

THE STATE'S MONOPOLY OF FORCE AND THE RIGHT TO BEAR ARMS

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ABSTRACT—In debates over the Second Amendment, the conventional view is that the government ought to possess a monopoly of legitimate force, subject to the right of individuals to act in emergency self-defense. Many treat the nondefensive circumstances in which our system decentralizes force as holdovers from the days of nonprofessional police and soldiers. When it comes to the Second Amendment, many believe that the only legitimate reason individuals may bear arms today is for individual self-defense against isolated criminal violence (e.g., to resist a home invasion).

This Symposium Essay attacks the monopoly-of-force account, justifying the continued relevance of American law's decentralization of legitimate force. This Essay argues that decentralization of force remains important for three reasons. First, despite the rise of professional police, American law enforcement still enforces core crimes below desirable levels, particularly in disadvantaged and rural communities and during times of civil unrest. Decentralization of force mitigates this underenforcement problem. And decentralization may be a better solution than providing more police because many areas where law is underenforced also (paradoxically) suffer from the effects of overcriminalization. Second, American law has a mismatch between public duties and private rights. Providing effective law enforcement is only a public duty. Individuals have no private claim that the government adequately enforce the law or protect them against unlawful violence. Self-help and private law enforcement are the best remedies when governments undersupply needed levels of police protection. Third, even if the government has a monopoly of force, it does not follow that government officers are the only ones in whom the government's monopoly may be vested. The "government" is an incorporeal entity whose power must be exercised by human agents. Agents do not perfectly carry out the tasks of their principals; some government officers commit malfeasance and nonfeasance. The decentralization of force provides a remedy for such abuses of office.

Ultimately, this Essay concludes that the individual right to bear arms still has relevance for public defense and security. This fact should warrant consideration when determining the scope of the right, including that the

arms protected by the Second Amendment should continue to include those arms that are primarily useful for public security.

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INTRODUCTION

On May 25, 2020, Minneapolis police arrested George Floyd on suspicion of using a counterfeit \$20 bill to purchase cigarettes.¹ When police tried to put Floyd into a police vehicle, Floyd actively resisted, indicating that he was claustrophobic.² Floyd’s struggle with police led him to fall to the ground.³ Once on the ground, Floyd was restrained by Officer Derek Chauvin, who placed his knee on Floyd’s neck.⁴ Despite protests from Floyd that he could not breathe, Chauvin kept his knee on Floyd’s neck for more

¹ *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/U4RA-NEUQ>].

² *Id.*

³ *Id.*

⁴ *Id.*

than nine minutes.⁵ Floyd fell unconscious, and he was pronounced dead shortly thereafter.⁶

Floyd's death triggered protests throughout the United States.⁷ Although most protests were peaceful,⁸ some were not. Violent protests caused at least five deaths and hundreds of millions of dollars of property damage.⁹ Protesters have targeted symbols they view as racist and oppressive, including statues of prominent Confederate officials, Christopher Columbus, and various conquistadors.¹⁰

In some places, police have been accused of using excessive force to quell the protests.¹¹ In others, however, police have been accused of not doing enough. In Minneapolis, for example, police abandoned the police

⁵ *Id.*

⁶ *Id.*

⁷ ACLED, DEMONSTRATIONS & POLITICAL VIOLENCE IN AMERICA: NEW DATA FOR SUMMER 2020 (2020), <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/> [<https://perma.cc/MZ9C-WP39>].

⁸ *See id.*

⁹ Campbell Robertson, Rick Rojas & Kate Taylor, *After George Floyd's Death, Toll Rises in Protests Across the Country*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/us/george-floyd-unrest-toll.html> [<https://perma.cc/5TKX-N6ZA>]; see Nellie Bowles, *Abolish the Police? Those Who Survived the Chaos in Seattle Aren't So Sure*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/08/07/us/defund-police-seattle-protests.html> [<https://perma.cc/MA4D-LDUR>] (reporting uninsured losses from property damage).

¹⁰ *See, e.g.*, Alan Taylor, *The Statues Brought Down Since the George Floyd Protests Began*, ATLANTIC (July 2, 2020), <https://www.theatlantic.com/photo/2020/07/photos-statues-removed-george-floyd-protests-began/613774/> [<https://perma.cc/W7XN-J4P6>] (listing twenty-seven statues that have been vandalized or removed); Jason Slotkin & Vanessa Romo, *Suspect in Shooting at Albuquerque Statue Demonstration Faces New Charges*, NPR (June 17, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/17/879410425/man-charged-over-shooting-at-albuquerque-statue-protest> [<https://perma.cc/T4H6-TKN3>] (reporting that protesters in New Mexico attempted to topple a conquistador statue).

¹¹ *See, e.g.*, Byron Tau, *National Guard Officer Says Excessive Force Used to Clear Lafayette Square in D.C.*, WALL ST. J. (July 28, 2020, 3:20 PM), <https://www.wsj.com/articles/national-guard-officer-says-excessive-force-used-to-clear-lafayette-square-in-d-c-11595964048> [<https://perma.cc/M35Z-GW4Q>] (reporting allegations of excessive force in the removal of protesters near the White House); Deborah Bloom, *U.S. Watchdog to Probe Use of Force in Portland; Federal Agents to Seattle on Standby*, REUTERS (July 23, 2020, 4:36 AM), <https://www.reuters.com/article/us-global-race-portland-protests/u-s-watchdog-to-probe-use-of-force-in-portland-federal-agents-to-seattle-on-standby-idUSKCN24O14G> [<https://perma.cc/7HCM-KFPC>] (reporting that the Department of Justice "would investigate the use of force by federal agents against protesters in Portland"); *George Floyd: Videos of Police Brutality During Protests Shock US*, BBC NEWS (June 5, 2020), <https://www.bbc.com/news/world-us-canada-52932611> [<https://perma.cc/BFC8-UMTX>] (collecting videos of alleged uses of excessive force by police during protests); Matthew Hendrickson & Matt Kiefer, *Record Number of Complaints Filed Against Chicago Police During George Floyd Protests*, CHI. SUN TIMES (July 12, 2020, 7:13 PM), <https://chicago.suntimes.com/2020/7/12/21308535/record-number-complaints-filed-against-chicago-police-george-floyd-protests> [<https://perma.cc/S66V-L4DE>] (reporting complaints against the Chicago Police Department).

station in the third precinct, allowing rioters to burn it.¹² In Seattle, protesters purported to establish a police-free “autonomous zone.”¹³ One can find other examples.¹⁴

In addition to these protests, ordinary criminal violence spiked over the summer of 2020.¹⁵ Homicides in major U.S. cities increased by 37%, with Chicago, Milwaukee, and Philadelphia leading the increase.¹⁶ Aggravated assaults were up by a similar number, with Chicago, Detroit, Louisville, and Nashville primarily responsible.¹⁷ Robbery was up 27%.¹⁸ It has been reported that some police officers, in response to public criticism, consciously decided not to vigorously enforce the law.¹⁹

And if the rise in violence and violent protests were not enough, Americans have also reeled from a pandemic caused by a novel coronavirus,

¹² See Andrew Tangel, Joe Barrett & Erin Ailworth, *‘We’re Just Going to Walk Away from This?’ How Minneapolis Left a Police Station to Rioters*, WALL ST. J. (July 1, 2020, 5:30 AM), <https://www.wsj.com/articles/were-just-going-to-walk-away-from-this-how-minneapolis-left-a-police-station-to-rioters-11593595802> [<https://perma.cc/KEA6-PFKC>].

¹³ Rachel Abrams, *Police Clear Seattle’s Protest ‘Autonomous Zone,’* N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/01/us/seattle-protest-zone-CHOP-CHAZ-unrest.html> [<https://perma.cc/YB4U-6XHF>].

¹⁴ See, e.g., Everton Bailey Jr., *Oregon Voters Disapprove of Portland Protests, Feel Police Aren’t Using Enough Force, Poll Finds*, OREGONIAN (Sept. 11, 2020), <https://www.oregonlive.com/politics/2020/09/oregon-voters-disapprove-of-portland-protests-feel-police-arent-using-enough-force-poll-finds.html> [<https://perma.cc/K7T2-CENU>] (reporting polls showing that most Oregon voters believed that police did not adequately keep the peace); Annie Sweeney, Gregory Pratt & Jeremy Gorner, *Chicago Police and City Leaders Defend Handling of Protests and Looting as Questions Swirl over Response Some Found Lacking*, CHI. TRIB. (June 2, 2020), <https://www.chicagotribune.com/news/criminal-justice/ct-chicago-unrest-policing-20200602-bdjvkhctsbfa3n2sfr5tdgxje-story.html> [<https://perma.cc/G375-HMVJ>] (reporting allegations from Chicago residents that the police largely stood down in the face of rioting and looting). For a similar account from the 2015 Baltimore protests, see Elizabeth Chuck, *Baltimore Mayor Stephanie Rawlings-Blake Under Fire for ‘Space’ to Destroy Comment*, NBC NEWS (Apr. 28, 2015, 11:05 AM), <https://www.nbcnews.com/storyline/baltimore-unrest/mayor-stephanie-rawlings-blake-under-fire-giving-space-destroy-baltimore-n349656> [<https://perma.cc/FW6V-3ESC>], which reported a Baltimore mayor’s comment that “we also gave those who wished to destroy space to do that as well.”

¹⁵ See RICHARD ROSENFELD & ERNESTO LOPEZ, NAT’L COMM’N ON COVID-19 & CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES 3 (2020), <https://covid19.counciloncj.org/2020/07/28/crime/> [<https://perma.cc/3JTT-QPDM>] (tracking crime data from over two dozen American cities).

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 10.

¹⁹ See Alec MacGillis, *How to Stop a Police Pullback*, ATLANTIC (Sept. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/how-stop-police-pullback/615730/> [<https://perma.cc/4EGR-DEV9>].

COVID-19.²⁰ As of August 2021, the pandemic has infected over 36 million Americans and killed over 600,000.²¹

These events have profoundly shaken Americans' belief in their personal security, and they are buying guns at record rates. In June 2020 alone, Americans purchased over 2 million guns.²² Brookings estimates that from March to June, Americans purchased 3 million more guns than in a typical year.²³ By September 1, 2020, U.S. gun sales for the year exceeded the total sales in 2019,²⁴ and the year ended with Americans purchasing about 23 million total firearms.²⁵ Handgun sales heavily outpaced the sale of rifles and shotguns, both in absolute numbers and in the relative size of the increase.²⁶

Not only are Americans buying guns at record rates but many are also engaged in activities more traditionally associated with professional law enforcement. In nearly three dozen states, armed civilians have taken to the streets, ostensibly to protect against violence to persons and property.²⁷ They are defending businesses, confronting protesters attacking statues, and, in at

²⁰ See John Elflein, *Coronavirus (COVID-19) in the U.S. - Statistics & Facts*, STATISTA (May 7, 2021), <https://www.statista.com/topics/6084/coronavirus-covid-19-in-the-us/> [https://perma.cc/9YC7-HLVD].

²¹ See *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker> [https://perma.cc/NN9J-ZUWQ].

²² See Press Release, Small Arms Analytics & Forecasting, U.S. Firearms Sales: June 2020 Unit Sales Soar Once More (July 1, 2020), <http://smallarmsanalytics.com/v1/pr/2020-07-01.pdf> [https://perma.cc/L79F-BNM8]; Stephanie Pagonis, *Gun Sales Soar 145% in June amid Protests, Coronavirus Pandemic*, FOX BUS. (July 1, 2020), <https://www.foxbusiness.com/lifestyle/gun-sales-june-coronavirus-pandemic-protests> [https://perma.cc/RMP6-ZJLY].

²³ Phillip B. Levine & Robin McKnight, *Three Million More Guns: The Spring 2020 Spike in Firearm Sales*, BROOKINGS (July 13, 2020), <https://www.brookings.edu/blog/up-front/2020/07/13/three-million-more-guns-the-spring-2020-spike-in-firearm-sales/> [https://perma.cc/9CVA-F66F].

²⁴ See Press Release, Small Arms Analytics & Forecasting, U.S. Firearms: Year-to-Date Sales Exceed All of 2019 (Sept. 1, 2020), <http://smallarmsanalytics.com/v1/pr/2020-09-01.pdf> [https://perma.cc/WQ76-5G2W].

²⁵ See Press Release, Small Arms Analytics & Forecasting, U.S. Firearms Sales December 2020: Sales Increases Slowing Down, Year's Total Sales Clock In at 23 Million Units (Jan. 5, 2021), <http://smallarmsanalytics.com/v1/pr/2021-01-05.pdf> [https://perma.cc/PB5Z-ACQZ]. By comparison, Americans purchased 14 million firearms in 2019. *Guns in the U.S.: 20 Years of State & Federal Data*, SAFEHOME.ORG (Feb. 2021), <https://www.safehome.org/data/firearms-guns-statistics/> [https://perma.cc/3BYW-G9DD].

²⁶ See Press Release, *supra* note 24 (discussing handgun and long-gun sales through September 2020).

²⁷ See Heath Druzin, *Bolstered by Lax Gun Laws, Armed Protesters Confront Anti-Racism Rallies*, BOISE STATE PUB. RADIO (June 30, 2020), <https://gunsandamerica.org/story/20/06/30/blm-protests-counter-armed-gun-laws/> [https://perma.cc/GE8N-U9AM]; *Armed White Men Patrolling Kenosha Protests Organized on Facebook*, GUARDIAN (Aug. 26, 2020, 5:21 PM), [theGuardian.com/us-news/2020/aug/26/kenosha-militia-protest-shooting-facebook](https://www.theguardian.com/us-news/2020/aug/26/kenosha-militia-protest-shooting-facebook) [https://perma.cc/8LL2-5W4D] (reporting that a Facebook post “urged armed citizens to protect their lives and property”).

least one prominent case, guarding the curtilage of their home against allegedly trespassing protesters.²⁸ Simply put, many Americans are resorting to self-help rather than putting their faith in the government to provide protection.

This resort to self-help has become a Rorschach test for the role of the Second Amendment during civil unrest. Many favoring an expansive Second Amendment praise the efforts at self-reliance and lament the police response to the protests.²⁹ Referencing a seventeen-year-old boy who shot and killed two individuals with an AR-15 rifle while patrolling Kenosha, Wisconsin, Fox News commentator Tucker Carlson controversially asked, “How shocked are we that seventeen-year-olds with rifles decided they had to maintain order when no one else would?”³⁰

In contrast, many favoring stricter gun controls are horrified, contending that armed civilian peacekeepers usurp the state’s monopoly of force.³¹ They see untrained civilians supplanting the role of trained police in managing the protests. A New Mexico district attorney even sought an injunction against members of a militia group.³² Gun-control supporters often advocate for severely limiting the kinds of arms in civilian hands, believing that nonsporting weapons belong exclusively in the hands of the military and police.³³

²⁸ See Druzin, *supra* note 27; Slotkin & Romo, *supra* note 10; Rachel Rice & Kim Bell, *Couple Points Guns at Protestors Marching to St. Louis Mayor’s Home to Demand Resignation*, ST. LOUIS POST-DISPATCH (June 29, 2020), https://www.sltoday.com/news/local/crime-and-courts/couple-points-guns-at-protesters-marching-to-st-louis-mayor-s-home-to-demand-resignation/article_9edc57ed-c307-583f-9226-a44ba6ac9c03.html [<https://perma.cc/8GZC-9MQG>].

