahmaud Arbery*, NPR (Nov. 17, 2021, 7:00 PM), <https://www.npr.org/2021/11/17/1056585780/travis-mcmichael-testifies-murder-trial-ahmaud-arbery> [<https://perma.cc/9TK6-Q4EH>]. *See also* Bynum, *supra* note 13 (quoting Travis McMichael's attorney about how McMichael shot Arbery because he feared disarmament).

he would have used it and killed me,” he asserted.¹⁷ Zimmerman’s and Rittenhouse’s self-defense claims ultimately prevailed.¹⁸

Of course, determining the lawfulness of self-defense is a fact-intensive inquiry, and carrying a gun that can be seized by an aggressor is only one fact. The modest contention is that gun carry is, however, a legally important fact that in some cases can result in wider berth under the law to use deadly defensive force.

II. THE DEADLY WEAPON DOCTRINE

While the criminal law can operate to grant advantages to gun carriers, it can also bestow disadvantages. One that has long existed in some jurisdictions is the “deadly weapon doctrine.” Under this doctrine, when a deadly weapon is used in a homicide, a jury is instructed that they can infer the requisite state of mind for murder, traditionally, malice aforethought.¹⁹

The logic and operation of the deadly weapon doctrine was set forth in a *Harvard Law Review* comment in 1962: “(1) a deadly weapon is one likely to cause death in the manner used; (2) use of such weapon in such manner is therefore likely to have been for a deadly purpose; (3) deadliness of purpose, and its derivative, ‘malice aforethought,’ may therefore be found from such use in the absence of rebutting circumstances.”²⁰ The reasoning underpinning this doctrine dates at least to the 1604 Statute of Stabbing²¹ and was a staple of the common law.²² As one scholar put it, “[f]ew doctrines of the common law of crimes are as frequently encountered.”²³

¹⁷ Eric Levenson et al., *Kyle Rittenhouse Testifies He Knew Joseph Rosenbaum Was Unarmed but Acted in Self-Defense During Fatal Shooting*, CNN (Nov. 10, 2021), <https://www.cnn.com/2021/11/10/us/kyle-rittenhouse-trial-wednesday/index.html> [<https://perma.cc/A3FV-CKMM>].

¹⁸ Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html> [<https://perma.cc/Q2PH-YKUN>]; Julie Bosman, *Kyle Rittenhouse Acquitted on All Counts*, N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/live/2021/11/19/us/kyle-rittenhouse-trial> [<https://perma.cc/KA2L-J9GL>].

¹⁹ See Walter E. Oberer, Comment, *The Deadly Weapon Doctrine — Common Law Origin*, 75 HARV. L. REV. 1565, 1565 (1962). Today, jurisdictions vary in how they articulate the mens rea for murder, and correspondingly, the inference allowed by the deadly weapon doctrine. See, e.g., PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502A(5) (2016 & Supp. 2019) (“If you believe that the defendant intentionally used a deadly weapon on a vital part of the victim’s body, you may regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant had the specific intent to kill.”).

²⁰ Oberer, *supra* note 19, at 1565.

²¹ 2 Jac. I, c. 8 (Eng.); see Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HIST. 310, 314 (1963) (discussing the Statute of Stabbing).

²² See Oberer, *supra* note 19, at 1565.

²³ *Id.*

Many jurisdictions no longer adhere to the deadly weapon doctrine, but it persists in others. A pattern jury instruction in North Carolina, for example, provides that “[i]f the State proves beyond a reasonable doubt, (or it is admitted) that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the victim’s death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so.”²⁴ Similarly, a recent Pennsylvania case noted that “[m]alice may be inferred from the use of a deadly weapon on a vital part of the victim’s body.”²⁵

Of course, someone carrying a gun is more likely to trigger a deadly weapon instruction than someone who is not for the simple reason that he has ready access to a deadly weapon. But the doctrine also speaks to public-carry habits more directly: some jurisdictions grant an exception — and will not instruct a jury on the deadly weapon inference — if a defendant chooses to carry a gun only in response to a particularized threat. One court, for example, held that “one who has been threatened with murderous assaults and who has reason to believe that such assaults will be made, may arm himself for defense and in such case no inference of malice can be drawn from the fact of preparation for it.”²⁶ In contrast, someone who arms with a gun “long before” a particularized threat arises can be denied the exception.²⁷

Like self-defense, adjudicating murder can be a fact-intensive inquiry, and the deadly weapon doctrine addresses just one aspect. The point is not to assess the desirability of that doctrine but only to use it as an example of how the criminal law can work to the disadvantage of gun carriers regardless of licensing.

