

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2021

Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground: A Reply to Joseph Blocher, Samuel W. Buell, Jacob D. Charles, and Darrell A.H. Miller, *Pointing Guns*, 99 Texas L. Rev. 1173 (2021)

Kimberly Kessler Ferzan

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Criminal Law Commons](#), [Criminology and Criminal Justice Commons](#), and the [Law and Society Commons](#)

Repository Citation

Ferzan, Kimberly Kessler, "Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground: A Reply to Joseph Blocher, Samuel W. Buell, Jacob D. Charles, and Darrell A.H. Miller, *Pointing Guns*, 99 Texas L. Rev. 1173 (2021)" (2021). *Faculty Scholarship at Penn Law*. 2704.
https://scholarship.law.upenn.edu/faculty_scholarship/2704

This Response or Comment is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

Texas Law Review Online

Volume 100

Response

Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground: A Reply to Joseph Blocher, Samuel W. Buell, Jacob D. Charles, and Darrell A.H. Miller, *Pointing Guns*, 99 TEXAS L. REV. 1173 (2021)

Kimberly Kessler Ferzan[†]

Introduction

In *Pointing Guns*,¹ Joseph Blocher, Sam Buell, Jacob Charles, and Darrell Miller present a disturbing challenge for criminal law and for society at large. People keep pointing guns at each other. These gun brandishings may be illegal assaults or legal acts of self-defense. It is hard *ex post* to determine the difference, and *ex ante* it may be difficult even for the gun owners themselves to discern whether their conduct is impermissible.

[†] Earle Hepburn Professor of Law and Professor of Philosophy, University of Pennsylvania. I thank Sam Buell for discussion and Maggie Sawin for excellent research assistance.

1. Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEXAS L. REV. 1173 (2021).

This paper is an excellent piece of legal scholarship on a pressing social phenomenon that has received neither the scholarly nor the practical attention that it deserves. Still, the authors' reliance on stand your ground laws as a pivotal part of the problem misunderstands two aspects of the gun debate.

First, retreat rules, and the exception created by stand your ground laws, are only triggered when deadly force is used. But pointing a gun may not be deadly force in the applicable jurisdiction. The fact that whether the gun display is deadly force often turns on the mental state of the weapon wielder means there is even greater ambiguity with respect to how to understand what a gun display means, particularly for the person at the other end of the raised gun. And, decision makers will face even more difficult inquiries in assessing the legality of the brandishing *ex post*. More fundamentally, however, society needs to ask whether we truly think that pointing a gun is no more problematic than throwing a punch.

Second, citizen's arrest provisions exacerbate the gun-display problem. Stand your ground laws effectively allow citizens to act like law enforcement does, as law enforcement has never been required to retreat.² But little known and even less understood citizen's arrest provisions give citizens the power to effectuate arrests; some jurisdictions even authorize the use of deadly force. Given current debates aiming to curb policing, one might expect citizen's arrest to fill the lacuna and the gun-pointing problem to become even more significant. Indeed, the shift in cultural norms is moving from citizen defense to citizen offense. It is this cultural norm, and the laws that enable it, that cry for immediate attention.

This Reply proceeds in three parts. First, I briefly review the authors' arguments as to the legal ambiguities with respect to pointing guns, the law and rhetoric that may inhibit potential reform, and the proposed solutions to this problem. Second, I problematize the authors' reliance on stand your ground laws as a primary culprit in this debate, as stand your ground laws are only applicable if pointing a gun is seen as deadly force. Instead, I contend that we have a more fundamental issue with how we view the pointing of a gun in the first place. Third, I argue that far from the law of defense creating the ambiguity, it is actually aggression—namely, aggression in the name of the state as a citizen's arrest—that presents the most vital need for reform.

2. Kimberly Kessler Ferzan, *Stand Your Ground*, in Larry Alexander and Kimberly Kessler Ferzan, eds., *THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW* 731, 742 (2019) (arguing that “what SYG laws do is essentially turn citizens into law enforcement” because “[l]aw enforcement officers are limited by proportionality and necessity, but they are not required to retreat”).

