Valuing Self-Defense

By T. Markus Funk, PhD

The argument that follows—one whose novelty may not be immediately apparent—is that it is high time that our legal culture comprehensively account for the bedrock values undergirding our state and federal U.S. self-defense laws. The reader may (reasonably) be surprised by this call to action: Surely our criminal justice system, often characterized as championing transparency and careful moral calibration, is already doing this? The truth is that our self-defense laws do not—and, in fact, never have—considered anything approaching the full spectrum of values that self-defense doctrine implicates. And, as with almost all things similarly reform-related, time is not our friend.

To level-set up front: It is no secret that our nation remains locked in a simmering debate about criminal justice reform. Signaling the reform movement's velocity, we already have witnessed the partial unwinding of some of the most purportedly fundamental precepts of criminal law. Among these proposed transformations gaining momentum, for example, are limits on the list of arrestable offenses and restrictions on pre-trial detention and qualified immunity.

Those challenging the status quo have unsurprisingly also focused attention on what Roman statesman Cicero aptly called the "first civil right," namely, the right of self-defense. Tying these strands together, the proposal made here is that developing a value-explicit analytical framework for addressing today's hot-button self-defense issues is a needed first step toward shoring up the justice system's battered moral credibility.

But first let's step back a bit to better understand the central claim being made here, namely, that "values matter." Few observers will dispute that inherently personal (and typically hidden, or at least undiscussed) value-judgments dictate how criminal law practitioners and the broader public evaluate the "justness" of self-defense laws and case-specific outcomes. And among the most contentious battlegrounds we find a set of core questions, including whether:

- a defender should be required to retreat or avoid conflict in the first place prior to deploying deadly self-preferential force;
- a threat to property alone can ever justify deadly force;
- a person's belief in the circumstances justifying defensive force must be reasonable; and
- there should be special rules for battered intimate partners who kill their abusers.

Bring up these admittedly rather indelicate topics at a dinner party and you are likely to witness a striking divergence of opinions, all traceable to differences in each guest's fundamental value-judgments and moral compasses.

Our history is in fact littered with cases beset with emotion and conflicting perspectives in the main held by otherwise thoughtful and good-hearted individuals. These include the high-profile recent tragedies involving Ahmaud Arbery, Breonna Taylor and Kenneth Walker, Diren Dede, Antonio DeJesus, Diego Ortiz, and Treyvon Martin. Everyone, whether legislator or layman, who has examined the facts of these cases will have a view, often passionately (and vocally) held, concerning how they should be resolved. And one thing these opinions always have in common is that they are based on deep and personal moral instincts.

Yet even those drafting our laws have, inexplicably, almost completely overlooked the wellspring for these outcome-determinative value judgments. More to the point, our law-givers rarely, if ever, advance their thinking beyond debatable, broad claims about "deterrence," the view that "all lives deserve protection," and (typically on the other side of the socio-political spectrum) notions about the primacy of the defender's "autonomy."

In contrast to, say, the German legal system, in the U.S. we never developed a shared, value-explicit language with which to engage in this vital dialogue. Instead, we simply defer to legislative drafters and politicians to tell us what the "rules" are. These law-makers, law-marketers, and their allies have relied on their own largely hidden normative judgments to advocate for, or against, "stand-your-ground," "castle doctrine," "duty to retreat," intimate partner carve-outs, and other contentious self-defense enactments.

By way of example, proponents of hard-edged self-defense laws, such as NRA President Marion Hammer, have expressed the perspective that today's laws "protect the criminals instead of victims and law-abiding citizens." In contrast, commentators like Professor Fiona Leverick contend that deadly force to ward off threatened rape or other serious bodily injury short of death should never be permitted. If only the choices were that simple.