²⁹ See, e.g., David Harsanyi, *The Riots and Protests Will Make Gun Ownership More Popular*, NAT’L REV. (June 18, 2020, 11:52 AM), <https://www.nationalreview.com/magazine/2020/07/06/a-second-amendment-moment/> [<https://perma.cc/AK2E-6FNV>] (arguing that riots, protests calling for defunding the police, and the perception of helplessness caused by COVID-19 revitalized Americans’ interest in the Second Amendment and self-defense).

³⁰ *Tucker Carlson Tonight* (Fox News television broadcast Aug. 26, 2020).

³¹ See, e.g., Darrell A.H. Miller, *Gun Laws Were Meant to Ban Private Militants. Now, Our Hands Are Tied*, WASH. POST (Sept. 2, 2020, 5:00 AM), <https://www.washingtonpost.com/outlook/2020/09/02/militants-kenosha-vigilante-second-amendment-law/> [<https://perma.cc/G9U3-AHL3>] (arguing that “it’s better to entrust law enforcement to professionals accountable to the people—rather than to private groups accountable to no one”).

³² Verified Complaint for Injunctive & Declaratory Relief at 2–5, *State ex rel. Torrez v. N.M. Civ. Guard*, No. D-202-CV-2020-04051 (N.M. Dist. Ct. July 13, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/07/State-v.-NM-Civil-Guard-Filed-Verified-Complaint.pdf> [<https://perma.cc/KQC9-TG22>].

³³ See, e.g., Nate Bethea, Essay, *I Used an Assault Rifle in the Army. I Don’t Think Civilians Should Own Them.*, N.Y. TIMES MAG. (June 16, 2016), <https://www.nytimes.com/2016/06/16/magazine/i-used-an-assault-rifle-in-the-army-i-dont-think-civilians-should-own-them.html> [<https://perma.cc/7HKG-3WEQ>] (highlighting the perspective of one former soldier who believes that civilians should not own military-style rifles because they should be reserved for the “battlefield”); *infra* note 58.

Both these perspectives share the same starting assumption: that the government ordinarily has a monopoly of force, which it exercises through government officers and employees, including the military and police. (I will call this the “strong” monopoly-of-force view.) Self-defense by private citizens exists as an exception when the government’s monopoly of force would be ineffective to protect against harm. Both sides may end up with divergent conclusions about the legitimacy of self-help in particular cases, and the right to bear arms more generally, because they disagree profoundly about whether the government is, in fact, sufficiently protecting the people in its jurisdiction. Those who think the government is not sufficiently protecting its people naturally believe in wider self-help rights, while those who think the government is doing so believe in more regulation. But the initial premise—that the state ordinarily has a monopoly of force and that it exercises that monopoly through government agents—is shared by both sides of the debate.

This premise, however, runs counter to a centuries-long tradition of Anglo-American law *decentralizing* the use of force. Since the Middle Ages, private citizens have had robust authority to make arrests for public crimes, to use force to keep the public peace, and to keep and bear arms.³⁴ In fact, the decentralization of force was so important to Americans in the eighteenth century that the Framers created a limited federal government, divided control of the country’s military forces between federal and state governments, and explicitly reserved the right of the people to keep and bear arms.³⁵

This decentralization of violence is compatible with two philosophical understandings of the state’s role in legitimate violence.³⁶ The first is complete decentralization: that although the government may be a source of legitimate violence, it is one of many sources over which no person or entity has a monopoly. The second is a weak or partial monopolization: the government (outside of emergency self-defense) has the monopoly to determine who will use force, but the government may authorize state or nonstate actors to exercise that authority. The conceptual space between these visions is small, though arguably significant for political theory. I will

³⁴ See, e.g., David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1195–98 (1999) (tracing the history of Anglo-American policing); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW* 21–28 (2009) (describing the hue and cry and the frankpledge system).

³⁵ Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 994–95, 1014–16 (2020).

³⁶ See, e.g., CHRISTOPHER W. MORRIS, *AN ESSAY ON THE MODERN STATE* 203–04 (1998) (discussing whether states have an actual monopoly of force and whether states have claims to be the sole deciders for when private force is legitimate).

not purport to settle on one of them in this Essay. The argument that follows is consistent with both.

This Symposium Essay justifies why the American system of decentralized violence remains preferable to the government having a complete monopoly of force, particularly in times of emergency and civil unrest. The strong monopoly-of-force approach has three principal shortcomings.

First, the supply of law enforcement falls far short of demand.³⁷ Despite the rise of professional police, underenforcement of law remains a key problem, one which disproportionately affects disadvantaged areas and groups. This problem becomes more widespread in times of civil unrest. During such times, supplementary state aid, such as resort to the Armed Forces and National Guard, may eventually supply the needed policing services, but that aid takes time. Massive destruction often occurs in the interim. Decentralizing force allows private citizens to defend their interests and to protect the public when the government underenforces the law. Decentralizing force also avoids the pitfalls of hiring more police. Many areas that suffer from underenforcement concomitantly suffer the effects of overcriminalization (e.g., harsh enforcement of drug laws and other regulatory crimes). Private law enforcement allows citizens to protect their interests while not risking the externalities caused by excessive enforcement that can come from flooding areas with more professional police.

Second, with respect to the obligation of the state to protect its citizens, Anglo-American law has a mismatch between duties and rights.³⁸ Under the public-duty doctrine, the government is under no obligation to furnish any individual citizen with police protection or law enforcement. So even if the state has some obscure public duty to furnish police protection in general, individuals lack any means of enforcement when the government refuses to protect them. Recognizing the legitimacy of self-help and law enforcement by private persons fills the gap between public duties and protecting private rights. Moreover, it prevents the need for courts to deem police protection to be a private right. Although recognizing police protection to be a private right would seem like an easy fix, such a reversal in traditional public law doctrine would severely intrude on the separation of powers. Courts would be placed in the position of second-guessing executive enforcement decisions and priorities, and judges and juries would essentially act as super-superintendents of police.

³⁷ See *infra* Section II.A.

³⁸ See *infra* Section II.B.

Third, even if the government has a monopoly of force, that does not imply that the government's monopoly may only be exercised through professional state employees.³⁹ Quite the contrary, state agents are imperfect agents of state power. As recent civil unrest has shown, individual state agents—including police officials and prosecutors—may refuse to exercise state power to punish those who have violated the law by breaching the peace and violating others' rights. In many cases, an executive officer's refusal to enforce the law raises serious claims about whether that official legitimately exercises the right to use force (or not to use force) on behalf of the state. Private force mitigates the problem of state-agent malfeasance or nonfeasance. When citizens protect themselves against unlawful violence and civil unrest, citizens act both in private self-defense and on behalf of the state in keeping the peace. They have a legitimate claim that they are exercising whatever monopoly of force the state has—and a much more legitimate claim than an executive official who turns a blind eye to violence that society has made unlawful through democratic legislation. In these cases, diffusing state power to private citizens provides a means to prevent improper circumvention by executive officials of their duties to the public to faithfully enforce the law.

How does all this relate back to the Second Amendment? The right to bear arms plays a critical role in decentralizing executive power. Just as “[t]he war power of the national government is ‘the power to wage war successfully,’”⁴⁰ the right of self-defense and the power to enforce the law must include some power to exercise these functions successfully.⁴¹ The possession of weapons plays a crucial role in this by allowing those of unequal strength, power, and numbers to overcome their adversaries. When those adversaries are individuals acting illegitimately against the public peace, the private right to bear arms serves both private and public ends. And that right takes on added significance when government agents are unable or unwilling to supply the necessary police protection. In these cases, individuals may need appropriate weapons for self-defense and to keep the public peace. Relatedly, the types of arms that they may need are those that are appropriate for these tasks. Extensive restrictions, for example, on the civilian possession of less-than-lethal weapons (e.g., tear gas) may counterproductively increase the amount of lethal force individuals may have to employ in emergencies. And prohibitions on the civilian possession

³⁹ See *infra* Section II.C.

⁴⁰ *Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948) (quoting Charles E. Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 3, 9 (1917)).

⁴¹ *Cf. Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring in the judgment) (“Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise.”).

of heavier weapons (e.g., rifles with high-capacity ammunition magazines) may make it impossible for grossly outnumbered individuals to protect themselves against lawless mass violence and for communities to restore order when their governments are unable or unwilling to do so.

Thus, we should be wary of claims that the Second Amendment is compatible with permitting only the police and military to use arms primarily appropriate for enforcing the laws. Quite the contrary, the Second Amendment recognizes the longstanding Anglo-American tradition of decentralizing the means of political violence. That statement may terrify many. But properly decentralized political violence assists the state in keeping the peace and enforcing the law, provides a check against private and public forms of domination, reinforces separation of powers, and promotes individual liberty and security.

I. WHAT MONOPOLY OF FORCE?

A. *Conventional Monopoly-of-Force Accounts*

In the Second Amendment and criminal law contexts, many contemporary scholars have assumed some form of the “monopoly of force” mantra. Under the monopoly-of-force approach, the government supplies preventative policing and law enforcement. That is, the government has the exclusive right to use force to prevent crimes, enforce the law, and punish wrongdoers. Private individuals retain the right to use force only in self-defense against imminent threats.

The idea that the government should have a monopoly of legitimate force is an old one.⁴² John Locke, whose writings influenced our Framers, was a prominent proponent of this view. Locke argued that individuals in the state of nature have both a right to preserve themselves and a right to punish wrongdoing.⁴³ But having private persons exercise these rights creates problems. In any dispute, private persons will favor their own interests, they are liable to punish too much, and, even if their claims are rightful, they may lack the raw power to see justice done over a stronger adversary.⁴⁴

The formation of government mitigates these problems.⁴⁵ In forming the social contract, a person entirely gives up his right to punish, and he

⁴² See, e.g., THOMAS HOBBS, LEVIATHAN 150–52 (Richard Tuck ed., rev. student ed., Cambridge Univ. Press 1996) (1651) (describing a social contract in which people transfer to the sovereign the right to enforce the law and use force on their behalf, except such force as is necessary for self-defense).

⁴³ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 67 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

⁴⁴ See *id.* at 66.

⁴⁵ See *id.* at 66–67.

subjects his right to preserve himself to the laws of society.⁴⁶ Individuals, however, cannot transfer their right of immediate self-defense against unjust deadly threats to the government because the law cannot adequately redress such violence.⁴⁷ In his *Letter Concerning Toleration*, Locke summed it up this way: “[A]ll Force (as has often been said) belongs only to the Magistrate; nor ought any private Persons, at any time, to use Force, unless it be in Self-defence against unjust Violence.”⁴⁸

A monopoly-of-force account can come in a strong and a weak interpretation. The strong interpretation is that the government, through its officers and agents, has the exclusive right to use force to keep the peace and enforce the laws. Under the strong view, private preventative force and law enforcement usurp the province of the government.⁴⁹ Private citizens are restricted to acting only in individual self-defense against immediate danger. The weak interpretation, in contrast, accepts that the government may be the ultimate decider of when force is permissible for preventative policing and law enforcement, but it breaks from the strong view by recognizing that the government may delegate its preventative policing and law enforcement authority in diverse ways, including to private citizens.⁵⁰

The strong interpretation of the monopoly-of-force account seems to prevail among those who interpret the Second Amendment narrowly or advocate its repeal. Many of these scholars treat the Second Amendment as an “anachronism.”⁵¹ When the Amendment was adopted, American society lacked professional police and a capable standing army. Today, in contrast, they argue that the federal army has supplanted the militia, and “the development of professional police . . . limit[s] the need for individuals and

⁴⁶ *Id.* at 67; *see also id.* at 47 (describing the original power of civil society).

⁴⁷ *See id.* at 15, 105.

⁴⁸ John Locke, *A Letter Concerning Toleration*, in *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS* 1, 19 (Mark Goldie ed., 2010).

⁴⁹ *See* Sklansky, *supra* note 34, at 1188 (describing others’ view that “peacekeeping, property protection, and law enforcement are often considered the clearest examples of functions that are essentially and necessarily public”).

⁵⁰ I have previously advocated the weak interpretation when justifying why the government may authorize private citizens to use nondefensive deadly force to capture fleeing felons. *See* Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 FLA. L. REV. 971, 1016–17 (2018).

⁵¹ William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 193, 206–07 (2009); Lawrence Friedman, *The Supreme Court and Its Big Second Amendment Problem*, HILL (Mar. 1, 2018, 2:00 PM), <https://thehill.com/opinion/judiciary/376284-the-supreme-court-and-its-big-second-amendment-problem> [<https://perma.cc/74K2-JQ4J>]; *see also* David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL’Y 177, 182–84 (2021) (collecting these and similar comments in academic literature and the popular press).

groups to engage in self-help.”⁵² Stated differently, these scholars view private citizens’ historical contribution to peacekeeping and national defense as a necessary evil. The Constitution authorized this because, at the time of the Framing, it was not possible for the government to have an effective monopoly of force. Now that the government has it, the Constitution’s decentralization of force should go the way of the horse and buggy.

To the extent that these scholars recognize any Second Amendment right at all, they recognize something fundamentally different from what the Framers had in mind. From the Framing through the nineteenth century, American law strongly protected the right of citizens to have arms of a kind used in war and public defense. The Militia Act of 1792 required able-bodied citizens to possess muskets appropriate for military service.⁵³ American judicial decisions throughout the nineteenth century and early twentieth century left no question that the core of the right to bear arms was the right to keep and bear muskets and rifles of a kind employed in civilized warfare.⁵⁴

⁵² Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 190 (2000); see also Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 323 (2000) (“To the extent that the Second Amendment ‘right’ to bear arms was in substantial measure a duty of the responsible citizenry to participate in the collective self-defense of the community, i.e., to the extent that it was understood as a liberty of the ancients, the government may be understood to respect that right today by maintaining professional police.” (footnote omitted)).

⁵³ Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271.