I. The Gun-Pointing Problem

The authors begin with compelling examples of how problematic gun displays can be, from shoppers at a Walmart in Florida who pulled a gun to the St. Louis couple who displayed a semiautomatic rifle and pointed a handgun at demonstrators.³ Although these cases became national news, they reveal something broader: most gun violence does not cause injury. As the authors note, “The vast majority of legally relevant gun-related activity, whether salutary, benign, or unwelcome, does not involve pulling a trigger.”⁴ Indeed, there is an extraordinarily wide gap between the number of self-reported defensive gun uses and the number of gun incidents that cause injury.⁵ People may be pointing guns all over the place, and the law is not picking up these cases.

The authors’ concern, however, is not that we are not empirically counting these incidents; it is that we do not know whether they are crimes. A gun owner may believe she successfully defended herself, but the person on the other end of the gun may believe he was assaulted.⁶ Psychological studies give further reason to worry, as they point to the likely racialized distributional effects as well as the increase in aggression when guns are present.⁷

The authors then contend that the criminal law fails to give appropriate guidance. To understand how the criminal law operates, the authors look to the law of Florida, Michigan, Missouri, and Texas, three of the four of which being the jurisdictions in which the events in the introduction took place. In the first instance, the criminal law does seem to declare pointing a gun at someone a crime.⁸ But whatever clarity offense definitions give, this resolution is soon lost once we turn to self-defense.

With respect to self-defense, the authors gesture at the general requirements before identifying the culprit in each jurisdiction as stand your ground laws.⁹ Each jurisdiction allows the defender to remain where she has a right to be, rather than requiring her to retreat.¹⁰ The authors contrast this stand your ground position with the Model Penal Code’s requirement of retreat.¹¹ The permissiveness of self-defense in these states, both because of stand your ground and because self-defense only requires that actors reasonably believe

3. Blocher, *supra* note 1, at 1173–74.

4. *Id.* at 1176.

5. *Id.* at 1178.

6. *Id.* at 1178–79.

7. *Id.* at 1179–82.

8. *Id.* at 1182–85 (concluding that many gun pointings do constitute assault but noting ambiguity in the statutes).

9. *Id.* at 1185–88.

10. *Id.* at 1186–88.

11. *Id.* at 1188.

that force is necessary,¹² combined with the requirement in each state that the government *disprove* self-defense beyond a reasonable doubt,¹³ leads the authors to conclude that any gun pointing, with a plausible claim of self-defense, is unlikely to lead to criminal liability.¹⁴ And, enforcement bias compounds the likely racialized effects.¹⁵ Criminal law offers nothing but “thin and blurry” answers.¹⁶

The authors then turn to the Second Amendment. After surveying the case law, they conclude that even under the robust gun ownership protections provided by current jurisprudence, there is still room for regulating pointing a gun at someone.¹⁷ Still, the authors suggest that the rhetorical power of the Second Amendment pervades the wider gun debate.¹⁸ Generally, people associate their guns with the right to protect themselves, a right they deem enshrined in the Constitution.¹⁹

What can be done? The authors are skeptical that we can reform criminal law statutes, though there is some hope that specifying clear rules, like the ones considered in the policing context, may be better than broad standards.²⁰ The authors suggest that private business owners can be encouraged to engage in greater regulation.²¹ Finally, the authors suggest battle: to wage war directly on the content of the social norms of how gun owners may display their weapons.²² The authors believe there is some room for law to play a role in shaping those norms.²³

Although the authors discuss a troubling problem, one might identify the primary “villain” of their narrative as stand your ground laws. These laws are typically thought to be the handiwork of the National Rifle Association as it seeks to enshrine stronger gun rights.²⁴ To the NRA, then, the emboldenment of gun usage may be a feature, not a bug.

12. *Id.* at 1188–89.

13. *Id.* at 1188.

14. *Id.* at 1190.

15. *Id.*

16. *Id.*

17. *Id.* at 1191–94.

18. *Id.* at 1194–98.

19. *Id.* at 1195–98.

20. *Id.* at 1198.

21. *Id.*

22. *Id.* at 1199.

23. *Id.* at 1200.

24. Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 UNIV. MIA. L. REV. 827, 836–40 (2013) (discussing the NRA’s “pivotal role” in Florida and how it used Florida as a “launching pad” for nationwide legislation); Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J. L. ECON. & POL’Y 331, 343 (2006) (noting Florida’s stand your ground law “is part of an established trend in the U.S., and the NRA is working to keep the trend rolling”).

