

Driver Immunity Laws: Why They Are More Dangerous Than You Think

On May 31, 2020, a man with his wife and two children sped his one-ton truck through a crowd of protesters in Tulsa, Oklahoma, injuring at least three people.¹ He stated that he and his family feared for their lives when protesters surrounded his vehicle.² While it is uncertain who initiated the hostilities during the incident, witnesses suggested the truck driver was to blame for escalating the situation.³

The incident occurred on westbound Interstate 244, which had been occupied by protesters for around twenty to thirty minutes⁴ as the protesters deviated from their preapproved route.⁵ Reverend Eric Gill of Metropolitan Baptist Church was at the scene and explained that the truck was initially stopped, but that the driver kept inching forward and bumping people.⁶ To get the man to stop forcing his way forward and hitting people, some protesters slapped his truck with their hands.⁷ Then, the driver put a gun on his dashboard, threatening the protesters to “get out of [his] way.”⁸

1. Memorandum from Steve Kunzweiler, Okla. Dist. Att’y for Tulsa Cnty., to Trooper Scott Miller, Investigator (July 23, 2020), <https://perma.cc/V2ZY-LCRJ> [hereinafter Memorandum from Steve Kunzweiler]; *New Video of Truck Incident on I-244 Bridge During Protests*, TULSA WORLD (June 2, 2020), https://tulsaworld.com/new-video-of-truck-incident-on-the-i-244-bridge-during-protests/video_df0b4e87-afcd-5876-bc34-81711901aba1.html.

2. Memorandum from Steve Kunzweiler, *supra* note 1.

3. *Pickup Rolls Through Protesters Gathered on Interstate 244; State Troopers Questioning Driver*, TULSA WORLD (June 1, 2020), https://tulsaworld.com/news/local/pickup-rolls-through-protesters-gathered-on-interstate-244-state-troopers-questioning-driver/article_f6703c70-2c6d-5455-85cb-ea41373fc7e8.html [hereinafter *Pickup Rolls Through Protesters*]. The facts of this event are intended to be presented with concern and regret for all parties who were emotionally and/or physically harmed as a result of this incident. This Article is not intended to insinuate the fault of any party from the incident—driver or protester.

4. Memorandum from Steve Kunzweiler, *supra* note 1.

5. Kelsy Schlotthauer, *Thousands Flock to Downtown in Support of Black Lives Matter Movement; At Least Two Injured When Crowds Block Traffic on I-244*, TULSA WORLD (May 31, 2020), https://tulsaworld.com/thousands-flock-to-downtown-in-support-of-black-lives-matter-movement-at-least-two-injured/article_f30eda20-156b-52ae-9363-dada5709023a.html.

6. *Pickup Rolls Through Protesters*, *supra* note 3; *New Video of Truck Incident on I-244 Bridge During Protests*, *supra* note 1.

7. *Pickup Rolls Through Protesters*, *supra* note 3.

8. *Id.*

Protesters reacted by banging on the truck, throwing things at it, and hanging off the truck mirrors and empty horse trailer in tow.⁹ This moment is likely when the driver would later report that he and his family were “fear[ing] for their lives.”¹⁰ In response, he accelerated his one-ton truck and forced his way through the crowd, hitting several people in his path.¹¹

At least three people were injured.¹² While one person was merely pushed to the ground,¹³ others were more severely hurt. A bicyclist broke his leg when the truck came up from behind and wedged him in between his bicycle and the truck’s bumper.¹⁴ As the truck hurled forward, the bicycle was swept beneath the hood of the truck, the man’s legs going with it.¹⁵ A Tulsa World photographer at the scene described the truck driver’s speed as “fast enough that I felt like I had to run . . . [p]eople scattered.”¹⁶ Another person was paralyzed from falling off a nearby overpass.¹⁷ It is unclear whether the paralyzed man was pushed from the overpass as a direct result of the truck accelerating through the crowd, but sources indicate he fell because the crowd was scattering to get out of the truck’s way.¹⁸