⁵⁴ See, e.g., *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 159–61 (1840) (“The legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence The arms, consist[] of swords, muskets, rifles, etc. . . .” (emphasis omitted)); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 179 (1871) (“What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature.” (emphasis omitted)); *English v. State*, 35 Tex. 473, 476 (1871) (“The word ‘arms’ in the connection we find it in the Constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.”); *Hill v. State*, 53 Ga. 472, 474 (1874) (“The word ‘arms,’ evidently means the arms of a militiaman, the weapons ordinarily used in battle, to-wit: guns of every kind, swords, bayonets, horseman’s pistols, etc.”); *Fife v. State*, 31 Ark. 455, 459–61 (1876) (ratifying the Tennessee rule in *Andrews*); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) (“So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knife, brass knuckles, billies, and such other weapons as are usually employed in brawls,

These decisions did not always reach agreement on the scope of the right to have or carry pistols for self-defense.⁵⁵ But they were in complete agreement on the right to own arms suitable for public defense. The U.S. Supreme Court followed this thinking in 1939, when it held that the Second Amendment only protected those arms which are “part of the ordinary military equipment” or the use of which “could contribute to the common defense.”⁵⁶

Now that the government has a supposed monopoly of force, these scholars believe that these cases are obsolete because Americans no longer need arms for public-defense purposes.⁵⁷ Many contemporary scholars argue that any individual right to bear arms is consistent with “reasonable regulations” such as reserving arms useful for public defense and law enforcement solely to the police and military.⁵⁸ As then-Vice President Joe Biden put it, “[y]ou don’t need an AR-15” to protect your home, so individuals should “[b]uy a shotgun” instead.⁵⁹ A more scholarly version of this view comes from Professor Eric Ruben, who argues that the traditional limitations on individual self-defense—necessity, imminence, and proportionality—should inform the types of arms that individuals may possess.⁶⁰

These scholars also oppose the existence of private organizations and private groups that have and bear arms. They firmly believe that the heart of the government’s monopoly of force is that all organized force must be

street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state.” (citation omitted)); *Ex parte Thomas*, 97 P. 260, 265 (Okla. 1908) (holding that “there is no room for doubt that the arms defendant had a right to bear, and which right could never be prohibited to him, relates solely to such arms as are recognized in civilized warfare and not those used by the ruffian, brawler, or the assassin”).

⁵⁵ *Compare, e.g., Workman*, 14 S.E. at 11 (holding no right to own pistols), with *Andrews*, 50 Tenn. (3 Heisk.) at 186–87 (right to carry pistols of a kind used by the military), and *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921) (general right to carry unconcealed pistols).

⁵⁶ *United States v. Miller*, 307 U.S. 174, 178 (1939); see also Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873 (1960) (“Although the Supreme Court has held this Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute.”).

⁵⁷ See *supra* notes 51–52.

⁵⁸ See, e.g., Allen Rostron, *Style, Substance, and the Right to Keep and Bear Assault Weapons*, 40 CAMPBELL L. REV. 301, 303, 327, 332–34 (2018) (advocating for restrictions on military-style weapons); John Dwight Ingram & Alison Ann Ray, *The Right(?) to Keep and Bear Arms*, 27 N.M. L. REV. 491, 511 (1997); see also Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 144 (2013) (explaining why “urban bans on assault weapons or high-capacity magazines might have a particularly strong claim to constitutionality”).

⁵⁹ *Joe Biden’s Tip for Self-Defense: Get a Shotgun*, REUTERS (Feb. 19, 2013, 7:35 PM), <https://www.reuters.com/article/us-usa-guns-biden-idUSBRE91J03720130220> [<https://perma.cc/7ZGE-D2AF>].

⁶⁰ Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 101–04 (2020); see also *id.* at 94–101 (using a similar self-defense analysis to demarcate when individuals may carry arms in public).

government authorized; any organized effort of private citizens to keep the peace and publicly bear arms is tantamount to vigilantism.⁶¹ And some denigrate the idea that the Constitution could have reserved power in the citizenry to resist a tyrannical government, labeling the idea the “insurrectionist” theory.⁶²

On the other side of the Second Amendment debate, many scholars who favor a broader understanding of the Second Amendment also accept some form of the monopoly-of-force view. Professor David Bernstein, for example, argues that the Second Amendment has relevance to “the civil unrest” of today because of “[t]he unwillingness or inability of local authorities to stop looting, rioting, and other lawless and violent behavior.”⁶³ Basing the Second Amendment’s relevance on the government’s failure to keep the peace seems tacitly to accept the primacy of government agents in preventing crime and enforcing the law, while denying the factual premise that government agents are adequately securing citizens’ rights.

Likewise, some individual-rights scholars, including Professor Eugene Volokh, agree that the government can prohibit many kinds of weapons and accessories primarily useful for public-defense purposes, such as automatic weapons, semiautomatic “assault weapons,” and large-capacity magazines.⁶⁴ The key question for Professor Volokh seems to be whether the government leaves citizens with adequate means of individual self-defense.⁶⁵ Similarly, most courts recognizing an individual right to bear arms for self-defense have also accepted the power of the state to ban arms primarily used for law enforcement and military applications.⁶⁶

⁶¹ *E.g.*, Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1367 (1993) (“[H]istory teaches that the alternative to a state monopoly on organized force is vigilantism.”); Miller, *supra* note 31 (“Nothing about the Second Amendment protects armed vigilantism.”).

⁶² *See, e.g.*, Joshua Horwitz & Casey Anderson, *Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences*, 1 ALB. GOV’T L. REV. 496, 497–98 (2008) (“Insurrectionist ideology holds that government, even in its most democratically accountable forms, is inevitably the enemy of freedom, and condemns any and all gun regulation as a government plot to monitor gun ownership”); Dennis A. Henigan, *Arms, Anarchy, and the Second Amendment*, 26 VAL. UNIV. L. REV. 107, 110–12 (1991) (describing the insurrectionist theory as the idea that the right to bear arms is meant to empower the citizenry to overthrow tyrannical government at all levels).

⁶³ Bernstein, *supra* note 51, at 179.

⁶⁴ *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1485–87 (2009).

⁶⁵ *See id.* at 1489 (“[T]hese same reasons probably mean that the magazine size cap would not materially interfere with self-defense, if the cap is set at 10 or so rather than materially lower.”).

⁶⁶ *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1262–64 (D.C. Cir. 2011) (upholding “assault weapons” ban); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015) (same); *Robertson v. City of Denver*, 874 P.2d 325, 335 (Colo. 1994) (same); *Benjamin v. Bailey*, 662 A.2d 1226, 1232–35 (Conn. 1995) (same); *People v. Brown*, 235 N.W. 245, 246 (Mich. 1931)

In sum, the conventional understanding is that the government maintains a monopoly of force. The use of individual force is reserved for cases of immediate self-defense when the government lacks the power or willingness to prevent violence. And many scholars accept, explicitly or implicitly, that government agents alone may exercise the government's monopoly of force to enforce the law and maintain the peace.

B. Anglo-American Law and the Strong Monopoly-of-Force Account

This Section argues against the strong monopoly-of-force account. No such monopoly of force has historically existed. And it does not exist today.

For over a millennium, private citizens have played a large role in Anglo-American public security. Blackstone credits King Alfred with organizing the “fyrd,” the old Anglo-Saxon militia,⁶⁷ while modern scholarship suggests that the militia “can be traced back to at least the seventh century.”⁶⁸ After the Norman Conquest, King Henry II reorganized the militia with the Assize of Arms in 1181, a law that divided the country by wealth and rank, requiring people to acquire private military arms according to their means.⁶⁹ In 1285, the Statute of Winchester further divided the English population into income groups, requiring individuals in each of the groups to obtain specific military weapons.⁷⁰ The law also required universal service for all able-bodied men between fifteen and sixty years of age.⁷¹

English law did not merely require individuals to obtain and bear arms for military purposes; the requirement of citizens to have and bear arms was also a staple of domestic policing. The Statute of Winchester devolved

(“Some arms, although they have a valid use for the protection of the state by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals, and, in times of peace, find their use by bands of criminals and have legitimate employment only by guards and police.”). The state cases are interpreting state constitutional provisions guaranteeing a right to keep and bear arms both for self-defense and for defense of the state. *See* COLO. CONST. art. II, § 13 (“The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question”); CONN. CONST. art. I, § 15 (“Every citizen has a right to bear arms in defense of himself and the state.”); MICH. CONST. art. I, § 6 (“Every person has a right to keep and bear arms for the defense of himself and the state.”).

⁶⁷ *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *409 (“It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and . . . made all the subjects of his dominion soldiers . . .”).

⁶⁸ William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 395–96 (1991).

⁶⁹ Assize of Arms 1181, 27 Hen. 2, §§ 1–2 (Eng.); *see* F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 162 (Cambridge Univ. Press 1968) (1908).

⁷⁰ 13 Edw. c. 6 (Eng.), in 1 THE STATUTES OF THE REALM 96, 97–98.

⁷¹ *Id.*

policing duties on the entire community. If a felon attempted to resist or flee, all able-bodied men had to respond to the “hue and cry” to try to capture the person.⁷² Relatedly, the Statute also held the community collectively liable for any robbery within its limits when the felon was not captured.⁷³ This system persisted until the 1800s.⁷⁴

In the seventeenth and eighteenth centuries, this civilian-led system coexisted with a system of professional soldiers and peace officers, but this professional class fell far short of the professionalism we have today.⁷⁵ For foreign wars, Britain traditionally raised professional troops through enlistment and impressment.⁷⁶ Beginning in the seventeenth century, Britain maintained a peacetime standing army.⁷⁷ But professional soldiers were viewed with great suspicion. Soldiers were often alcoholics and petty criminals,⁷⁸ or as Professor Akhil Amar put it, “the dregs of society—men without land, homes, families, or principles.”⁷⁹ The same was true of peace officers. Although constables were originally unpaid, conscripted men, those men with means would hire deputies, who would then subcontract for further deputies.⁸⁰ The result was that, like soldiers, constables were men “who could find no other employment,” resulting in peace officers “of notorious incompetence.”⁸¹ And the constable’s main purpose was to prevent crimes, not to prosecute them; private citizens—the victims—primarily prosecuted those who committed crimes.⁸²

In this country, at the time of the Founding, Americans faced two problems, not one, with government force. With an inadequate army and no

⁷² Sklansky, *supra* note 34, at 1196–97.

⁷³ *Id.* at 1196.

⁷⁴ *Id.* at 1197–1202.

⁷⁵ See RUSSELL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 20 (enlarged ed. 1984) (“[N]o military profession in the modern sense existed at all.”); *infra* notes 80–81 and accompanying text.

⁷⁶ CORRELLI BARNETT, *BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY* 41–42 (1970).

⁷⁷ For a history on the formation of the British peacetime standing army, see CLIFFORD WALTON, *HISTORY OF THE BRITISH STANDING ARMY: A.D. 1660 TO 1700*, at 1–14 (London, Harrison & Sons 1894).

⁷⁸ BARNETT, *supra* note 76, at 41–42 (describing impressment system that generally caused drunks, criminals, and the idle to be enlisted into the professional army).

⁷⁹ See AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 53 (1998); see also WEIGLEY, *supra* note 75, at 19 (“Common soldiers were in fact the dregs of European society, vagabonds, ne’er-do-well’s, and criminals, the only sorts of men who were willing to risk their lives for the little pay bestowed upon them.”).

⁸⁰ Sklansky, *supra* note 34, at 1197–98.

⁸¹ *Id.* at 1198; see also BLACKSTONE, *supra* note 67, at *356 (explaining that constables “are armed with very large powers, of arresting, and imprisoning, of breaking open houses, and the like: of the extent of which powers, considering what manner of men are for the most part put upon these offices, it is perhaps very well that they are generally kept in ignorance”).

⁸² Sklansky, *supra* note 34, at 1198.

professional police (America followed the English model when it came to policing⁸³), the first problem—the obvious problem—was that the government did not have enough centralized force for policing and national defense. Decentralization and reliance on nonprofessionals derived from a time when the colonies *had* to rely on private citizens for these public functions.⁸⁴ But bare necessity was not the only issue. The Founding generation also did not trust professional soldiers and peace officers.⁸⁵ The Founding generation viewed professional soldiers as an armed special interest faction whose guiding principle was obedience to military hierarchy rather than preservation of republican liberty.⁸⁶ Many felt that professional soldiers could either be co-opted by unprincipled rulers to usurp democratic government or could usurp democratic government themselves for their own benefit.⁸⁷ And as just explained, many soldiers and peace officers were

⁸³ Sklansky, *supra* note 34, at 1205 (explaining that, for domestic law enforcement, America followed the English model, relying on constables, watchmen, and the hue and cry).

⁸⁴ See RUSSELL F. WEIGLEY, *A HISTORY OF THE UNITED STATES ARMY* 4 (Enlarged ed. 1984) (1967) (“The American colonies in the seventeenth-century were much too poor to permit a class of able-bodied men to devote themselves solely to war and preparation of war.”).

⁸⁵ LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 46–48 (1982); Jason Mazzone, *The Security Constitution*, 53 *UCLA L. REV.* 29, 73 (2005) (“By the fall of 1774, opposition to professional soldiering had reached national proportions.”); *supra* note 81 and accompanying text.

⁸⁶ See, e.g., Brutus, Essay (Jan. 10, 1788), *reprinted in* *THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE* 218, 220 (Michael P. Zuckert & Derek A. Webb eds., 2009) [hereinafter *THE ANTI-FEDERALIST WRITINGS*] (explaining that a standing army consists of “a body of men distinct from the body of the people; they are governed by different laws, and blind obedience, and an entire submission to the orders of their commanding officer, is their only principle” (quoting 8 COBBETT’S *PARLIAMENTARY HISTORY OF ENGLAND* 1250 (London 1811))); Letter from Samuel Adams to James Warren (Jan. 7, 1776), *in* 3 *THE WRITINGS OF SAMUEL ADAMS 1773–1777*, at 250, 250–51 (Harry Alonzo Cushing ed., 1907) (similar).