My worry, however, is that this is not a story about stand your ground. Stand your ground is ultimately beside the point. The questions are far more fundamental. First, how do we conceptualize what kind of force it is to point a gun at another? That is, even defensively, what does it mean to display a gun? Second, as citizen's arrest cases are percolating to the surface of our public consciousness, we need to stop worrying about the people who only use guns on the defense and start thinking about how the law is authorizing civilian gun usage to go on the offense.

II. Is Pointing a Gun Deadly Force?

Stand your ground is only the problem if the actors are using deadly force. If pointing a gun is nondeadly force, then retreat is never required.²⁵ If retreat is not required, then stand your ground, which eliminates the duty to retreat before using deadly force,²⁶ never comes into play.

Three of the authors' four states would place displaying a gun on the nondeadly side of the divide. In Florida, "the mere display of a gun, or even pointing a gun at another's head or heart without firing it, is not deadly force as a matter of law."²⁷ It is only deadly force when the natural, probable, and foreseeable consequences of the defendant's actions are death, and only discharging a firearm has been held to meet that standard as a matter of law.²⁸ Michigan concurs. "A *threat* of deadly force is itself *nondeadly* force."²⁹ This includes brandishing a weapon.³⁰ Texas, too, treats displaying a gun as potentially nondeadly force. "[A] threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force."³¹ Only Missouri disagrees. Brandishing a deadly weapon is deadly force because "the risk of death or

25. WAYNE R. LAFAVE, CRIMINAL LAW 578 (5th ed. 2010) ("It seems everywhere agreed that one who can safely retreat need not do so before using nondeadly force.").

26. *Id.* (noting "the question of the duty to retreat is a problem only when deadly force is used in self-defense").

27. *Copeland v. State*, 277 So. 3d 1137, 1140, 1142 (Fla. Dist. Ct. App. 2019) (quoting *Jackson v. State*, 179 So. 3d 443, 446 (Fla. Dist. Ct. App. 2015)) (finding the defendant was entitled to a nondeadly force instruction when he pointed the gun at the victim ostensibly to deter the victim from continuing to pursue him in a road rage incident).

28. *Id.* at 1140–41 (citing *Cruz v. State*, 971 So. 2d 178, 182 (Fla. Dist. Ct. App. 2007)).

29. *People v. Ra*, No. 343202, 2019 WL 3941490 at *3 (Mich. Ct. App. Aug. 20, 2019) (*per curiam*).

30. *Id.* at *4.

31. TEX. PENAL CODE § 9.04.

serious physical harm is significantly elevated when one of the parties to an angry confrontation displays a handgun.”³²

It should be apparent how extremely difficult a public policy question this is. Indeed, while the Model Penal Code agrees with Florida, Michigan, and Texas (or they agree with it), the Restatement (Third) of Torts has just taken the opposite position. Model Penal Code section 3.11(2) claims that a gun display is not deadly force—“so long as the actor’s purpose is limited to creating an apprehension that he will use deadly force if necessary.”³³ That is, the law says that pointing a gun may be no different than pushing one’s alleged assailant. In contrast, the Restatement (Third) of Torts recently parted ways with the Restatement (Second), rejecting that threatening to use greater force would constitute nondeadly force.³⁴ The drafters reasoned that (1) the rule is difficult for fact finders to apply as it is difficult to know whether the defender only intended to discourage the aggressor, (2) it might encourage this kind of nondeadly force instead of a lesser available means, and (3) authorizing deadly weapons could lead to an escalation in violence.³⁵

This disparate treatment means that there is uncertainty at the core of gun usage. There is the uncertainty for the person at the other end of the barrel as to what the actor intends. There is uncertainty for law enforcement, prosecutors, and juries *ex post*. But more fundamentally, we as a society do not know what it means to point a gun in self-defense.