After the incident, Steve Kunzweiler, the Tulsa District Attorney, chose not to press charges against the driver, citing Oklahoma’s self-defense statute, title 21, section 643(3), as support for his decision.¹⁹ Kunzweiler’s memo explained that “[a] person is justified in using force in self-defense if that person reasonably believed that use of force was necessary to protect himself/herself from imminent danger of bodily harm.”²⁰

9. Memorandum from Steve Kunzweiler, *supra* note 1.

10. *Id.*

11. *Pickup Rolls Through Protesters*, *supra* note 3.

12. Memorandum from Steve Kunzweiler, *supra* note 1.

13. *Id.*

14. *Tulsa Co. DA: No Charges Filed for Driver Who Drove Through Crowd on I-244*, 2NEWS OKLA. (July 24, 2020, 8:11 AM), <https://www.kjrh.com/news/local-news/tulsa-co-da-no-charges-filed-in-horse-trailer-incident>.

15. *Id.*

16. *Pickup Rolls Through Protesters*, *supra* note 3.

17. Memorandum from Steve Kunzweiler, *supra* note 1.

18. Mike Simons & Kelly Hines, *Man Who Fell from I-244 During Tulsa Protest Broke His Neck and Back, Remains in ICU*, TULSA WORLD (June 8, 2020), https://tulsaworld.com/news/local/man-who-fell-from-i-244-during-tulsa-protest-broke-his-neck-and-back-remains/article_f6e795ae-882e-5296-9993-9d6586ba991c.html#tncms-source=login.

19. Memorandum from Steve Kunzweiler, *supra* note 1 (citing 21 OKLA. STAT. § 643(3) (2021)).

20. *Id.* (citing VERNON’S OKLAHOMA FORMS 2D: OKLAHOMA UNIFORM JURY INSTRUCTIONS, Westlaw OUI-CR 8–48 (database updated Apr. 2020)).

While Kunzweiler's report recounts the resulting damage to the truck and the family's mental state during the incident, it fails to mention the driver's armed threat preceding his decision to barrel through the crowd.²¹ Instead, Kunzweiler concludes that the driver and his family were purely "victims of a violent and unprovoked attack."²²

Vehicles injuring protesters are increasingly common. As protests surged around the country in 2020, the number of incidents increased. Between May 2020 and September 2020, drivers hit protesters more than 100 times.²³ Of those 100 drivers, at least thirty-nine have been charged criminally,²⁴ meaning prosecutors in almost forty percent of cases presumably thought there was sufficient evidence to prove the driver had criminal intent.²⁵ In response to the crisis, at least two states have taken a stance on the side of vehicle operators by passing driver immunity laws to protect drivers from legal liability when they accidentally cause harm to people while fleeing from riots.²⁶ Oklahoma is one of these states.²⁷

Title 21, section 1320.11 of the Oklahoma Statutes ("Driver Immunity Statute") was passed in April 2021.²⁸ This statute grants civil and criminal

21. *See id.*

22. *Id.*

23. Donald Morrison, *Cars Have Hit Protesters More than 100 Times This Year*, WALL ST. J. (Oct. 25, 2020, 1:00 PM ET), <https://www.wsj.com/articles/cars-have-hit-protesters-more-than-100-times-this-year-11603645201>.

24. *Id.*

25. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3 (Am. Bar Ass'n 2017) ("A prosecutor should seek to file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, [and] that admissible evidence will be sufficient to support conviction beyond a reasonable doubt"), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

26. Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html>; S. File 342, 89th Gen. Assemb. (Iowa 2021); H.B. 1674, 57th Leg., 2d Sess. (Okla. 2021).