⁸⁷ See Letter from Brutus to the People of the State of New-York (Jan. 24, 1788), *reprinted in* *THE ANTI-FEDERALIST WRITINGS*, *supra* note 86, at 227, 227; *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) (explaining that Framing-era history demonstrated concern that disarming the population would “enabl[e] a select militia or standing army to suppress political opponents”); A Ploughman, Letter, *VA. GAZETTE*, Mar. 19, 1788, *reprinted in* *THE ORIGIN OF THE SECOND AMENDMENT* 303, 303 (David E. Young ed., 2d ed. 1995) (objecting that a standing army is necessary if American political officials intended oppressive government and explaining the dangers standing armies posed to established government); *The Republican*, Letter, *CONN. COURANT*, Jan. 7, 1788, *reprinted in* *THE ORIGIN OF THE SECOND AMENDMENT*, *supra*, at 188, 190 (“Tyrants never feel secure until they have disarmed the people. They can rely upon nothing but standing armies of mercenary troops for the support of their power.”); Albany Antifederal Committee, *N.Y.J.*, Apr. 26, 1788, *reprinted in* *THE ORIGIN OF THE SECOND AMENDMENT*, *supra*, at 337, 337 (“The bane of a republican government; by a standing army most of the once free nations of the globe have been reduced to bondage; and by this Britain attempted to enforce her arbitrary measures.”); see also 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1890 (Boston, Hilliard, Gray, & Co. 1833) (“It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people.”).

unprincipled men, who were nevertheless vested with the authority of government to use force.⁸⁸

Thus, it should come as no surprise that, as the Framers increased the amount of force available to the federal government, they simultaneously provided that no government in the United States would maintain a monopoly of force. The Framers divided the military establishment among the federal and state governments. The federal government would have near plenary control over the professional forces.⁸⁹ The states would retain usual control of the militia (i.e., citizen-soldiers—the nonprofessional forces) and could use the militia for domestic law enforcement; these state powers, however, were subject to the federal power to organize the militia and to call forth the militia for national emergencies.⁹⁰ The Constitution provided some separation among military leaders: the professional services would have nationally appointed officers, while the militia would have state-appointed officers.⁹¹ The Second Amendment protected “the right of the people to keep and bear Arms,” allowing citizens to possess the means of violence (which Anglo-American citizens had traditionally kept since at least the twelfth century’s Assize of Arms).⁹² And the right of the government to employ force was diffused by decentralizing political power. The federal government would have a few enumerated powers that presumably would not require an extensive national law enforcement apparatus. The states would retain the police power and, thus, more control over the everyday lives of Americans.⁹³ The Framers believed that liberty across a large and diverse country could be preserved best not by recognizing the government’s monopoly of legitimate force, but by actively rejecting it.

In the nineteenth century, both the American military and American policing became truly professional institutions. The universal militia system partially gave way to a standing army, led by competent professional officers who respected civilian control.⁹⁴ In law enforcement, the biggest

⁸⁸ See *supra* notes 78–81 and accompanying text.

⁸⁹ U.S. CONST. art. I, § 8, cl. 12 (army); *id.* art. I, § 8, cl. 13 (navy); *id.* art. I, § 10, cl. 3 (prohibitions on states having peacetime troops or naval ships without congressional consent).

⁹⁰ *Id.* art. I, § 8, cls. 15–16; see also Debates of the Virginia Convention (June 16, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1299, 1304 (John P. Kaminski et al. eds., 2000) (statement of James Madison).

⁹¹ U.S. CONST. art. I, § 8, cl. 16; *id.* art. II, § 2, cl. 2.

⁹² U.S. CONST. amend. II.

⁹³ See THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”).

⁹⁴ See SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 80–97 (1964).

development of the nineteenth century was the rise of professional police forces, which both prevented and investigated crimes.⁹⁵

Yet, despite the rise of professional military and police, American use of force remains decentralized. At first glance, we might think that the government in the United States just has a duopoly of legitimate violence—a “splitting [of] the atom of sovereignty” among the federal and state governments.⁹⁶ But that small modification fails to capture how decentralized the right to violence in this country actually is. State laws are mostly enforced not by state officials (though there are some state police), but by officials of (nonsovereign) municipal and county governments.⁹⁷ That is to say, although state legislatures make laws, policing is a local function, performed by local employees, accountable to local government officials. Thus, the duopoly is now a triopoly.

But we are even more decentralized than that. Government agents also can work for private employers. Many police moonlight when off duty—sometimes in uniform—and many businesses contract with municipal police to provide on-duty policing.⁹⁸ Many states allow private police forces.⁹⁹ The University of Pennsylvania employs sworn police officers with a range of law enforcement authority, but they are employed by the university, not by a governmental entity.¹⁰⁰ Businesses and even governments employ armed and unarmed security guards. The people who guard federal courthouses carry guns and handcuffs, and they have arrest authority as special deputy U.S. Marshals, but they are private contractors, not federal employees.¹⁰¹

⁹⁵ See Sklansky, *supra* note 34, at 1207–10.

⁹⁶ *Alden v. Maine*, 527 U.S. 706, 751 (1999) (alterations and internal quotation marks omitted).

⁹⁷ William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 666 (2002); David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1217–18 (2020).

⁹⁸ Sklansky, *supra* note 34, at 1176.

⁹⁹ See, e.g., N.C. GEN. STAT. § 74E-6(c)–(e) (2021) (company, campus, and railroad police); 22 PA. CONS. STAT. § 501 (2021) (private police for nonprofit institutions); *id.* § 3301 (railroad police).

¹⁰⁰ See David Alan Sklansky, *Private Police & Democracy*, 43 AM. CRIM. L. REV. 89, 92 n.18, 93 (2006) (describing private police forces); *Penn Police Department*, UNIV. OF PA. DIV. OF PUB. SAFETY, <https://www.publicsafety.upenn.edu/about/uppd/> [<https://perma.cc/83DA-AT9D>] (“The University of Pennsylvania Police Department (UPPD) is comprised of 121 . . . full-time sworn police officers. All UPPD officers are certified by and receive their law enforcement authority through the Commonwealth of Pennsylvania Municipal Police Officers Training and Education Commission.”); see also 22 PA. CONS. STAT. § 501(c) (2019) (“Such policemen, so appointed, shall severally possess and exercise all the powers of a police officer in this Commonwealth . . .”).

¹⁰¹ See, e.g., U.S. MARSHALS SERV., *Court Security*, https://www.usmarshals.gov/judicial/court_security_officer.htm [<https://perma.cc/RG3W-LRRC>] (“Court Security Officers (CSOs) are recruited, hired, and employed by a private company awarded a security contract by the United States Marshals Service (USMS).”); U.S. MARSHALS SERV., *Major Responsibilities of the U.S. Marshals*

Private security officers “actually outnumber law enforcement personnel.”¹⁰² And when it comes to political supervision of municipal and county police, local governments do not unilaterally set official policies for their law enforcement agencies; instead, private insurance companies that indemnify local governments for police misconduct play a large role in setting those policies.¹⁰³

Outside of police and licensed security agents, American law recognizes that private citizens may exercise the legitimate use of force. Although the precise rules vary by jurisdiction, private citizens retain significant authority to make arrests for felonies and breaches of the peace. In the case of felonies, private citizens may arrest a suspected person if a felony has been committed and they have probable cause to believe that the suspected person committed the crime.¹⁰⁴ That is only slightly narrower than the arrest authority of professional law enforcement, who are excused if they have probable cause even if a crime has not, in fact, been committed.¹⁰⁵ In making arrests, private citizens may use force to effectuate those arrests and deadly force in some cases.¹⁰⁶ Private citizens may also use force to prevent felonies and breaches of the peace.¹⁰⁷ In many states, shopkeepers have law-enforcement-like powers in their stores to detain individuals suspected of

Service, <https://www.usmarshals.gov/duties/> [<https://perma.cc/XP5S-3KC9>] (“These specially deputized officers have full law enforcement authority . . .”). Private individuals commissioned as “special deputies” should not be confused with regular deputy U.S. Marshals, all of whom are governmental employees. *See id.*

¹⁰² Sklansky, *supra* note 34, at 1174. For more recent statistics on total private security guards and law enforcement personnel, compare *Security Guards and Gambling Surveillance Officers*, U.S. BUREAU OF LAB. STAT.: OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/ooh/protective-service/security-guards.htm> [<https://perma.cc/95J2-MWCM>], which lists the total number of U.S. security guards and gambling surveillance officers as 1,164,600 as of 2019, with *Police and Detectives*, U.S. BUREAU OF LAB. STAT.: OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/ooh/protective-service/police-and-detectives.htm> [<https://perma.cc/ZT7R-62XZ>], which lists the total number of U.S. police and detectives as 813,500 as of 2019.

¹⁰³ John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1574–76 (2017).

¹⁰⁴ Sklansky, *supra* note 34, at 1184.

¹⁰⁵ *Id.* at 1184–85.

¹⁰⁶ *See, e.g.*, CAL. PENAL CODE § 197 (2021) (authorizing homicide “[w]hen necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace”); MODEL PENAL CODE § 3.07(2)(b) (Proposed Official Draft 1962) (authorizing deadly force by private persons assisting peace officers when, among other things, it is necessary to effectuate an arrest for a violent felony or by a person who will pose a substantial risk of violence if not apprehended immediately); *id.* § 3.07(5)(a)(ii) (authorizing private persons to use deadly force to prevent violent crimes and, in some circumstances, to suppress a riot or mutiny). For states adopting the *Model Penal Code* provision at least in part, *see*, for example, DEL. CODE ANN. tit. 11, § 467 (2021); NEB. REV. STAT. § 28-1412 (2021); N.Y. PENAL LAW § 35.30 (McKinney 2021); 18 PA. CONS. STAT. § 508 (2021).

¹⁰⁷ *See supra* note 106.

stealing based on probable cause.¹⁰⁸ And U.S. citizens privately own about forty percent of all worldwide firearms,¹⁰⁹ giving them ample access to the means of violence.

One might object (and many have objected) that these authorities are holdovers from the days of private, communal policing. They argue that American law has grown detached from the realities of modern, urban living with professional police and military. We should, they say, be curbing archaic rules authorizing private citizens to conduct policing activities, and we need to more broadly regulate guns.¹¹⁰

This objection is mistaken. In the next Part, I explain why the reasons that animated the Framers to decentralize force remain with us today, even in the age of professional militaries and police.

II. NONDOMINATION AND DIFFUSING THE RIGHT TO USE FORCE

The previous Section identified two problems with public force at our Framing: (1) not enough governmental resources to maintain public security with public employees and (2) fear that professional public-security employees could oppress the population.¹¹¹ We can recast these concerns in contemporary republican terms. The Framers decentralized force to prevent domination by public and private actors.¹¹² Decentralizing force provided a check against oppressive governmental actors. And decentralizing force allowed private citizens to supplement government officers in preventing and punishing crimes, thereby preventing criminals from exploiting honest citizens.

In this Part, I argue that our continued decentralization of force serves the same purposes. For three reasons, vesting a near monopoly on the use of legitimate violence solely in the government and its agents would be highly problematic. First, many areas paradoxically suffer from both lack of adequate law enforcement and from overcriminalization. Private law enforcement mitigates the underenforcement problem, while avoiding the pitfalls of simply hiring more police, which could result in exacerbating the disproportionate overenforcement of regulatory offenses. Second,

¹⁰⁸ Sklansky, *supra* note 34, at 1184, 1185 n.87.

¹⁰⁹ See Niall McCarthy, *Report: Nearly 40 Percent of the World's Guns Are Owned by U.S. Citizens [Infographic]*, FORBES (June 27, 2018, 7:30 AM), <https://www.forbes.com/sites/niallmccarthy/2018/06/27/report-nearly-40-percent-of-the-worlds-guns-are-owned-by-u-s-citizens-infographic/?sh=73d04f4e664a> [<https://perma.cc/END8-S7LR>].

¹¹⁰ See *supra* note 51.

¹¹¹ See *supra* notes 72–88, and surrounding text.

¹¹² On republican liberty as freedom from nondomination, see PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 21–26 (1997).

individuals have no private right to policing services. And any attempt to convert the public duty to provide policing services into an enforceable private right would create severe separation of powers and policy problems. Third, state agents may improperly exercise the state's power to use force in two ways. They can commit nonfeasance by improperly refusing to enforce the law, and they can commit malfeasance by using force improperly (e.g., using excessive force in making arrests). Private law enforcement provides an alternative path to combat both forms of misconduct by state agents. Thus, the professionalization of the military and the police has not solved the resource problem, nor the potential for government officers to oppress the population, either directly or through neglect. Decentralizing force remains an important way to preserve freedom as nondomination.

A. *Underenforcement of the Law*

Those who believe that private arms bearing is anachronistic assert that professional soldiers and police now perform the public security functions once played by private citizens. This is wrong. Government agents underenforce core crimes, and the problem only becomes more acute during times of civil unrest. Private use of force, as a supplement for force by state agents, remains an important part of our distribution of legitimate violence.

While overcriminalization in American criminal law garners significant attention—especially now, because of all the allegations of police misconduct—underenforcement of criminal law remains a serious problem.¹¹³ Measured by “clearance rates” (arrests plus offenses cleared by exceptional means versus police-reported crimes), police make arrests only for 62% of all murders, 33% of all rapes, 30% of all robberies, 14% of all burglaries, and 19% of all thefts.¹¹⁴ More generally, official clearance rates are around 45% for violent crimes and 15% to 20% for property crimes.¹¹⁵

But these numbers overstate police effectiveness. Many individuals do not report crimes because they may view the crimes as “a personal matter,” they may consider the crime insufficiently important, or they fear that they would face reprisals or that the police would offer insufficient assistance.¹¹⁶ Measuring arrests versus crimes reported in the National Crime Victimization Survey paints an even darker picture of American law

¹¹³ Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717–18 (2006).

¹¹⁴ FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2018 (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/clearances> [https://perma.cc/VKJ3-5TLH].

¹¹⁵ Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 91 (2020).

¹¹⁶ *Id.* at 66–67.

enforcement. In 2018, police cleared about 11% of all known crimes, including 62% of murders, 6% of rapes, 14% of robberies, 9% of thefts, and 6% of burglaries.¹¹⁷ So the vast majority of serious crimes result in no arrests, let alone successful prosecutions.

Making matters worse, the problems caused by underenforcement disproportionately harm the poor. Like many government services, policing is redistributive.¹¹⁸ Crime—especially violent crime—is heavily concentrated in poor areas.¹¹⁹ Yet, policing is funded by tax dollars coming primarily from wealthy and middle-class residents, who need fewer policing services because the areas where they live and work are safer.¹²⁰ The result is that governments often allocate public security services to areas where they are not needed as much. For example, Alexandra Natapoff reported in 2006 that “while the Compton area [of Los Angeles] suffers the city’s highest homicide rates, it has only seventy-five full-time police deputies, while the neighboring southeast division—with dropping homicide rates—employs more than 250 officers to patrol a comparable geographical area and has an only slightly larger population.”¹²¹ In poor urban areas, underenforcement results in “unsolved homicides, permitted open-air drug markets, slow or nonexistent 911 responses, and the tolerance of pervasive, low levels of violence, property crimes, and public disorder.”¹²²

Underenforcement is not just the result of systemic neglect of politically marginalized populations; underenforcement also results from deliberate, overt discrimination against disfavored victims.¹²³ During Reconstruction and Jim Crow, white murderers were routinely not prosecuted or convicted for crimes against African Americans.¹²⁴ Until the 1970s, police frequently did not enforce domestic violence crimes, viewing them as a family issue.¹²⁵ As Professor Leon Whipple recognized nearly a century ago, “[I]f we turn to the state’s influence on liberty, we find that the most extensive and

¹¹⁷ *Id.* at 90 & n.221 (noting that National Crime Victimization numbers result in “a potentially more accurate measure of clearance rates” because they “presumably consider a large swath of crimes that could be reported to police but are not”).

¹¹⁸ Stuntz, *supra* note 97, at 672.

¹¹⁹ Chase Sackett, *Neighborhoods and Violent Crime*, EVIDENCE MATTERS, Summer 2016, at 16, 19.