This question is both normative and empirical and likely turns on the “typical case” that opponents and proponents imagine. If one believes that the typical defensive gun use is done by the small woman who is then able to ward off an attacker, one will think that this option should be readily available to her without the limitations placed on deadly force. She is merely shooing them away. If one believes that the typical defensive action is actually an inaccurate racist assessment that a black male poses a threat, then one is far more likely to classify this as deadly force. Though one could simply ask how frequently pointing a gun ends with firing that gun, unfortunately this issue is not simply a matter of getting the facts right. People’s views are more keyed to their cultural constructs than to the data.³⁶ And, even if we had the data and the error rates, the question of what a fair distribution of errors is

32. *State v. Endicott*, 600 S.W.3d 818, 825 n.2 (Mo. Ct. App. 2020) (quoting *State v. Parkhurst*, 845 S.W.2d 31, 36 (Mo. banc 1992)).

33. MODEL PENAL CODE § 3.11(2).

34. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 22 cmt. i (AM. L. INST., Tentative Draft No. 6, 2021).

35. *Id.*

36. Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1317 (2003) (“Once the contribution of cultural orientations is exposed, it becomes clear that those involved in the gun control debate aren’t really arguing about whose perception of risk is more grounded in empirical reality; they are arguing about what it would *say* about our shared values to credit one or the other side’s fears through law.”).

raises a normative question, not an empirical one.³⁷ Ultimately, we need consensus on just how serious it is to point a gun at someone.

III. Citizen's Arrest, not Stand Your Ground

Even if we understand how guns are used defensively, we need to recognize that the highwater mark of gun usage is not stand your ground. Stand your ground laws have been subject to sustained criticism. To be fair, the jury is still out on some of the central critiques. Although some argue that stand your ground laws embolden white men to attack black men, other studies find no such effects.³⁸ And, while some argue that stand your ground engrains masculine norms, others contend it levels the playing field for women.³⁹ Indeed, even the authors' harkening back to the "true man" defense as having "gendered normative significance" misses the fact that "true men" were not manly men but blameless ones.⁴⁰ Perhaps the greatest red herring is that stand your ground played a key role in the George Zimmerman case.⁴¹ The problem was not the stand your ground law, given that under Zimmerman's account, he could not safely retreat.⁴² The problem was that the court never gave an initial aggressor instruction that Zimmerman's behavior provoked the

37. Cf. Renée Jorgensen Bolinger, *Reasonable Mistakes and Regulative Norms: Racial Bias in Defensive Harm*, 25 J. POL. PHIL. 196, 211 (2017) ("When the standards determining which mistakes are 'reasonable' are partially shaped by racial bias, use of a reasonable belief standard forces an already vulnerable minority to face increased risk of harm so that others can reduce their own risks. This is unjust in two distinguishable ways: (i) it imposes unfair risk of suffering serious harm on the minority, and (ii) it treats them as moral inferiors by refusing to acknowledge bias-driven harms to them as violations of their rights.").

38. Compare Lave, *supra* note 24, at 850–54 ("Florida has a particularly ugly history of extrajudicial killings of African Americans, and *Stand Your Ground* continues that legacy."), with Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws and Homicides* (IZA Discussion Paper No. 6705, 2012), <https://ssrn.com/abstract=2114885> [<https://perma.cc/UR6M-YEB4>] (finding that stand your ground laws increase homicide among white males but finding no similar increase in the killing of black men).

39. Compare Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 UNIV. MIA. L. REV. 1099, 1127 (2014) (arguing "Stand Your Ground re-entrenches gender norms to restrain women's use of force even as men's use of force expands"), with Alicia M. Kuhns, *Why Maryland Should Stand Its Ground Instead of Retreat*, 48 UNIV. BALT. L.F. 17, 24 (2017) (arguing duties to retreat can harm women).

40. Compare Blocher, *supra* note 1, at 1187 n.79, with RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 9 (1991) (tracing this original understanding to Sir Matthew Hale).

41. See Cynthia V. Ward, "*Stand Your Ground*" and *Self-Defense*, 42 AM. J. CRIM. L. 89, 92 (2015) (noting the misplaced blame placed on stand your ground in the aftermath of the killing of Trayvon Martin).

42. See Ferzan, *supra* note 2, at 746 n.1; Franks, *supra* note 39, at 1104–05.

violence in a way that forfeited his defensive rights, even in a stand your ground jurisdiction.⁴³

Stand your ground also seems theoretically misunderstood at times. Although it might be thought to abandon proportionality,⁴⁴ it does not do so. Deadly force is only authorized against some types of threats.⁴⁵ Similarly, the claim that stand your ground laws abandon necessity is overinclusive as well.⁴⁶ The defender is not permitted to use deadly force if nondeadly will do. Rather, the only thing that stand your ground does (with respect to substantive self-defense) is to eliminate the requirement to retreat. Just as law enforcement does not need to retreat, neither do citizens in stand your ground jurisdictions.