27. Okla. H.B. 1674; Elisha Fieldstadt & Associated Press, *Oklahoma Passes Law Protecting Drivers Who Kill or Hurt Rioters*, NBC NEWS (Apr. 23, 2021, 12:46 PM CDT), <https://www.nbcnews.com/news/us-news/oklahoma-passes-law-protecting-drivers-who-kill-or-hurt-rioters-n1265111>.

28. *See Bill Information for HB 1674*, OKLA. LEG., <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1674&Session=2100> (last visited Sept. 14, 2022). A federal court issued a preliminary injunction against two portions the bill because they are being challenged as unconstitutional. *Okla. State Conf. of the NAACP v. O'Connor*, 569 F. Supp. 3d 1145 (W.D. Okla. 2021).

immunity for any death or injury a motor vehicle operator causes if “[1] [t]he injury or death occurred while the motor vehicle operator was fleeing from a riot . . . [2] under reasonable belief that fleeing was necessary to protect [themselves] from serious injury or death; and [3] [they] exercised due care at the time of the death or injury.”²⁹

Although the statute may be well-intended to protect innocent victims, existing laws already protect drivers who need to flee from a riot to defend themselves and their families.³⁰ In both the criminal and civil contexts, self-defense laws provide justifications for a driver to use force to protect himself.³¹ A driver is further protected by either prosecutorial discretion in a criminal lawsuit or by comparative negligence law in a civil lawsuit. Because of these existing mechanisms, the statute is unnecessary to protect drivers from liability; instead, the Driver Immunity Statute likely expands existing self-defense laws and creates other negative side effects.³²

Part I of this Note provides an overview of the history of driver immunity laws and an introduction to why they are prejudicial. Part II explains why Oklahoma’s Driver Immunity Statute is not necessary to protect drivers who flee from a riot in self-defense. Part III describes how the statute instead expands the doctrine of self-defense and will likely result in negative consequences. Part IV illustrates how other states have similarly expanded their self-defense doctrines, also opening the door to potential harm. This Note ends with a summary of why driver immunity laws endanger the public and two recommendations for the future: (1) state legislatures should repeal these laws; (2) courts should constrain these laws with a narrow application to avoid harm.

29. 21 OKLA. STAT. § 1320.11 (2021).

30. See Memorandum from Steve Kunzweiler, *supra* note 1 (citing Oklahoma’s self-defense statute as a rationale for declining to press charges on the Tulsa truck driver).

31. 21 OKLA. STAT. § 643 (2021) (criminal); 76 OKLA. STAT. § 9 (2021) (civil).

32. *U.S. Current Trend: Bills Provide Immunity to Drivers Who Hit Protesters*, ICNL, <https://www.icnl.org/post/analysis/bills-provide-immunity-to-drivers-who-hit-protesters> (last visited Sept. 15, 2022) [hereinafter *U.S. Current Trend*]; see also Kaleigh Darty, *N.C. House Bill 330: Immunizing Drivers Who Accidentally Hit Protesters*, FIRST AMEND. L. REV., <https://firstamendmentlawreview.org/2017/12/13/n-c-house-bill-330-immunizing-drivers-who-accidentally-hit-protesters/> (last visited Sept. 15, 2022) (criticizing North Carolina’s driver immunity bill that was proposed in 2017 because it would be unnecessary and would probably cause negative consequences).

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I. Background: Driver Immunity Laws Are Prejudicial

Drivers hitting protesters first became a subject of legislatures' attention in 2017. That year, the United States experienced an uptick in protests opposing police shootings, racial injustice, and the Dakota Access Pipeline.³³ In response, Republican lawmakers across six states promoted bills to establish a blanket immunity for drivers who unintentionally hit protesters.³⁴ The goal was to shield such drivers from expensive litigation.³⁵ The bills lost support after an attack in Charlottesville, Virginia on August 17, 2017, however, when a hate criminal killed one person and injured nineteen others by intentionally speeding his car into a peaceful protest.³⁶

33. Ryan J. Foley, *Backlash over GOP Bills to Shield Drivers Who Hit Protesters*, AP NEWS (Aug. 15, 2017), <https://apnews.com/article/817f34d2f4a04a4cb1e65afc079f6292>; *U.S. Current Trend*, *supra* note 32.