¹²⁰ Stuntz, *supra* note 97, at 672.

¹²¹ Natapoff, *supra* note 113, at 1725.

¹²² *Id.* at 1723; see also Susan S. Kuo, *Bringing In the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177, 180 (2004) (emphasizing the failure of local governments to prepare for impending mob violence and the magnitude of the ensuing damage).

¹²³ Natapoff, *supra* note 113, at 1745.

¹²⁴ Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 82–84 (2009).

¹²⁵ Natapoff, *supra* note 113, at 1739.

frequent losses of liberty are not due either to court or executive, but to the failure of the force of the government to protect men from violence and mobs.”¹²⁶

Concerns about underenforcement only get more acute during times of civil unrest. In California, Minnesota, Ohio, Oregon, Washington, and elsewhere, police officers seemingly stood down while protesters engaged in violence, burned buildings, and looted stores.¹²⁷ During the Rodney King riots, police were outmanned, leading Los Angeles Police Department commanders to order their officers to retreat and hold back.¹²⁸ This is, in part, what led to the famous images of Korean business owners standing on top of their stores with semiautomatic rifles to protect their businesses.¹²⁹ One business owner “would not see law enforcement for three days.”¹³⁰ In these situations, government officials may use the National Guard or the Army to reinforce local police. But calling in supplemental forces takes time, and enormous destruction occurs in the interim.¹³¹ Just look at the destruction caused by supporters of President Trump at the U.S. Capitol in 2021, while Capitol Police waited for backup from other law enforcement agencies and the National Guard to arrive and quell the riot.¹³²

The harms caused by underenforcement are significant. There are, of course, the immediate harms caused by the crimes themselves: bodily injury, emotional harm, loss of property, and, in the case of homicides, loss of life. But the total harm to the community extends deeper. Underenforcement disrupts the ability of all people in the jurisdiction to execute life plans by causing them to lose security for their persons and property.¹³³ A person will

¹²⁶ LEON WHIPPLE, *OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES* 144 (1927).

¹²⁷ Bernstein, *supra* note 51, at 185–202 (collecting stories).

¹²⁸ Lou Cannon, *When Thin Blue Line Retreated, L.A. Riot Went Out of Control*, WASH. POST (May 10, 1992), <https://www.washingtonpost.com/archive/politics/1992/05/10/when-thin-blue-line-retreated-la-riot-went-out-of-control/2ccf3e5c-c03b-4d82-bce1-0ea43be30cd3/> [https://perma.cc/4P99-FU8E].

¹²⁹ See Kyung Lah, *The LA Riots Were a Rude Awakening for Korean-Americans*, CNN (Apr. 29, 2017, 1:11 PM), <https://www.cnn.com/2017/04/28/us/la-riots-korean-americans/index.html> [https://perma.cc/2YJF-6NQ9].

¹³⁰ *Id.*

¹³¹ See Kuo, *supra* note 122, at 180.

¹³² Maura Judkis & Ellen McCarthy, *The Capitol Mob Desecrated a Historical Workplace—and Left Behind Some Disturbing Artifacts*, WASH. POST (Jan. 8, 2021, 6:17 PM), https://www.washingtonpost.com/lifestyle/style/the-capitol-mob-desecrated-a-historical-workplace--and-left-behind-some-disturbing-artifacts/2021/01/08/e67b3c88-51d1-11eb-83e3-322644d82356_story.html [https://perma.cc/8H5U-GGU6]; Lolita Baldor & Robert Burns, *Why the DC National Guard's Role Was Limited During US Capitol Riot*, MIL. TIMES (Jan. 12, 2021), <https://www.militarytimes.com/news/your-military/2021/01/12/why-the-dc-national-guards-role-was-limited-during-us-capitol-riot/> [https://perma.cc/7T3C-CGFY].

¹³³ Natapoff, *supra* note 113, at 1717–18, 1753.

not invest in a business that he fears will be burned and looted with impunity at any moment. Even petty crimes, once aggregated, cause significant losses to businesses—losses that may make businesses unprofitable and deprive residents of the vital services that the businesses provide.¹³⁴ The lack of physical security limits people's movements; many residents of high-crime areas fear going outside alone and at night.¹³⁵ And lack of security devastates communities. As Professor Thomas Abt describes the cycle, “Fear . . . leads to avoidance,” and avoidance causes “the civic and commercial life of those locations [to] drain[] away,” in part by “strangling the[] economic prospects” of local businesses.¹³⁶ Places that are violent face depopulation, lower tax revenues, fewer government services, and psychological harm to residents, especially children.¹³⁷ Collective violence can be especially devastating for communities. The 1968 riots in Washington, D.C. left many neighborhoods destroyed for decades; no one rushed in to rebuild.¹³⁸

Given that underenforcement remains a serious problem, we should not centralize more force in the government by limiting self-help and private law enforcement. Many think that only state employees should provide public security; they believe in strong civilian gun control and the prohibition of citizen's arrests.¹³⁹ But vesting a true monopoly of force in the government makes this situation worse, not better. When professional police employed by the government are insufficient to meet a community's needs to prevent and detect crimes, private law enforcement—whether through neighborhood watches, private security officers, or citizen's arrests—acts as a useful supplement. And not only is private supplementation useful, it may also be morally required. If the government cannot provide adequate police services,

¹³⁴ See, e.g., Erica Sandberg, *San Francisco's Quality-of-Life Toll*, CITY J. (May 19, 2019), <https://www.city-journal.org/san-francisco-crime> [<https://perma.cc/J246-FSDU>] (explaining the harm caused in San Francisco by rampant property crime); Nora Mishanec, *Video Shows Brazen Theft at S.F. Walgreens as Shoplifting Drives Out Retailers*, S.F. CHRON. (June 14, 2021), <https://www.sfchronicle.com/crime/article/Video-shows-brazen-theft-at-S-F-Walgreens-as-16248034.php> [<https://perma.cc/9BW7-BTZG>] (“Rampant shoplifting has shuttered more than a dozen San Francisco pharmacies in recent years . . .”).

¹³⁵ See, e.g., Alexander E.M. Hess, Thomas C. Frohlich & Vince Calio, *10 Cities Where Americans Are Pretty Much Terrified to Live*, TIME (Apr. 20, 2014, 1:30 PM), <https://time.com/69550/10-cities-where-americans-are-pretty-much-terrified-to-live/> [<https://perma.cc/R8EG-RQY6>] (providing examples of cities where residents feel unsafe to travel at night).

¹³⁶ THOMAS ABT, BLEEDING OUT 22–23 (2019).

¹³⁷ *Id.* at 21–23.

¹³⁸ Martin Austerhuhle, *D.C.'s Black Commercial Districts Came Back from the 1968 Riots, but Many Black Residents Left*, WAMU (Apr. 4, 2018), <https://wamu.org/story/18/04/04/d-c-s-black-commercial-districts-came-back-1968-riots-many-black-residents-left/> [<https://perma.cc/P9Q5-N23Q>].

¹³⁹ See, e.g., Miller, *supra* note 31; Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557, 572–99 (2016) (arguing for the prohibition of the general citizen's arrest and restricting its use to trained individuals in certain contexts); *supra* note 51 (discrediting the Second Amendment as an anachronism).

the least it can do is to allow its citizens to protect themselves and to act as an auxiliary to the police to enforce the laws. Failing to provide adequate police services *and* prohibiting self-help effectively immunizes the wrongdoers, thereby making the government complicit in the wrongdoing.¹⁴⁰ A legal system that does this undermines its own legitimacy.¹⁴¹

We also have some reason to doubt whether simply providing more police would be an acceptable solution. Paradoxically, areas that suffer from underenforcement of some crimes also suffer from too much enforcement of others.¹⁴² Many criminal laws are broad and vague; virtually everyone violates some law, especially traffic offenses.¹⁴³ This leaves police with significant discretion about whom they wish to detain, search, and arrest.¹⁴⁴ Police do not exercise this discretion evenly; for example, police are more likely to stop African Americans than other racial groups.¹⁴⁵ Even if the traffic offenses themselves are minor, encounters with police increase the probability of police detecting further crimes.¹⁴⁶ Moreover, prosecutors exercise their substantial prosecutorial discretion “differently in poor city neighborhoods than in wealthier urban and suburban communities.”¹⁴⁷ As a result, some groups face disproportionate prosecution and harsher sentencing.¹⁴⁸ Flooding areas with more police could exacerbate this problem, as police may seek to improve their careers through making lots of easy arrests for drug and other regulatory offenses. When the government

¹⁴⁰ See V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1710 (2003) (describing how eliminating self-defense would likely cause citizens to view the government as “ha[ving] abandoned them to the violence of their fellow citizens”).

¹⁴¹ See *id.*

¹⁴² See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 2–5 (2011) (“Bottom line: poor black neighborhoods see too little of the kinds of policing and criminal punishment that do the most good, and too much of the kinds that do the most harm.”).

¹⁴³ Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 355–56 (2019) (explaining that broad and vague laws create an “impossible position” for individuals trying to avoid criminal liability); see also Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 263–64 (2001) (finding there to be an “abundance of federal and state criminal statutes”); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 745 (1996) (“By choosing to create a large number of crimes, and by defining those crimes with the breadth proposed by the Model Penal Code, legislatures make it impossible to enforce all criminal statutes and, at the same time, make it possible for a single act to be charged under many overlapping provisions.”). For a discussion on how substantive criminal law and criminal punishment intersect, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–09 (2001).

¹⁴⁴ STUNTZ, *supra* note 142, at 3–5.

¹⁴⁵ ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEP’T OF JUST., *CONTACTS BETWEEN POLICE AND THE PUBLIC*, 2015, at 4 (2018), <https://www.bjs.gov/content/pub/pdf/cpp15.pdf> [<https://perma.cc/5UTQ-5TTF>].

¹⁴⁶ See STUNTZ, *supra* note 142, at 3.

¹⁴⁷ *Id.* at 6.

¹⁴⁸ See *id.* at 3–6.

has a complete monopoly of force, the line between anarchy and a police state can be a thin one.

Furthermore, vesting powers of arrest exclusively in the police's hands can lead to perverse outcomes. Take, for example, Georgia, which has a new law generally prohibiting citizen's arrests¹⁴⁹ but still allows individuals to use force in self-defense.¹⁵⁰ Imagine that a rioter tries to firebomb an occupied house, in which all family members but one are asleep. And for the purposes of this hypothetical, imagine that the police do not have enough resources to respond quickly to any individual crime. In such a case, the homeowner or a bystander would be justified in using deadly force to prevent the arson of an occupied dwelling because it is a felony likely to cause death or serious bodily injury.¹⁵¹ But neither he nor a bystander could capture and detain the arsonist for an extended period because that would be an unlawful imprisonment.¹⁵² The law should not incentivize the use of greater force in self-defense by making the ability to detain and arrest unavailable. Equally strange, once the person successfully firebombs the house, a victim or bystander must let the arsonist go. Although the Georgia law does not repeal the use of force in self-defense and defense of others¹⁵³ (and one might argue that, in some cases, detentions constitute a form of defensive force), defensive force is preventative only. Once the person consummates the crime, there is nothing left to prevent, and thus, any force against the arsonist would not be justified on the grounds of self-defense or defense of others.

A similar problem can occur when governments prohibit private citizens from possessing certain weapons primarily useful for public safety (e.g., tear gas or stun guns). Consider, for example, the recent case involving Mark and Patricia McCloskey in St. Louis. Several protesters allegedly broke into their private street by force to protest police violence.¹⁵⁴ The McCloskeys claimed that several protesters threatened to burn their home and that, in response, they stood in the curtilage of their home with a pistol

¹⁴⁹ H.B. 479, Reg. Sess. (Ga. 2021) (enacted). For an earlier academic proposal to the same effect, see Robbins, *supra* note 139, at 596–98.

¹⁵⁰ GA. CODE ANN. §§ 16-3-21 to -24.2 (2021).

¹⁵¹ See *id.* § 16-3-23(3) (authorizing deadly force to prevent a felony against a dwelling). For a summary of the law authorizing deadly force to protect dwelling, including against arson, see 2 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 10.6(b) (3d ed. 2020).

¹⁵² Amy Swearer, *Why Georgia Shouldn't Repeal Its "Citizen's Arrest" Law*, HERITAGE (Aug. 6, 2020), <https://www.heritage.org/crime-and-justice/commentary/why-georgia-shouldnt-repeal-its-citizens-arrest-law> [<https://perma.cc/LBN7-Q58D>].

¹⁵³ GA. CODE ANN. § 17-4-80(d)(1) (2021).

¹⁵⁴ Rice & Bell, *supra* note 28.

and a semiautomatic rifle.¹⁵⁵ In this kind of situation, it would be preferable for private citizens to have access to various riot-control agents to disperse the crowd than to rely on deadly force or threats of deadly force. A similar problem exists when a state licenses private citizens to carry firearms but prohibits them from having stun guns.¹⁵⁶ Lack of access to such less-than-lethal weapons can perversely cause private citizens to use greater defensive force than would otherwise be necessary.

At the other end of the spectrum, we should also be skeptical of claims that semiautomatic rifles belong exclusively to the police. Let me return to then-Vice President Joe Biden's comment that a homeowner should use a double-barreled shotgun, not an AR-15, to defend his home.¹⁵⁷ That firepower may be sufficient against one not-particularly-determined burglar. It would not be adequate for a business owner to secure his business against a riot, particularly where the police are unavailable for an extended period of time. Relatedly, it may not be entirely coincidental that Judge Kenneth Lee authored a Ninth Circuit opinion striking down California's prohibition on large-capacity magazines.¹⁵⁸ Judge Lee grew up in Koreatown in Los Angeles and, during the 1992 riots, personally witnessed the business owners who had defended their property in circumstances where access to a handgun

¹⁵⁵ Teo Armus & Kim Bellware, *St. Louis Couple Point Guns at Crowd of Protestors Calling for Mayor to Resign*, WASH. POST (June 29, 2020, 7:09 PM), <https://www.washingtonpost.com/nation/2020/06/29/st-louis-protest-gun-mayor/> [<https://perma.cc/PZ7Q-2NCS>]; Jeremy Kohler, *The St. Louis Couple Charged with Waving Guns at Protestors Have a Long History of Not Backing Down*, ST. LOUIS POST-DISPATCH (Aug. 19, 2020), https://www.stltoday.com/news/local/metro/the-st-louis-couple-charged-with-waving-guns-at-protesters-have-a-long-history-of/article_281d9989-373e-53c3-abcb-ecd0225dd287.html [<https://perma.cc/529U-XA9G>]. The McCloskeys' claim is controversial. Mark and Patricia McCloskey subsequently pleaded guilty to assault and harassment, respectively, see Mallika Kallingal & Keith Allen, *St. Louis Couple Who Waved Guns at Protestors Last Summer Plead Guilty to Misdemeanor Charges*, CNN (June 17, 2021, 11:08 PM), <https://www.cnn.com/2021/06/17/us/st-louis-mccloskeys-plead-guilty-to-misdemeanors/index.html> [<https://perma.cc/352U-XBPU>], but they were almost immediately pardoned by the governor, see Paul LeBlanc & Keith Allen, *Missouri Governor Pardons St. Louis Couple Who Pointed Guns at Protestors*, CNN (Aug. 3, 2021, 8:35 PM), <https://www.cnn.com/2021/08/03/politics/mark-mccloskey-patricia-mccloskey-pardon/index.html> [<https://perma.cc/7HXQ-PRSC>]. For the sake of illustrating my argument, I will assume that they reasonably believed that the protesters might have been a threat to themselves and their home.