CONCLUSION

To return to the question posed in the introduction: What comes after *Bruen*? Until now, the focus with regard to public carry has been overwhelmingly about licensing. If the Supreme Court restricts “proper

²⁴ N.C. PATTERN JURY INSTRUCTIONS 206.10, *First Degree Murder Where a Deadly Weapon Is Used, Covering All Lesser Included Homicide Offenses and Self-Defense* (adopted June 2020).

²⁵ *Commonwealth v. Rivera*, No. 339, EDA 2019, 2021 WL 2769875, at *5 (Pa. Super. Ct. July 2, 2021) (citing *Commonwealth v. Knox*, 219 A.3d 186, 195 (Pa. Super. Ct. 2019); *Commonwealth v. Young*, 431 A.2d 230, 232 (Pa. 1981)).

²⁶ *State v. Summers*, 188 S.E. 873, 875 (W. Va. 1936); see also *Bevley v. Commonwealth*, 36 S.E.2d 331, 333 (Va. 1946); 2 DE WITT C. BLASHFIELD, *BLASHFIELD’S INSTRUCTIONS TO JURIES: CIVIL AND CRIMINAL CASES* § 3892, at 2704 (Oklahoma jury instruction).

²⁷ *Wilson v. Commonwealth*, 487 S.E.2d 857, 863 (Va. Ct. App. 1997). This policy is consistent with the fact that most gun owners never use their guns for lawful self-defense. Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 201–02 (2021) (discussing the rarity of lawful defensive gun uses).

cause” licensing regimes in *Bruen*, however, that will divert attention to other available mechanisms to insulate gun carriers from liability or regulate gun use, and whether they are sufficient for changed circumstances. This Essay barely scratches the surface of the intersections between public carry and criminal law. How does criminal law grade crimes and punish convicted defendants more severely when a gun is involved?²⁸ How has criminal law responded (if at all) to past variations in public armament?²⁹ How might the criminal law be adjusted in novel ways to address the changed circumstance of increased public carry? Reform proposals are starting to arise, reflecting fertile ground for future exploration.³⁰ Each proposal, meanwhile, is likely to raise new questions about the Second Amendment and criminal justice.³¹ Regardless of whether a jurisdiction skews toward encouraging or discouraging public carry, judges, policymakers, and scholars will need to grapple with the criminal law implications of increased gun carry.

²⁸ For example, an assault generally becomes “aggravated” when done with a gun. *See, e.g.*, MODEL PENAL CODE § 211.1 (AM. L. INST. 1985) (providing for simple assault, a misdemeanor, if a person “attempts to cause or purposely, knowingly or recklessly causes bodily injury to another,” and for aggravated assault, a felony, if a person “attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon”). Meanwhile, sentencing guidelines for certain crimes take into consideration gun use. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(16)(B) (U.S. SENT’G COMM’N 1985) (increasing the base offense level for certain basic property offenses if the conduct involves “possession of a dangerous weapon (including a firearm) in connection with the offense”).

²⁹ *See, e.g.*, Brown, *supra* note 21, at 310–13 (discussing how the doctrine of chance medley provided a lesser form of homicide than murder for affrays that were often deadly as a result of the custom of weapon carry, and that the disestablishment of that custom was a “main influence[],” *id.* at 313, in the subsequent demise of chance medley).

³⁰ *See, e.g.*, Cynthia Lee, Firearms and Initial Aggressors 29–33 (Mar. 6, 2022) (unpublished manuscript) (on file with author) (proposing adjusting self-defense’s initial aggressor doctrine to account for increased gun carry); Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. CAL. L. REV. 1 (forthcoming 2023) (manuscript at 23–27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4076257 [<https://perma.cc/SM35-6NL6>] (describing the gun rights movement’s efforts to provide prosecutorial immunity to those who exercise self-defense in order to reduce defense costs for gun carriers); Eric A. Johnson, *When Provocation Is No Excuse: Making Gun Owners Bear the Risks of Carrying in Public*, 69 BUFF. L. REV. 943, 943 (2021) (proposing adjusting the heat-of-passion defense to account for increased gun carry).

³¹ *See* Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 303–13 (2016) (discussing the constitutional implications of incidental burdens on the Second Amendment); Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2213–15 (2016) (discussing the implications for mass incarceration of certain gun policies).