34. Foley, *supra* note 33; Dakin Andone, *These States Have Introduced Bills to Protect Drivers Who Run over Protesters*, CNN (Aug. 19, 2017, 3:36 AM EDT), <https://www.cnn.com/2017/08/18/us/legislation-protects-drivers-injure-protesters/index.html>.

35. Foley, *supra* note 33.

36. *Id.*; Kriston Capps, *The States Trying to Pass Laws Protecting Drivers Who Hit Protesters*, BLOOMBERG (Aug. 16, 2017, 7:00 AM), <https://www.bloomberg.com/news/articles/2017-08-16/gop-lawmakers-defend-civil-immunity-laws>. James Fields, the Charlottesville attack perpetrator, later pled guilty to twenty-nine of thirty federal hate crime charges. Elisha Fieldstadt, *James Alex Fields, Driver in Deadly Car Attack at Charlottesville*

The attack was widely reported and raised public concerns about vehicular attacks as a method for opposing protests.³⁷ The Charlottesville attack seemingly shifted public opinion against the bills, and none of them became law.³⁸

That is, until recently. In response to the recent resurgence of protests around the country, some state legislatures proposed driver immunity laws similar to those that were proposed in 2017, and the bills proved just as controversial as before. Proponents claim driver immunity laws are necessary to clarify a motorist's rights, while opponents fear they will "encourage [motorists] to go ahead . . . and plow into the crowd."³⁹ Some opponents even describe the laws as "hit and kill" laws.⁴⁰

Despite what may be a pure motive by legislatures passing these laws, the laws seem highly prejudicial considering the social backdrop against which they appeared. This backdrop includes news media that frequently discriminates against protests,⁴¹ and an ongoing social media trend that aggressively opposes protesters who block traffic and demands that drivers "#RunThemOver."⁴² This malicious environment has grown over the years.

Rally, Sentenced to Life in Prison, NBC NEWS (June 28, 2019, 2:36 PM CDT), <https://www.nbcnews.com/news/us-news/james-alex-fields-driver-deadly-car-attack-charlottesville-rally-sentenced-n1024436>.

37. See, e.g., Foley, *supra* note 33; Jacob Stoil, *Vehicle Ramming, from the Middle East to Charlottesville: How Do Tactics Spread?*, MOD. WAR INST. (Mar. 8, 2018), <https://mwi.usma.edu/vehicle-ramming-middle-east-charlottesville-tactics-spread/>; Michael Singer, *D.C. Officials Ignored the Lessons We Learned in Charlottesville. Here Are 3 Things Leaders Should Do to Help Prevent Future Attacks*, TIME (Jan. 13, 2021, 9:46 AM EST), <https://time.com/5929153/charlottesville-capitol-riot/>.

38. Andone, *supra* note 34; *U.S. Current Trend*, *supra* note 32.

39. David Lee, *Oklahoma House Passes Bill Protecting Drivers Who Injure or Kill Rioters*, COURTHOUSE NEWS SERV. (Mar. 10, 2021), <https://www.courthousenews.com/oklahoma-house-passes-bill-protecting-drivers-who-injure-or-kill-rioters/>.

40. Foley, *supra* note 33.

41. SUSANNA DILLIPLANE ET AL., *POLICING 2020: LOCAL NEWS REPORTING DURING A YEAR OF RACIAL JUSTICE PROTESTS* 8 (2020), https://www.asc.upenn.edu/sites/default/files/2022-01/Policing2020_MICReport.pdf (finding that news coverage of civilians who were seriously injured or harmed by police during protests was more likely to include criminalizing information as opposed to humanizing information). This report additionally found that a majority of protest covered portrayed protesters as posing a threat and that this focus aligned with the narrative of protester deviancy that is typical of news coverage. *Id.* at 10.