Even the most thoughtful and scholarly law review articles on self-defense at best note that the justification is marked by a "clash" between the State's conflicting interest in protecting

T. Markus Funk, a former federal prosecutor (now in private practice), is an American Law Institute Fellow and co-founder of the ABA Criminal Justice Section's Global Anti-Corruption Committee.

both the defender's autonomy and bodily integrity and the attacker's right to life. It is true that such a largely obvious observation can appropriately initiate the analysis. But it does not help answer self-defense's more challenging questions. Without a more granular examination of the values/interests at issue, the goal of drawing an appropriate line between state power and individual use of force will remain out of reach.

Of course, identifying a problem is not the same thing as proposing a solution. Here, however, adjusting our present approach is not some impossible, pie-in-the-sky task. To the contrary, and as I have detailed elsewhere, all self-defense cases can be viewed through a value-explicit prism. Moral philosophy and contemporary legal theory, in fact, help us distill the values-as-decision-grounds most centrally at play.

Specifically, value-based interests such as (1) reducing overall societal violence by protecting the State's collective monopoly on force, (2) protecting the attacker's presumed individual right to life, (3) maintaining equal standing between people, (4) ensuring the primacy of the legal process, (5) reserving (as well as enhancing) the legitimacy of the legal order, along with (6) deterrence, and (7) protecting the defender provide the analytical building blocks for a more value-centric model of self-defense. Although one can reasonably disagree about the appropriate weighting of these values, and can reasonably believe that there are others that should be included, the position advanced here is that this list is a reasonable and defensible starting point that represents a far more nuanced approach than we have seen in any legislative proposal or scholarly commentary.

Putting theory into practice, consider the high-profile shooting of Ahmaud Arbery. Arbery, a 25yearold Black man, was chased by three armed white residents of a South Georgia neighborhood. One of the three pursuers' viral cellphone video shows the unarmed Arbery engage in what can reasonably be argued was lawful defensive conduct under Georgia law before Travis McMichael, armed with a shotgun, killed him.

Yet, Waycross Circuit District Attorney George E. Barnhill, who ultimately recused himself from the case, initially claimed the shooting was "perfectly legal" because the men were in "hot pursuit of a burglary suspect" and had "solid first-hand probable cause." Even media discussion about the case treated the claim that Arbery was exercising lawful self-defense as an afterthought, apparently overlooking that the possibility that, under Georgia law, the initial wrongful aggressor(s) (here, the men chasing Arbery) are precluded from claiming this justification.

Put in the context of our value-centric discussion, we must ask why legal and lay commentators, much like the politicians, have completely overlooked the central value-base questions. These questions include whether:

- Arbery's pursuers were improperly asserting a right to use force when the police were a viable alternative;
- permitting the pursuers/aggressors to exercise force in such circumstances threatens to diminish the law's moral authority and credibility; or
- such claimed "hot pursuit" authorization weakens the law's deterrent impact and ability to ensure the equal standing among people?

Perhaps there is a ready answer: Such a broad array of implicated values has never been considered by legislators making the laws (and the courts issuing jury instructions after the laws are on the books). Instead, what we have are blinkered public expressions in favor of purported "law and order," on the one hand, and blanket claims about the importance of equally protecting all life, on the other.

Stated bluntly, we need to rethink our approach to self-defense. Fundamental fairness, along with common sense, require us to take a closer and more democratic and transparent look at what constitutes "just outcomes." It is no overstatement to say that this is a precondition to a society capable of engaging in a more fully-informed discussion about procedural fairness and due process (not to mention appropriate limits on state power).

Today we stand at a crossroads, where in many parts of our society the credibility of our criminal justice system is eroding like never before. Lacking the ability to engage in a substantive value-based conversation, we predictably are left with undemocratic legislative and judicial sloganeering and (worse) decision-making.

The introduction of a value-centric dialogue is, of course, not a panacea. But by driving hidden normative judgments, biases, and false dichotomies out of the obscuring shadows, we can at least begin to move toward a more democratic and transparent approach that protects the law's moral credibility, creditworthiness, popular "buy in," and, ultimately, its effectiveness.