¹⁵⁶ For a case involving the Second Amendment and a ban on stun guns, see *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016), which addressed a Massachusetts law that prohibited private citizens from having stun guns.

¹⁵⁷ *Joe Biden's Tip for Self-Defense: Get a Shotgun*, *supra* note 59.

¹⁵⁸ *Duncan v. Becerra*, 970 F.3d 1133, 1140–41 (9th Cir. 2020), *vacated and reh'g en banc granted*, 988 F.3d 1209 (9th Cir. 2021).

or a taser would have been insufficient and where police protection remained unavailable for days.¹⁵⁹

In sum, we should reject claims that in our modern, urban society the government's monopoly of force is adequate to protect everyone within its jurisdiction. Professional policing has made long strides since the days of incompetent constables, and we may have less need today for citizen's arrests than in centuries past. Yet, underenforcement remains a serious law enforcement problem. The decentralization of violence is by no means a complete fix. But if the government cannot provide adequate protection—and often it cannot—then the least it can do is to allow members of the community to protect themselves and to preserve law and order. Moreover, decentralized law enforcement, unlike hiring more police, may help temper the effects of statutory overcriminalization.

B. The Mismatch Between Public Duties and Private Rights

Let's say someone accepts that underenforcement remains a serious problem. He might object: "Persistent underenforcement just demonstrates that the government needs to provide more law enforcement services. But decentralizing violence is the wrong cure."

Even if the provision of more governmental law enforcement services were the right fix (and I raised doubts about that in Section II.A), our legal system lacks any viable coercive means to compel governments to provide adequate law enforcement services. In technical legal terms, the provision of law enforcement may be a public duty, but it is not a private right. And making it a private right would create profound separation of powers problems.

It is hornbook tort law that individuals lack any private right to adequate police protection. "The usual rule is that public entities are free of all liability for failure to provide police or fire protection, even if that failure was negligent. Similarly, statutes and judicial decisions usually exclude liability for failure to arrest a dangerous person who later harms or kills others."¹⁶⁰

The cases establishing the lack of a private right involve heinous facts and terrible derelictions of police duty. In *Riss v. City of New York*, a man stalked a young woman and threatened to kill or maim her if she did not

¹⁵⁹ See *Korean Federal Judge Helps Strike Down California's Ban on Large-Capacity Magazine*, ASIAN DAWN (Aug. 14, 2020), <https://www.asian-dawn.com/2020/08/15/korean-federal-judge-helps-strike-down-californias-ban-on-large-capacity-magazine-ban/> [<https://perma.cc/NM5N-TZKS>]; Christina Lin, 'When Looting Starts, Shooting Starts,' ASIA TIMES (May 30, 2020) <https://asiatimes.com/2020/05/when-looting-starts-shooting-starts/> [<https://perma.cc/2AMT-NSMY>].

¹⁶⁰ DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 22.10 (2d ed. 2016).

accede to his sexual advances.¹⁶¹ After the woman became engaged to another man, the stalker called her to warn that this was her “last chance.”¹⁶² The woman reported the threat to police and pleaded for protection, but police refused to provide it.¹⁶³ The next morning, someone hired by the stalker threw lye in the woman’s face, blinding her in one eye, damaging her vision in the other, and permanently scarring her face.¹⁶⁴ Only after the disfiguring assault did police provide protection.¹⁶⁵ Despite these facts, New York’s highest court held that the New York City Police Department did not owe the woman any duty of care. The court explained that “[t]he amount of protection that may be provided is limited by the resources of the community and by a considered legislative–executive decision as to how those resources may be deployed.”¹⁶⁶ The dissent noted the “rather bitter irony [that] she was required to rely for protection on the City of New York” because New York law prohibited her from being armed for self-defense, and now that she was injured, the city “denies all responsibility to her.”¹⁶⁷

In *Braswell v. Braswell*, a wife left her husband, a deputy sheriff.¹⁶⁸ When the wife informed her husband she was leaving, “he told her that neither of them was going anywhere and that if he could not have her, nobody could.”¹⁶⁹ The wife had already called the sheriff to express her fear that her husband would kill her and that he had been handling three envelopes in a peculiar manner. She subsequently discovered that the envelopes contained notes, stating, in part, “All I can say is son I loved your mother, and I just couldn’t stand to see her leave me. . . . Please, Mike don’t hold this against me. I know it’s the worst thing any one can do”¹⁷⁰ She reported the “gist” of the letters to the sheriff, who sent two deputies to check on the husband; the deputies “reported that [the husband] appeared neither homicidal nor suicidal.”¹⁷¹ Although the sheriff agreed to have other deputies watch the wife, her husband shot and killed her.¹⁷² The North Carolina supreme court reaffirmed the common law rule that “a municipality and its

¹⁶¹ 240 N.E.2d 860, 862 (N.Y. 1968) (Keating, J., dissenting). The majority left it to the dissent to describe the facts. *See id.* at 860 (majority opinion).

¹⁶² *Id.* at 862 (Keating, J., dissenting).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 860–61 (majority opinion).

¹⁶⁷ *Id.* at 862 (Keating, J., dissenting).

¹⁶⁸ 410 S.E.2d 897, 899 (N.C. 1991).

¹⁶⁹ *Id.* at 900.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 900–01, 904.

agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals.”¹⁷³ The court further found that no exception to the public-duty doctrine applied and that the sheriff’s promise to watch the wife was not specific enough to create a duty.¹⁷⁴

Federal constitutional law recognizes an analogous doctrine: “a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”¹⁷⁵ In *DeShaney v. Winnebago County Department of Social Services*, a father beat his son, causing the boy to suffer permanent and severe brain damage.¹⁷⁶ This came after the county’s department of social services received repeated reports, including from family members and an emergency room, that the father was abusing his son.¹⁷⁷ The county offered voluntary counseling to the father but decided against removing the boy from the home. The Supreme Court held that the county was not liable for a constitutional tort because the Due Process Clause protected only against state deprivations of life and liberty, not those by private parties.¹⁷⁸

Although these cases involve ordinary criminal violence, the public-duty doctrine is not so limited. Courts routinely deny similar claims against governments and their officers for bodily harm and property damaged caused by riots and civil disorder.¹⁷⁹ Analogously, courts generally refuse to compel prosecutors to enforce the law. Decisions whether to make arrests or prosecute are quintessential executive powers, and courts rarely interfere with how the executive branch exercises it.¹⁸⁰

¹⁷³ *Id.* at 901–02.

¹⁷⁴ *Id.* at 902.

¹⁷⁵ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989).

¹⁷⁶ *Id.* at 193.

¹⁷⁷ *Id.* at 192.

¹⁷⁸ *Id.* at 192, 195.

¹⁷⁹ Kuo, *supra* note 122, at 191 n.79 (collecting cases).

¹⁸⁰ See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[As] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion.”); see also Griffin, *supra* note 143, at 275 (“Separation of powers leaves courts reluctant to intrude on executive decisions.”); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 4–7 (2009) (emphasizing the breadth and limited review of prosecutorial discretion); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736–41 (1996) (discussing the largely unsuccessful efforts to impose judicial review on the criminal justice system). For those few areas in which courts will review acts of prosecutorial discretion, see Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1370–72 (1987).

Because of the public-duty doctrine, restrictions on self-defense leave a mismatch between public duties and private rights.¹⁸¹ Even if the government is under a duty to provide police protection to the public, no individual member of the public has a personal legal right to that protection. Thus, if the government refuses to provide adequate preventative policing or to investigate crimes that have occurred, a person cannot go to court and demand that police provide these services.¹⁸² This means that, with respect to contemporary civil disorder, individuals in Portland, Seattle, and other areas where police have pulled back¹⁸³ have no legal recourse to compel police to protect their lives, homes, and businesses. Nor do those people in areas where, in response to public criticism, police refuse to vigorously enforce the law. No one has a private legal right that police do their jobs at all, let alone that they do them well.

In terms of retrospective damages, the public-duty doctrine effectively leaves victims of crimes and civil disorder severely undercompensated. In many cases, victims are unlikely to identify the people causing harm.¹⁸⁴ Even if they do, the perpetrators are likely judgment proof.¹⁸⁵ And the victims have no tort claim against the government for failure to protect. Maybe the victims have insurance, but even this is uncertain.¹⁸⁶ Small business owners may not be able to afford such policies. Insurance policies may also refuse to cover

¹⁸¹ See Alice Marie Beard, *Gay Rights Strengthen Gun Rights*, 57 S. TEX. L. REV. 215, 219 n.37 (2016) (“There is a practical reason for the right to keep and bear arms: Courts have held that neither the state nor the police owe a duty to protect the individual.”).

¹⁸² This is not merely hypothetical. For example, in Asheville, North Carolina police have refused to investigate and respond to certain thefts and assaults because of a staffing shortage. See Thomas Gore, *Asheville Police Suspending Responses to Some Crimes*, FOX CAROLINA (June 2, 2021), https://www.foxcarolina.com/news/asheville-police-suspending-responses-to-some-crimes/article_084cde80-c3e6-11eb-9d29-1ff464f0ed03.html [<https://perma.cc/Z3BZ-HV9H>].

¹⁸³ See *supra* note 127 and accompanying text.

¹⁸⁴ See Note, *Compensation for Victims of Urban Riots*, 68 COLUM. L. REV. 57, 77 (1968) (“[T]he property owner is unlikely to be on the premises to acquire evidence against a possible defendant; in practice the action will probably be limited to those actually apprehended and charged with a criminal violation.”).

¹⁸⁵ *Id.* (“The main defect of a suit against an ordinary rioter is the extreme unlikelihood that the defendant will be able to pay more than a token amount in satisfaction of a judgment.”).

¹⁸⁶ See, e.g., Sam Dean, Laurence Darmiento & Ronald D. White, *Is Looting Covered by Insurance? Depends on the Business*, L.A. TIMES (May 31, 2020, 8:59 PM), <https://www.latimes.com/business/story/2020-05-31/business-insurance-looting-riots> [<https://perma.cc/K8ZR-WU6E>] (discussing property owner concerned about uninsured losses); Caitlin Dickerson, *‘Please, I Don’t Have Insurance’: Businesses Plead with Protestors*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/minneapolis-protests-business-looting.html> [<https://perma.cc/2A76-XWYD>] (same); see also Nellie Bowles, *Abolish the Police? Those Who Survived the Chaos in Seattle Aren’t So Sure*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/08/07/us/defund-police-seattle-protests.html> [<https://perma.cc/YN8Q-KSEW>] (reporting that one business district had \$200 million in losses not covered by insurance).

damages from widespread harm, such as war or civil disorder, or they may only cover part of the losses.¹⁸⁷ So not only can potential victims not compel police to provide protection, but they lack effective redress should they be harmed.

The public-duty doctrine has been subject to severe criticism, and one may object that the public-duty doctrine ought to be abandoned.¹⁸⁸ In fact, in some cases, Anglo-American law has imposed governmental or communal liability for failing to provide adequate protection against violence, especially riots.¹⁸⁹

But overturning the public-duty doctrine raises other profound problems. Decisions about how to enforce the law and allocate police resources are committed to the political branches.¹⁹⁰ Treating government protection as a private right would place judges and juries above elected and appointed officials in determining how many police officers to hire, where to station the officers, which laws to enforce, and when to provide private individuals and businesses with personal protection.¹⁹¹ Indirectly, it may also compel states and local governments to raise taxes so that the government can afford the minimum level of protection that the courts will demand *ex post*.¹⁹²

Alternatively, courts may hesitate to rigorously enforce a private right to police protection, given the uncertainties about how police should be allocated. More likely, they would use a tort remedy to curb the worst abuses, while immunizing officers for normal failures to provide protection.¹⁹³ This would help the extraordinary plaintiffs—those, for example, in *Riss* and *DeShaney*—but it would still leave the vast majority of the population without any effective remedy against the police for failure to provide police protection. And it is unimaginable that courts will second-guess how governments deploy the police and National Guard during civil disorder, when many lives and businesses may be on the line.¹⁹⁴

¹⁸⁷ See *supra* note 186.

¹⁸⁸ See Kuo, *supra* note 122, at 182–83 & n.28 (collecting commentary criticizing the Supreme Court's restrictive reading in *DeShaney*).

¹⁸⁹ *Id.* at 184–205.

¹⁹⁰ See *Riss v. City of New York*, 240 N.E.2d 860, 860–61 (N.Y. 1968).

¹⁹¹ See *id.* at 860–61.

¹⁹² See *id.* (suggesting that court would allocate the limited community resources “without predictable limits”).

¹⁹³ See Sklansky, *supra* note 34, at 1283 (“[J]usticiable standards for the adequacy of public services are hard to find.”).

¹⁹⁴ Cf. *Gilligan v. Morgan*, 413 U.S. 1, 5, 11 (1973) (holding that policy decisions related to how the National Guard is trained and armed for civil disorder were nonjusticiable).

In cases of mob violence, the imposition of governmental liability could also prove highly regressive, further damaging impoverished communities. Many communities in America remain divided along racial, ethnic, and economic lines.¹⁹⁵ The burning of a central business district could result in poor urban residents indemnifying rich and middle-class suburbanites for the losses sustained by their downtown businesses. And even when income does not flow across jurisdictions, a city comprised mostly of impoverished residents would be hard-pressed to use its scarce tax dollars to insure its residents and business owners against the risk of violence. Many such areas have trouble even providing basic governmental services in the first place.¹⁹⁶

Even where “riot acts” exist providing for municipal liability for harms caused by mob violence, state legislatures and courts have frequently cabined the scope of liability. When faced with significant riots, many states have suspended or repealed their riot acts.¹⁹⁷ In New York, for example, legislative suspension occurred “whenever the need for the legislative relief was most pressing.”¹⁹⁸ And where a riot causes widespread economic disruption, liability has been limited to physical damage to property, normally rendering personal injury and economic harm noncompensable.¹⁹⁹ Thus, abrogation of the public-duty doctrine has not reliably solved the undercompensation problem.

