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Reimagining Criminal Justice: In Defense of Self-Defense

If those defending themselves against systemic police violence are also allowed a lower threshold to argue self defense, this could have the outcome of forcing police to think twice before using deadly unwarranted force, says Jude Diebold, a law student at Golden Gate School of Law.

By **Jude Diebold** | March 02, 2021



Jude Diebold is a fourth year evening law student at Golden Gate School of Law.

The Recorder has collaborated with students enrolled in Reimagining Criminal Justice, a seminar at Golden Gate University School of Law, to publish this series of student writings. This next generation of lawyers explore a broad range of topics touching on criminal and racial justice, and provide their perspectives and voices on myriad proposals for building a better, more just, system.

Since the Louisville, Kentucky police killed Breonna Taylor in the middle of the night in her own apartment, the United States has seen an uptick in protests against racially motivated police violence. However, the officers responsible for her death have not been criminally charged, in part because her boyfriend, unaware

that police were entering the apartment in the middle of the night, shot one of the officer's in the leg, "justifying" the next six rounds that were shot by the police and ultimately killed an innocent woman during the botched police raid.

As if this was not outrageous enough, in October 2020, the officer shot during the police raid, Jonathan Mattingly, who killed Taylor, filed a lawsuit against Breonna Taylor's boyfriend alleging "battery, assault, and intentional infliction of emotional distress."

Unfortunately, this series of events is not surprising, as the affirmative defense of "self defense" is unevenly and rarely applied when police are the perpetrators of deadly violence. This is especially concerning as police continue to routinely abuse their power by killing innocent people, yet are rarely held accountable for their actions. The police are so accustomed to immunity to consequences for use of deadly force, that they even have the nerve to sue innocent bystanders who acted out of self defense during an act of police brutality that ended in the killing of an innocent woman.

This is even more concerning as those victim to police violence have so few options. They could run, which may still result in death and would likely result in being questioned about your motive; such as the case of Michael Brown. On the other hand, they could stay and cooperate, even though this has more and more often lead to police killing of civilians, such as Eric Garner, Freddie Gray, and the list goes on and on.

If we as a society are handing the "boys in blue" a seemingly lowered standard to use deadly force, the public should, at minimum, also be enforcing a lowered standard for self defense as an affirmative defense for civilians who are victims of unwarranted police brutality. We must lower the threshold for self defense against police violence as an affirmative defense to acknowledge the terror reigned down by the police and the lack of actions that can be taken by civilians to prevent their own murder by police. In light of the systemic abuses committed by police across the nation, unprovoked police violence should be classified as a per se threat of imminent injury or death in the context of self defense.

I propose this because our justice system fails to keep civilians safe from the very people meant to protect and serve, making the last line of defense for civilians, and in particular Black civilians, self defense. If police are not going to be held accountable for their violence, or forced to curb their violence, perhaps police would reconsider their swift-handed use of deadly force if it was met with the protected right of self defense at a lower threshold. This would allow victims of police violence to protect their own lives with less risk of persecution, something made necessary by a judicial system that refuses to treat police brutality with even a nod of seriousness or condemnation.

What is self defense?

While the definition of self defense may vary slightly from state to state, generally the elements of self defense include: (1) an unprovoked attack, (2) which threatens imminent injury or death, and (3) an objectively reasonable degree of force, used in response to (4) an objectively reasonable fear of injury or death.

The action's of Taylor's boyfriend fit well within these elements, as the police did not announce themselves the night they raided Breonna Taylor's apartment and had actually misidentified Taylor as their suspect, meaning they committed an unprovoked attack when they entered the home of an innocent woman unannounced. Additionally, it was three officers who forced their way into the apartment in the dead of night with a battering ram, an act that its recipients could naturally (and in this case correctly) assume may lead to their imminent injury or death. Taylor's boyfriend acted with (and perhaps below the necessary degree) of reasonable force, firing one shot into one officer's leg during the home raid.

Finally, their fear of death was objectively reasonable as three men broke into their apartment while they slept, an act that was likely perceived as a home invasion, as they were unaware these men were police. However, even if they had been aware the intruders were police, that knowledge may further promote self defense, as police so routinely murder black citizens, just as they did that night.

But, let's assume the night of Taylor's death had gone differently. Imagine a cop had ended up dead instead of her. It is hard to imagine in that scenario that Taylor's boyfriend would be let off the hook the way the cop that killed his girlfriend was let off.

For example, in Mississippi, a man spent 10 years on death row after shooting and killing a police officer, also during a no-knock raid, though he later pleaded down to a manslaughter charge and was released on time served. Similarly, in Texas in December 2013, a man shot and killed an officer entering his home on a no-knock warrant. While ultimately he was not indicted for murder, he still spent a year and a half in jail for a minor cannabis related charge, seemingly in retaliation for his self defense against police.

Both of these cases were similar to Taylor in that they involved no-knock raids wherein the civilians were unaware it was police entering their home. But, unlike Taylor, they managed to potentially save their own lives rather than become another victim of a police murder. So why did these individuals have to serve jail time for protecting themselves against police violence, when if a neighbor had broken into their apartment, perhaps even with suspicion of criminal activity in the apartment, their right to self defense would likely be unquestioned?

This becomes even more poignant when one considers the Kentucky Attorney General's reasoning on why charges against the officers who killed Taylor were not filed. The Kentucky AG, Daniel Cameron, actually cited "vigorous laws on self defense," and that "because they were fired upon they were justified in firing." But, this continues to beg the question, had Taylor's boyfriend killed a cop that night, after having their home invaded by three men with a battering ram, would he be afforded the same protections under "vigorous laws on self defense"? The answer is almost certainly no.

Why do we need self defense as an affirmative defense to police violence?

In 2019, approximately 1,000 people were killed by the police, with the highest risk of that violence allotted to Black people. This is more than any other industrialized 'democratic' nation. Among those killings, the ones considered most egregious are those committed against unarmed civilians. This categorization of police killing unarmed civilians as more egregious is ironic, as the United States touts the right to bear arms as among the most important to prevent the take over of a "tyrannical government." However, a government that turns a blind eye to racially motivated killings committed by its own government agents could easily be considered tyrannical.

As illustrated by the acquittal of the officer who killed Philando Castile, the right to bear arms is a freedom protected only when it is white men exercising that right. Philando Castile was a Black man shot dead when he merely informed a white police officer he was carrying a gun for which he had a permit to own. Yet, if Philando had used the gun to prevent his murder, an acquittal in the name of self defense would have been a very surprising outcome.

Essentially, as the United States allows a lower self defense threshold for police to justify the killing of civilians, the people will be forced to defend themselves against police violence. If those defending themselves against systemic police violence are also allowed a lower threshold to argue self defense, this could have the outcome of forcing police to think twice before using deadly unwarranted force. Thus, allowing civilians to make a choice not between life and jail, but just between life and death.

As a final note, if the idea of making self defense more accessible to defend against police violence offends the reader, perhaps you should be more offended at the ongoing violence committed by police and the state's failure to address it. What is truly offensive is not allowing people who are offered no recourse for justice the ability to defend their own lives.

Jude Diebold is a fourth year evening law student at Golden Gate School of Law, graduating in 2021. Jude is also the 2020-2021 Managing Editor of the GGU Environmental Law Journal and author of the article: "Hostile Environments: Public Health and Environmental Impacts of the Trump Administration's Attempted Reversal of Sex Stereotyping as Sex Based Discrimination."

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