Elsewhere, I have argued that this transformation of citizen into cop is practically redundant because little-known citizen's arrest laws already do just that.⁴⁷ But here I want to suggest that what we see percolating to the top of the cultural conversation is not the language of defense—it is the language of aggression. Citizens' arrests, and more generally the idea of using violence *in the name of the state*, is where the action is. And, the laws governing citizen's arrest further muddy the waters with respect to the criminal law while simultaneously the rhetoric of citizen's arrest is giving far more robust support for gun usage than self-defense does.

Let's return to the authors' four jurisdictions. In Florida, a private citizen can arrest a person who commits a felony or breach of peace in their presence, or if the arresting citizen has probable cause to believe, and does believe, the person arrested to be guilty of a felony or breach of peace.⁴⁸ A “breach of the peace” includes any action that “threatens the public security and involves violence,”⁴⁹ including drunk driving on a sparsely populated road.⁵⁰ Michigan also authorizes citizen's arrest for felonies:

“A private person may make an arrest—in the following situations:

43. Ferzan, *supra* note 2, at 746 n.1; *see generally* Kimberly Kessler Ferzan, *Provocateurs*, 7 CRIM. L. & PHIL. 597 (2013) (explaining how those who pick fights lose defensive rights).

44. *See* Heidi M. Hurd, *Stand Your Ground*, in THE ETHICS OF SELF-DEFENSE 254, 259 (Christian Coons & Michael Weber eds., 2016) (arguing in favor of such laws and against the “proportionality principle”).

45. Ferzan, *supra* note 2, at 742 (demonstrating that Florida law does not abandon proportionality).

46. *Id.* at 736 (explaining that stand your ground laws accept necessity limitations).

47. *Id.* at 743 (“The bottom line is that if someone is shooting at you in Florida, you are permitted to shoot him if necessary to effect an arrest, and when you are arresting, you are never required to retreat. Indeed, you can shoot the person in the back as he is running away if that is the only way to prevent his escape.”) (citation omitted).

48. *State v. Price*, 74 So. 3d 528, 530 (Fla. Dist. Ct. App. 2011); *Edwards v. State*, 462 So. 2d 581, 582 (Fla. Dist. Ct. App. 1985).

49. *State v. Furr*, 723 So. 2d 842, 845 (Fla. Dist. Ct. App. 1998) (quoting *City of Waukesha v. Gorz*, 479 N.W.2d 221, 223 (Wis. Ct. App. 1991)).

50. *Id.* at 845.

(a) For a felony committed in [his] presence; (b) [i]f the person to be arrested has committed a felony although not in [his] presence.”⁵¹

This includes using deadly force to prevent the escape of nondangerous felons.⁵² In Missouri, “[a] private citizen may arrest on a showing of the commission of a felony and reasonable grounds to suspect the arrested party, to prevent an affray or breach of the peace, and for a misdemeanor if authorized by statute.”⁵³ Among the behaviors that count as breaches of the peace is the use of “fighting words” in an angry manner, that is, calling someone a “son-of-a-bitch.”⁵⁴ In Texas:

“(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.”⁵⁵

Ultimately, in Texas, a citizen can make an arrest for a felony committed in their view or for a misdemeanor in their presence where the “evidence shows that the person’s conduct poses a threat of continuing violence or harm to himself or the public.”⁵⁶

More generally, it is important to appreciate the full scope of these laws. Joshua Dressler notes that there is a broad minority rule for crime prevention under which private persons are permitted to use deadly force to stop the commission of any felony.⁵⁷ He notes “an undesirable anomaly: If a defendant kills an intended thief, she may avoid conviction if she claims the defense of crime prevention, but may be convicted of murder if she raises a defense-of-property claim.”⁵⁸

The rules for citizen’s arrest, particularly for using deadly force, are different than those for police. In many jurisdictions, a felony must really have occurred; if not, probable cause isn’t going to cut it.⁵⁹ Moreover, in many

51. MICH. COMP. LAWS ANN. § 764.16 (West 1988).

52. *People v. Couch*, 461 N.W.2d 683, 687 (Mich. 1990). The court noted, “The Legislature is presumed to have accepted the then-existing common-law rule that ‘[a]ny private person (and *a fortiori* a peace-officer) [may arrest a fleeing felon] . . . and if *they kill him*, provided he cannot otherwise be taken, it is justifiable” *Id.* at 686 (citations omitted; emphasis in original).