The right to use force and the decentralization of executive power fill the gap between public duties and private rights. By decentralizing the means of violence, the Second Amendment allows individual citizens to have the

¹⁹⁵ See, e.g., Richard Florida, *America’s Worsening Geographic Inequality*, BLOOMBERG (Oct. 16, 2018, 9:22 AM), <https://www.bloomberg.com/news/articles/2018-10-16/geographic-economic-inequality-is-growing-in-the-u-s> [<https://perma.cc/TZ8T-FY3M>] (discussing inequality across communities).

¹⁹⁶ See, e.g., Heather Gillers, *For Growing Numbers of Struggling U.S. Cities, the Downturn Has Arrived*, WALL ST. J. (Mar. 3, 2020, 10:16 AM), <https://www.wsj.com/articles/for-growing-numbers-of-struggling-u-s-cities-the-downturn-has-arrived-11583248603> [<https://perma.cc/596J-GFRS>] (reporting an expected decrease in the total general-fund revenue of collected municipalities for fiscal year 2019); Ted C. Fishman, *America’s Next Crisis Is Already Here*, ATLANTIC (May 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/state-and-local-governments-are-plunging-crisis/611932/> [<https://perma.cc/7RMK-JXP8>] (highlighting the detrimental effect of the pandemic on state and local finances); David W. Burns, *The Economy and Cities: What America’s Leaders Are Seeing*, U.S. CONF. MAYORS (Apr. 14, 2020), <https://www.usmayors.org/2020/04/14/the-economy-and-cities-what-americas-leaders-are-seeing/> [<https://perma.cc/PB9V-973J>] (reporting that public services will be affected in about half of all U.S. cities as a result of the COVID-19 pandemic).

¹⁹⁷ *Compensation for Victims of Urban Riots*, *supra* note 184, at 75–76 (finding that New York, California, Illinois, and Louisiana suspended or repealed their riot-damage statutes).

¹⁹⁸ Frank S. Sengstock, *Mob Action: Who Shall Pay the Price?*, 44 J. URB. L. 407, 425–26 (1967).

¹⁹⁹ *Id.* (finding that many states failed to provide compensation for personal injuries); *Compensation for Victims of Urban Riots*, *supra* note 184, at 71–72 (finding that recovery for economic harm is not easily granted).

tools of violence. Armed with such tools, citizens may supplement the government's use of force when that supplementation may be necessary. A government that has no complete monopoly of force has no moral responsibility to extend supplemental police protection or to indemnify citizens for losses caused by other citizens. If governmental protection is inadequate, individuals retain their full self-help remedies. And individuals are not limited merely to self-help. In our system, individuals also have the authority to act on behalf of the state by making arrests and using force to prevent forcible felonies and breaches of the peace. In other words, they may protect not only themselves, but also their communities. This power takes on critical importance when police are unable or unwilling to provide adequate protection during times of civil unrest.

C. *State Agents and the Monopoly of Force*

In this Section, I discuss one final, theoretical problem with the strong monopoly-of-force view. Even if it is true in some abstract sense that “the state” has a monopoly of force, it does not follow that state *agents* are the only people who can exercise force on behalf of the state. To the contrary, private citizens may exercise state power.

The common law has long recognized the power of private citizens to use violence on behalf of the state. Take self-defense for example. English common law did not recognize a clear private right of self-defense for centuries, finally confirming the right in 1532.²⁰⁰ Under early English common law, a person acting in private self-defense needed to secure a pardon from the King.²⁰¹ By the time of the Framing, English common law allowed individuals to use deadly force in self-defense, but scholars dispute whether the common law justified or merely excused individuals who used deadly force for private self-defense.²⁰² In contrast, English law fully justified the use of force to prevent a forcible felony—an act that was taken on behalf of the state.²⁰³ Of course, these categories overlapped; a person

²⁰⁰ Rollin M. Perkins, *Self-Defense Re-Examined*, 1 UCLA L. REV. 133, 137–38 (1954).

²⁰¹ See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 478 (Cambridge Univ. Press 2d ed. 1899).

²⁰² The distinction matters legally because the common law imposed a duty to retreat before acting in excusable self-defense. Scholars have debated whether individuals defending themselves from an attempted murder were justified or excused, and thus, whether they had a duty to retreat before acting in self-defense. Compare Perkins, *supra* note 200, at 139–44 (justified; no duty to retreat), with Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 574–75 (1903) (excused; duty to retreat); see also 4 BLACKSTONE, *supra* note 67, at *183–87 (providing requirements for excusable self-defense upon a “sudden affray”); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1244–46 (2001) (discussing a central distinction between justified and excused self-defense: temporality).

²⁰³ 4 BLACKSTONE, *supra* note 67, at *179–80, *292.

acting to prevent a rape or robbery acted both in personal defense and to prevent a felony. But the common law treated private violence more favorably when it was used on behalf of the public.

Conversely, Anglo-American law traditionally did not treat all violence by state agents as violence on behalf of the state. Peace officers had wide latitude to use force when their actions were authorized by the state.²⁰⁴ But absent statutory immunity, when peace officers acted outside the bounds of their office, they were treated like private trespassers and subject to both tort liability and self-help remedies.²⁰⁵ In essence, the state cut them loose and disclaimed their actions.

Underneath these rules are two important principles. First, even if a state has a monopoly of violence, there is nothing inconsistent about allowing private citizens to exercise that monopoly on behalf of the government. The government's distinctive claim on those subject to its jurisdiction is the duty to have the government's directives obeyed.²⁰⁶ A private citizen enforcing the law consistent with the state's directives is not acting in derogation of the state's monopoly of force.

Second, public law enforcement officers, by virtue of their office, do not have a claim to be acting on behalf of the state at all times. "The state" is an incorporeal entity. Like a corporation, it exercises its power through individual agents. But the mere fact that a state agent performs an act does not mean that the act should be attributed to the state. Agents can exceed or abuse the authority given by their principals. Proper respect for the rule of law recognizes that state agents, no less than private citizens, lack a legitimate claim to exercise the state's monopoly of force when they fail to properly exercise the authority given by the government.

Let me put the matter in more concrete terms. In 2020 when Officer Derek Chauvin knelt on George Floyd's neck until he died, Chauvin exceeded his authority under state law to use deadly force; he had already subdued and handcuffed Floyd, so his continued application of force was not necessary to effectuate Floyd's arrest.²⁰⁷ Because Chauvin's use of force exceeded the bounds of state law, he lost any claim to be exercising the

²⁰⁴ *Id.* at *179–80.

²⁰⁵ See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 51–52 (2018).

²⁰⁶ See MORRIS, *supra* note 36, at 207. Here, Morris is borrowing heavily from Professor Joseph Raz, although Raz's claims about preemptive reasons apply only to legitimate political authorities. See *id.* at 206 & n.83 (quoting JOSEPH RAZ, *THE MORALITY OF FREEDOM* 46 (1986)).

²⁰⁷ See MINN. STAT. § 609.066 (2021) (providing peace officers, in limited cases, with the power to use deadly force to effectuate an arrest).

state's monopoly of force.²⁰⁸ Chauvin became the unlawful aggressor²⁰⁹ (and a jury subsequently convicted him of murder²¹⁰). Should a private citizen have intervened—say he pushed the officer off of Floyd's neck—the private citizen would have had the superior claim to exercise the state's monopoly of force, even though Chauvin wore the badge.

Like actions, omissions are another way in which government officers can lose their claim to be properly exercising the state's monopoly of force. The policy of “the state” is not reducible to the policy of its individual law enforcement officers, including those who hold high office. Consider, for example, recent claims that police and prosecutors have pulled back and are refusing to enforce the law diligently.²¹¹ The state made it unlawful to commit certain crimes, including violence to persons, destruction of property, theft, and rioting. These laws result from a democratic process. Suppose after police refuse to enforce the laws against rioting and looting, private citizens fill the void. As the enforcer of democratically enacted laws, private citizens who enforce these laws have a better claim to be exercising the state's monopoly of force than the police, who are committing nonfeasance.²¹²

Again, we see that the decentralization of force is essential to prevent illegitimate domination by public and private actors. As I explained in the previous Section, individuals lack any effective remedy against police who refuse to enforce the law, and the creation of a judicial remedy would create

²⁰⁸ Cf. *Ex parte Young*, 209 U.S. 123, 159–60 (1908) (“The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”).

²⁰⁹ See *Commonwealth v. Biagini*, 655 A.2d 492, 499 (Pa. 1995) (explaining that a police officer becomes an unlawful aggressor, against whom there exists a right of self-defense, when the officer “unnecessarily uses unlawfully excessive or deadly force”).

²¹⁰ Tim Arango, Shaila Dewan, John Eligon & Nicholas Bogel-Burroughs, *Derek Chauvin Is Found Guilty of Murdering George Floyd*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/chaubin-guilty-murder-george-floyd.html> [<https://perma.cc/E6VL-TC45>].

²¹¹ E.g., Charles Lipson, *The Fiasco of ‘Go Ahead, Break Our Windows’ Policing*, REAL CLEAR POL. (Aug. 13, 2020), https://www.realclearpolitics.com/articles/2020/08/13/the_fiasco_of_go_ahead_break_our_windows_policing__143946.html [<https://perma.cc/VMK3-CME6>] (providing examples where police allegedly held back and arguing that such pullbacks have been harmful to the community).

²¹² To be clear, I am not advocating that private citizens should have the right to enforce any statute on the books that police choose not to enforce. The exercise of prosecutorial discretion partially sets criminal law policy, and unrestrained private enforcement can cause private citizens to act like a shadow government. I delve into this issue more deeply in Section III.B, *infra*.

profound separation of powers problems. Decentralization of force provides an alternative way to bypass executive officers engaged in nonfeasance and malfeasance. When police refuse to stop lawless violence, private citizens can. So even if a state has a monopoly on the legitimate use of violence, nothing inherently requires state officers to exercise the state's monopoly of force. Private citizens may exercise it too.

III. OBJECTIONS AND RESPONSES

The idea that private citizens may legitimately exercise the state's monopoly of force will prompt several objections. I will consider two main objections here, though I have no doubt that more exist.

A. *Private Force and Vigilantism*

The most obvious objection is that this is a call to vigilantism. Private use of force and law enforcement will leave individuals at the mercy of oppressive private actors. Indeed, this is what prompted many in the United States to condemn private police used to suppress labor demonstrations at the end of the nineteenth century.²¹³

To this objection, I have two responses. First, whether private law enforcement and use of force are consistent with the state's use of force depends on how they are employed.²¹⁴ Private use of force may be employed in a manner consistent with the state's objectives and policies or in contravention of them.²¹⁵ This is the difference between Korean business owners banding together with semiautomatic weapons to protect their lives and property and Shays's Rebellion,²¹⁶ in which an armed uprising interfered with the ability of courts to foreclose on indebted property.

Relatedly, one can also distinguish between defensive and offensive force.²¹⁷ Defensive force is the force used to protect against imminent threats to persons and property. Offensive force is the kind of force used to

²¹³ Sklansky, *supra* note 34, at 1213–14.

²¹⁴ David Sklansky, *Private Police & Democracy*, 43 AM. CRIM. L. REV. 89, 96–101 (2006) (discussing private policing as “augmentation, displacement, and transformation” of public policing).

²¹⁵ Cf. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176 (2019) (arguing that prosecutorial power may be employed in a matter that either “achieve[s] a shared goal” or “mak[es] a group of people do what you want”).

²¹⁶ See LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 7–10 (2002).

²¹⁷ This concept is adapted from the distinction between defensive and offensive war. See 3 EMER DE VATTEL, THE LAW OF NATIONS 471 (Béla Kapossy & Richard Whatmore eds., 2008) (1797) (“War is either *defensive* or *offensive*. . . . The object of a defensive war is very simple; it is no other than self-defence: in that of offensive war, there is as great a variety as in the multifarious concerns of nations: but, in general, it relates either to the prosecution of some rights, or to safety.”).

implement policy: for example, retaliating against someone to alter their or their confederates' behavior or usurping the state's role to punish public crimes. African Americans who banded together in the South to protect themselves against unlawful white violence were engaged in defensive violence. The Ku Klux Klan, who used the threat of force to prevent people from voting and who engaged in vigilante violence against those they accused of crimes,²¹⁸ were engaged in offensive violence.

This distinction between offensive and defensive force (or between force consistent with the state's policies and force antagonistic to them) is reflected in historical English law. Under English common law, groups of people armed with unusual weapons might constitute an unlawful assembly.²¹⁹ But an individual could assemble "neighbours and friends in his own house, against those who threaten to do him any violence therein"—that is, to assemble force in private self-defense.²²⁰ And individuals could arm themselves in public with dangerous or unusual weapons "to suppress dangerous rioters, rebels, or enemies" in order "to suppress or resist such disturbers of the peace"—that is, they unquestionably had the right to bear arms to further collective security.²²¹

Returning to the objection, I agree about the dangers of having private citizens engaged in unauthorized offensive force. Again, the distinctive claim of a state on its citizens is a claim to have the state's directives obeyed.²²² When private groups band together in an offensive manner, they are creating a de facto shadow government. Private force can be a political problem not because it is private, but because it becomes the means of imposing illegitimate rule. In other words, offensive force weakens the state's claim to have its directives obeyed. Defensive force does not.²²³

²¹⁸ See Jared A. Goldstein, *The Klan's Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 297 (2018) (listing the purposes of Klan violence during Reconstruction).

²¹⁹ 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 514–15 (John Curwood ed., London 1824).

²²⁰ *Id.* at 489.

²²¹ *Id.*

²²² See *supra* note 206.

²²³ Some decentralization of force in foreign countries reflects the offensive–defensive distinction as well. For example, the Israeli government subsidizes organized security at settlements and kibbutzim (collective, traditionally agrarian communities), but Israel eliminated the Irgun shortly after the state's founding. Compare Elisha Ben Kimon, *IDF to Cut Number of Civilian Guards in Israeli Settlements in West Bank*, YEDIOTH AHRONOT (June 12, 2019, 3:57 PM), <https://www.ynetnews.com/articles/0,7340,L-5524217,00.html> [<https://perma.cc/RD2R-L7SP>] (discussing Israel's support of armed civilian guards at settlements), with Yehuda Lapidot, *The Irgun: The Altalena Affair*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/the-altalena-affair> [<https://perma.cc/Z893-NVGB>] (discussing Israel's refusal to allow the Irgun to act as a parallel army after Israel's independence). Armed security

Second, a government monopoly of force does not guarantee freedom as nondomination. Police paradoxically are “both a guarantor of the security upon which the exercise of liberty depends, and a potent, ever-present threat to those very same liberties.”²²⁴ The protests that consumed America in 2020 derived largely from allegations of police misconduct, and many have adopted the motto “abolish the police.”²²⁵ Presently, a large disconnect has emerged among those who both decry the police and who seek to further restrain guns and the private use of force. Lest we return to a state of nature, someone has to enforce the law and that enforcement must be at adequate levels to provide the public with security. But too much centralization has its own problems. North Korea and China maintain centralized force. They are not governments that we should wish to emulate. Just as vigilantes can abuse the decentralization of force, so, too, can government abuse the centralization of force. Determining the legitimate allocation of force is more nuanced than simply allocating a monopoly to state officials.