53. *State v. Devlin*, 745 S.W.2d 850, 851–52 (Mo. Ct. App. 1988).

54. *State v. Parker*, 378 S.W.2d 274, 283 (Mo. Ct. App. 1964) (“Again according to his testimony, he had used the words ‘son-of-a-bitch’ in an angry manner. We are not an authority on whether ‘swearing’ is considered by the general public to consist only in taking the Lord’s name in vain. Certainly in Southern Missouri the words ‘son-of-a-bitch’ when used in an angry manner are considered as ‘fighting words’ and a breach of the peace likely to produce a more violent breach.”).

55. TEX. CODE CRIM. PROC. ANN. art. 14.01 (West 2015).

56. *Miles v. State*, 241 S.W.3d 28, 42 (Tex. Crim. App. 2007).

57. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 280 (2009).

58. *Id.*

59. Thomas J. Griffin, Annotation, *Private Person’s Authority, in Making Arrest for Felony, to Shoot or Kill Alleged Felon*, 32 A.L.R.3d 1078 § 6 (1970) (listing jurisdictions that require actual commission).

jurisdictions, the victim must have been the one to commit the felony.⁶⁰ Typically, the citizen must say that he is arresting and give some notice.⁶¹ And in many jurisdictions, the felony must be serious.⁶² That said, constitutional limitations on the use of force by police officers have no purchase on the use of force by private citizens; this will be a matter of common law and statutory provisions.⁶³

The bottom line is that when you are arresting, you are never required to retreat. Indeed, you can shoot the person in the back as he is running away if that is the only way to prevent his escape. To appreciate the full scope of this permission, consider *Nelson v. Howell*,⁶⁴ a civil action brought by the alleged felon to recover damages after he was shot in the back when he tried to flee his burglary.⁶⁵

The appellee is the owner of a seafood store in a shopping center. He knew the appellant well and suspected the appellant of being the person who had broken into the store on several occasions.

....

The [appellant ran and the] appellee gave chase and grabbed a gun as he left the rear of the store. The appellant went out the back door with the appellee following him and yelling at him to stop or that he would shoot. The appellee fired a warning shot and then, realizing that he was not going to be able to catch up with the appellant on foot, fired his gun and shot the appellant in the back.

60. *Id.* § 7.

61. *Id.* § 9.

62. *Id.* §10; *see, e.g.*, *Commonwealth v. Chermansky*, 242 A.2d 237, 240 (Pa. 1968) (holding that citizen's arrest with deadly force is "justified only if the felony committed is treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, common law burglary, kidnapping, assault with intent to murder, rape or rob, or a felony which normally causes or threatens death or great bodily harm").

63. *See, e.g.*, *People v. Couch*, 461 N.W.2d 683, 687 (Mich. 1990). The Supreme Court of Michigan noted:

Stated otherwise, it is hard to conceive of an issue more demanding of public debate and the give-and-take of the legislative process than whether the citizens of Michigan are willing to assume the risk that certain criminals should remain at large rather than be subjected to the risk of harm at the hands of their victims. The clear question of policy, whether police officers or citizens should be subject to *criminal* liability for the killing of a nondangerous fleeing felon, is one for the Legislature, not this Court.

Id.

64. 455 So. 2d 608 (Fla. Dist. Ct. App. 1984).

65. *Id.* at 608–09.

The trial judge entered a summary judgment for the appellee, ruling that a private citizen has a common law right to arrest a person who commits a felony against him and in his presence and thus is justified in using whatever force is necessary to effectuate such an arrest. We agree with the statement of law, but disagree with the trial judge's tacit ruling that, as a matter of law, force was necessary in this case.⁶⁶

Bottom line: reversible error. This had to go to the jury on the question of necessity. *But a trial court judge thought this clearly was necessary as a matter of law.* The authorization of force is extraordinary.