Professor Jacob Charles further objects to my argument that private citizens may have a superior claim to exercise executive power on behalf of the state when state officers engage in unlawful misconduct or improperly refuse to enforce laws that they are sworn to uphold. He contends that this claim is insensitive to the realities of racism that pervade modern American society, particularly as they concern stereotypes of criminality in American culture.²²⁶ Decentralization of force, he argues, results in racist vigilantism.²²⁷

Professor Charles, however, fails to explain why decentralized law enforcement by private citizens creates peculiar risks of racist policing. Law enforcement officers are drawn from the same community as private citizens. Social ills that affect the community generally seep into the community’s

organizations at settlements and kibbutzim do not jeopardize the government’s sovereignty in legal and political affairs, even though the organized guards are not comprised of government employees; they are defensive security forces only. The Irgun, in contrast, was a parallel army implementing its own political agenda through offensive military operations. Its abolition at Israel’s founding was necessary to consolidate sovereignty in the new Israeli government and to prevent offensive force unauthorized by that government. See *Irgun Tz’va’I Le’umi (Etzel): Background & Overview*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/background-and-overview-of-the-irgun-etzel> [https://perma.cc/2DHQ-K2LS].

²²⁴ Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEGAL STUD. 323, 325 (2000) (citation omitted).

²²⁵ See generally Sean Illing, *The “Abolish the Police” Movement, Explained by 7 Scholars and Activists*, VOX (June 12, 2020, 11:00 AM), <https://www.vox.com/policy-and-politics/2020/6/12/21283813/george-floyd-blm-abolish-the-police-8cantwait-minneapolis> [https://perma.cc/V3SY-XAYM] (providing different interpretations of the slogan).

²²⁶ 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 51–54), <https://papers.ssrn.com/a=3789216> [https://perma.cc/W4ES-6ACB].

²²⁷ *Id.* (discussing the 2020 murder of Ahmaud Arbery as one such example of this vigilantism).

governmental institutions, including professional police. Racism is no exception.²²⁸ In fact, many of the examples Professor Charles cites as racist policing—the prosecution of Marissa Alexander for firing a warning shot at her estranged husband and the shooting of Philando Castile, who was lawfully carrying a firearm—were undertaken by government officers, not by private citizens.²²⁹ In claiming that decentralized force will result in racist vigilantism, Professor Charles fails to grapple with the extensive critical literature concerning race and professional law enforcement.²³⁰ And he fails to contend with the fact that some of the worst historical discrimination against minorities and disadvantaged groups has been the failure of governments to adequately enforce the law, leaving members of these groups vulnerable to private violence.²³¹

Nor does Professor Charles demonstrate that private citizens' use of force is distinctively problematic compared with that employed by the police. A 2019 study reported that “[p]olice violence is a leading cause of death for young men, and young men of color face exceptionally high risk of being killed by police.”²³² “Black men,” the study concluded, “are about 2.5 times more likely to be killed by police over the life course than are white men,” while “Black women are about 1.4 times more likely to be killed by police than are white women.”²³³ Other psychological studies have found that “the threshold of the certainty of danger that participants required to shoot a black man was significantly lower than the threshold required to shoot a white man” and that “[t]his phenomenon . . . has been empirically demonstrated in acting police officers at rates substantially similar to the general public.”²³⁴ Professor Charles gives us no reason to conclude that private citizens' use of force contains greater racial disparities than that of the police. And Professor Charles does not establish that private citizens are

²²⁸ See Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 214, 243–61 (2019) (collecting examples of actual and alleged overt racist incidents by police and noting that “[i]n 2006, the FBI ‘detailed the threat’ of white supremacist groups infiltrating police departments”).

²²⁹ Charles, *supra* note 226, at 50.

²³⁰ See, e.g., Johnson, *supra* note 228, at 206 n.1 (collecting sources); John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 695 (2014) (“By far the most extensive empirical research demonstrating the effects of implicit racial bias on the American criminal justice system concerns the individuals on its front lines: law enforcement officers. . . . [T]he data consistently demonstrate that police officers stop and search black Americans at disproportionate rates.”).

²³¹ See *supra* notes 123–126.

²³² Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCIS. 16793, 16796 (2019).

²³³ *Id.* at 16794.

²³⁴ Clemons, *supra* note 230, at 695–96.

disproportionately likely to use unjustified force against minorities when engaged in self-defense or law enforcement compared with law enforcement officers. Professor Charles's anecdotes of questionable or illegal uses of force by private citizens could just as easily be matched with anecdotes from professional police.

Finally, in arguing against decentralized force, Professor Charles's argument ignores that private citizens are more accountable under law for improper uses of force. Police officers are clothed with many civil and criminal immunities, including broader arrest authority based on probable cause alone, more power to use force, and qualified immunity for mistaken judgments.²³⁵ Juries also tend to be sympathetic to police when they use force.²³⁶ Other things equal, it is comparatively easier to hold a private citizen civilly and criminally liable for improper force than a law enforcement officer.²³⁷ The decentralization of force is not a license for unrestrained vigilantism.

B. *Private Law Enforcement and the Overenforcement of Criminal Law*

A second objection concerns the tendency of private law enforcement to overenforce our laws. We have moved away from private law enforcement, in part, because private law enforcers tend to enforce the law too stringently.²³⁸ Just because private citizens enforce the laws on the books does not mean that they are not engaged in policy setting through their enforcement decisions.

²³⁵ See *infra* notes 249–251 and surrounding text; *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (analyzing police use of force); see generally John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 82–91 (2017) (analyzing Supreme Court cases involving qualified immunity and police use of force and concluding that the Supreme Court has immunized reckless police conduct); Corinthia A. Carter, Note, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 531–38 (2017) (noting the difficulty in holding officers civilly and criminally liable for improper uses of force).

²³⁶ Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 754 (1993).

²³⁷ See, e.g., Michael Drejka: “Wannabe” Cop Jailed for Parking Spot Murder, BBC (Oct. 10, 2019), <https://www.bbc.com/news/world-us-canada-50005833> [<https://perma.cc/M7P6-XZT3>] (describing a conviction of a private citizen for manslaughter for unnecessary use of deadly force after defendant confronted the victim's girlfriend about whether she had violated handicapped parking restrictions). In that case, the sheriff's office initially did not press charges. *Man Won't Be Charged in Deadly Shooting over Parking Spot Due to Florida's 'Stand Your Ground' Law*, ABC NEWS 7 (July 23, 2018), <https://abc7.com/florida-markeis-mcgllockton-news-drejka/3809824/> [<https://perma.cc/6B9M-3P7L>]. But that was an error in the application of the state's stand your ground law, not a defect of the law itself.

²³⁸ See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 725–26 & n.174 (2004) (referencing historical criticism of *qui tam* statutes).

There is no easy answer to this objection. Earlier, I suggested that private citizens have a legitimate claim to exercise state power when they enforce the law and state agents refuse. I now need to qualify that claim. I do not want to suggest that private citizens should have the unqualified right to enforce any criminal law on the books. Although police agencies may underenforce the law, we simultaneously suffer from statutory overcriminalization. The result is that de facto criminal law—the criminal law enforced on the streets—is not really statutory. Instead, our criminal law remains primarily a common law system, and as a society, we expect executive officers to set their enforcement decisions around local and national customs.²³⁹ As Professor Kevin McMunigal explains, “[T]he distribution of power in regard to criminal lawmaking is considerably more complex and nuanced than the notion of legislative supremacy indicates and that all three branches of government exercise power in shaping criminal law.”²⁴⁰

I maintain the distinction I set out earlier: private law enforcement becomes problematic when citizens use their private enforcement power to usurp the state’s role in setting criminal justice policies, but it is not inherently problematic for private citizens to enforce the law consistent with the state’s established policies. My response to this objection, therefore, is to deny that we can draw this line formalistically based on statutory law. We affirmatively want some statutory law to go unenforced or to be underenforced. Thus, private citizens should not be engaged in private law enforcement simply because the government decides not to enforce a particular statutory law.

To give examples, the speed limit on our superhighways is often fifty-five miles per hour, Wisconsin law makes adultery a felony,²⁴¹ and federal law prohibits medical marijuana.²⁴² As a society, we have decided that we do not want government officials enforcing these laws, even as we have failed to repeal them. We narrow overbroad statutory criminal law through, among other things, legislative decisions (e.g., how we fund law enforcement and legislative oversight of the executive branch), elections of executive

²³⁹ For my full argument on this point, see Robert Leider, *The Modern Common Law of Crime*, 111 J. CRIM. L. & CRIMINOLOGY 407, 437–53 (2021).

²⁴⁰ Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U. L.J. 1285, 1293–94 (2004).

²⁴¹ WIS. STAT. § 944.16 (2021).

²⁴² 21 U.S.C. §§ 812, 844.

officials, and jury trials (or plea bargaining under the threat of jury trials).²⁴³ Many of these institutional arrangements do not constrain private law enforcement. Yet, private citizens enforcing such laws would be no less problematic.

In the mine-run of cases where citizens use force on behalf of the state, the distinction between the technical statutory criminal law and the “real” criminal law does not matter. Many cases involve protecting core private rights: life, liberty, bodily integrity, and property.²⁴⁴ Traditional common law crimes—for example, murder, rape, robbery, arson, burglary, false imprisonment, riot, and theft—invade these interests, and these are the kind of crimes that we expect the government to prosecute in all (or nearly all) cases where the perpetrators can be found. So, the friction between public and private force in such cases is likely to be minimal.

Private citizens, however, sometimes go further by enforcing *mala prohibita*²⁴⁵ and regulatory crimes. The “Minuteman Project,” for example, placed armed civilians on the border to curb illegal immigration.²⁴⁶ The federal government lacks the resources to prevent many illegal border crossings,²⁴⁷ and undocumented labor forms an important part of our national economy.²⁴⁸ So we tolerate some illegal immigration (the DREAMers are a paradigmatic example). Complete enforcement of immigration laws would be a major policy change, one that the government should have to make.

So where, *exactly*, is the line? I cannot fully answer the question here. From custom and tradition, we know which crimes commonly get enforced

²⁴³ Leider, *supra* note 239, at 453–75; Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 256 (2007); Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 NAT’L INST. JUST., CRIM. JUST. 2000, at 81, 91–96 (Charles M. Friel ed., 2000); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789–93 (1999).

²⁴⁴ For background on core private rights, see Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007).

²⁴⁵ *Mala prohibita* crimes are those that are made wrong only because a statute prohibits them, in contrast to *mala in se* crimes (e.g., murder and robbery) that involve inherent wrongdoing. See, e.g., BLACKSTONE, *supra* note 67, at *54–55; 4 *id.* at *8; Note, *The Distinction Between “Mala Prohibita” and “Mala in se” in Criminal Law*, 30 COLUM. L. REV. 74, 74 (1930).

²⁴⁶ Lourdes Medrano, *What Happened to Minuteman Project? It’s Still Roiling Immigration Reform.*, CHRISTIAN SCI. MONITOR (Apr. 30, 2014), <https://www.csmonitor.com/USA/2014/0430/What-happened-to-Minuteman-Project-It-s-still-roiling-immigration-reform> [<https://perma.cc/QAM9-PXKB>].

²⁴⁷ Memorandum from Hans von Spakovsky & Charles Stimson, Heritage Found., *Enforcing Immigration Law: What States Can Do to Assist the Federal Government and Fight the Illegal Immigration Problem 2* (Oct. 8, 2019), https://www.heritage.org/sites/default/files/2019-10/LM254_0.pdf [<https://perma.cc/3FC2-6JHS>].

²⁴⁸ David Becerra, David K. Androff, Cecilia Ayón & Jason T. Castillo, *Fear vs. Facts: Examining the Economic Impact of Undocumented Immigrants in the U.S.*, 39 J. SOCIO. & SOC. WELFARE 111, 123–24 (2012) (collecting studies).

and which go totally or partially unenforced, even if we have no formal compilation of them. Private law enforcement—like its public counterpart—must be limited to enforcing those crimes that we would expect the government to enforce. I do not purport to give a comprehensive list, but I will say that private enforcement becomes increasingly problematic when we move beyond core *mala in se* crimes recognized at common law to broad statutory offenses that are *mala prohibita*.

Finally, I will note that while our legal system has decentralized law enforcement, various legal doctrines help contain the potential externalities caused by excessive decentralized force. Under modern common law, private citizens, when making a warrantless felony arrest, remain strictly liable whether a felony was, in fact, committed, and the power of private citizens to make warrantless misdemeanor arrests is often limited to breaches of the peace committed in their presence.²⁴⁹ An erroneous decision can expose a private citizen to significant civil or criminal liability.²⁵⁰ In contrast, public officers may act on probable cause alone, and, subject to the law of their jurisdiction, they have more power to make misdemeanor arrests, including for any offense committed in their presence.²⁵¹ Likewise, criminal law often gives law enforcement more power to use force than private citizens when engaged in law enforcement.²⁵² The more stringent rules applied to private citizens make it practically irrational for them to engage in free-floating law enforcement. Private citizens have nothing to gain by privately enforcing laws in which they have no personal interest and a substantial amount they can lose.

In sum, I do not deny that unrestrained decentralization of force and executive power can create vigilantism no less oppressive than that caused by excessive monopolization. A well-run political community checks excesses from both directions.

CONCLUSION

In federalizing the government, splitting control over the armed forces, and protecting the right of the people to keep and bear arms, the Framers made a conscious decision to decentralize the right to use force. That

²⁴⁹ See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 94 (2d ed.), Westlaw (database updated June 2021); 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 10.7(a) (3d ed. 2020).

²⁵⁰ See *supra* note 249.

²⁵¹ See LAFAVE, *supra* note 249, § 10.7(a); *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (upholding the constitutionality of a warrantless arrest by an officer for a seatbelt violation punishable only by a fine).

²⁵² LAFAVE, *supra* note 249, § 10.7(a).

decision retains its vitality today. Even with the rise of professional police and soldiers, the government does not supply the full quantity of law enforcement and security services that the public needs. And while today's soldiers and police officers are better trained and more competent than those of centuries ago, problems caused by rogue officers and policymakers remain. Decentralization of force remains an important tool to prevent private and public domination by those acting outside the law. In a legal system where the supply of police is inadequate to meet demand and where no one has an enforceable private right to police protection, the government has a duty to allow self-help and the means of self-help. The right is especially important during times of civil unrest when the government may be unable or unwilling to provide security. And the right to bear arms is still about more than just individual self-defense. When individuals bear arms, they also exercise force on behalf of the community. Professional police and soldiers may have reduced the need for private law enforcement, but they have not rendered the original Second Amendment obsolete.