While these laws have lurked in the background unchanged,⁶⁷ the kind of authorization they provide is becoming far more public. Recent gun incidents tell us that citizens are no longer thinking that they may just defend themselves. Instead, they intend to take the fight to the “criminals.” Consider the letter by George Barnhill when he determined probable cause did not exist in the Ahmaud Arbery case:

It appears Travis McMichael, Greg McMichael, and Bryan William were following, in ‘hot pursuit[,]’ a burglary suspect, with solid first hand probable cause, in their neighborhood, and asking/telling him to stop. It appears their intent was to stop and hold this criminal suspect until law enforcement arrived. Under Georgia Law this is perfectly legal⁶⁸

And with respect to the plot to kidnap Governor Gretchen Whitmer, Sheriff Dar Leaf said, “Are they trying to kidnap? . . . [T]hey want her arrested. So, are they trying to arrest or was it a kidnap attempt? Because you can still in Michigan, . . . you can make a felony arrest.”⁶⁹ Michigan Attorney General Dana Nessel dismissed the sheriff's remarks, tweeting, “[L]et me make this abundantly clear[—]Persons who are not sworn, licensed members of a law enforcement agency cannot and should not ‘arrest’

66. *Id.* at 609–10.

67. See Chad Flanders, Raina Brooks, Jack Compton & Lyz Riley, *The Puzzling Persistence of Citizen's Arrest Laws and the Need to Revisit Them*, 64 HOW. L.J. 161, 175–76 (2020) (noting that the advent of a professional police force should have diminished citizens' duties and authorization to arrest but instead such laws have persisted).

68. Letter from George E. Barnhill, Dist. Att'y, Waycross Jud. Cir., to Captain Tom Jump, Glynn Cnty. Police Dep't (released Apr. 3, 2020), <https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf> [<https://perma.cc/QY9J-ZKHY>].

69. Rachel Sweet, *Michigan Attorney and Sheriff Give Perspectives on Kidnapping Plot*, WILX (Oct. 9, 2020, 9:29 PM), <https://www.wilx.com/2020/10/10/michigan-attorney-and-sheriff-give-perspectives-on-kidnapping-plot/> [<https://perma.cc/JH3E-378Q>].

government [officials] with whom they have disagreements. These comments are dangerous.”⁷⁰

Whether such comments are dangerous or not, these laws are on the books. The problem is that with a citizenry armed with guns, we have blurred every line. What is defense? What is reasonable? When may one stand one’s ground and when must one retreat? And, when is a citizen entitled to step in as an aggressor in the name of the state? Given the widespread availability of police, the number of times citizens need to arrest are minimal and the times they ought to pursue with deadly force are infinitesimal.

Evaluating citizen’s arrest is all the more important when scholars think about reining in police departments. If ordinary citizens are going to simply fill the void, we may be worse off. Here is a fact about the Zimmerman case that often gets lost in the shuffle: Zimmerman was part of a neighborhood watch.⁷¹ He pursued because he felt entitled to pursue. He pursued because Florida law authorized him to do so. As we seek to reform the police, we need to reform the entitlement of citizens to use force in the name of the state.

Conclusion

The authors have presented a compelling social problem that needs political and legal resolution. Unfortunately, in identifying stand your ground laws as a pivotal pressure point, they miss just how deeply divided our views about guns actually are. If we conceptualize pointing a gun as a mere use of nondeadly defensive force, while we simultaneously authorize citizens to use force in the name of the state, we are authorizing the widespread wielding of weaponry. If citizens only used their guns to stand their ground, frankly, we’d be lucky.

70. Bianca Cseke, *Michigan AG Responds to Barry County Sheriff’s Comments on Alleged Kidnapping Plot*, FOX 17 (Oct. 9, 2020, 3:51 PM), <https://www.fox17online.com/news/local-news/michigan-ag-responds-to-barry-county-sheriffs-comments-on-alleged-kidnapping-plot> [https://perma.cc/27W5-D8BS].

71. *George Zimmerman’s Written Statement*, N.Y. TIMES, https://archive.nytimes.com/www.nytimes.com/interactive/2012/06/22/us/21george-zimmerman-transcript.html?_r=0 [https://perma.cc/48AR-SBQQ].