42. See, e.g., @Emrys4210, TWITTER (June 27, 2020, 5:03 PM), <https://twitter.com/Emrys4210/status/1276999508497518598>; @MarinaGipps, TWITTER (Sept. 4, 2020, 6:15 PM), <https://twitter.com/MarinaGipps/status/1302022390260600836>; @purpledalmation,

Beginning in 2016, social media users,⁴³ news outlets,⁴⁴ and law enforcement⁴⁵ circulated images and videos with captions that justified drivers forcing their way through protests and suggested that protesters have it coming if they are in the way.⁴⁶ One such video is a mash-up of protesters getting pushed out of the way by cars, with a caption reading, “Study the technique; it may prove useful in the next four years.”⁴⁷ In another, a Florida sheriff’s deputy posted an image of a semi-truck smeared with blood accompanied with a caption that said, “JUST DROVE THROUGH ARIZONA/DIDN’T SEE ANY PROTESTERS.”⁴⁸ This media fosters a dangerously prejudicial attitude toward protesters, suggesting drivers can intentionally injure protesters without raising public concern.

Because of the current social climate, there may already be a veil of immunity for drivers who hit protesters. People who consume this aggressively biased media may be more likely to assign fault to the protestors for being in the way and forget to question the role the driver played in creating the circumstance that caused him to be afraid and flee. Nonetheless, Oklahoma took an additional step to ensure protection for motorists when it passed its Driver Immunity Statute in April 2021.⁴⁹ The legislature justified the law by claiming it was necessary to protect

TWITTER (Nov. 17, 2016, 2:48 AM), <https://twitter.com/purpledalmation/status/799172382652911616>.

43. See, e.g., @Limerick1914, TWITTER (July 18, 2016, 3:08 PM), <https://twitter.com/Limerick1914/status/755132030493556736>; @NinjetteTheReal, TWITTER (Jan. 22, 2016, 10:23 PM), <https://twitter.com/NinjetteTheReal/status/690751705479299073/photo/1>; @ohbeaulaland, TWITTER (Nov. 16, 2016, 7:00 PM), <https://twitter.com/ohbeaulaland/status/799054682115178496>.

44. See, e.g., Tom Kludt, *Fox News, Daily Caller Delete Posts Encouraging People to Drive Through Protests*, CNN BUS. (Aug. 15, 2017, 7:57 PM ET), <https://money.cnn.com/2017/08/15/media/daily-caller-fox-news-video-car-crashing-liberal-protesters/index.html>.

45. Emily Hoerner & Rick Tulsy, *Cops Around the Country Are Posting Racist and Violent Comments on Facebook*, INJUSTICE WATCH, <https://www.injusticewatch.org/interactives/cops-troubling-facebook-posts-revealed/> (last visited Sept. 15, 2022).

46. *U.S. Current Trend*, *supra* note 32.

47. Alex Ward, *People Are Running over George Floyd Protesters. Are Far-Right Memes to Blame?*, VOX (June 1, 2020, 3:10 PM EDT), <https://www.vox.com/2020/6/1/21276941/george-floyd-protests-truck-police-attack>.

48. See Hoerner & Tulsy, *supra* note 45; *U.S. Current Trend*, *supra* note 32.

49. See *Bill Information for HB 1674*, *supra* note 28.

drivers.⁵⁰ As support for the bill, Oklahoma lawmakers emphasized the possibility that a driver could unexpectedly find himself surrounded by a riot, fearing for his life.⁵¹ Oklahoma Representative Kevin West, a co-author of the bill, explained that the law “is an important protection for citizens who are just trying to get out of a bad situation.”⁵² The “bill will protect innocent people trapped by a rioting mob,” added fellow co-author, Senator Rob Standridge.⁵³

Opponents do not think the law is necessary.⁵⁴ Prosecutor Kunzweiler, who chose not to charge the truck driver in Tulsa, “stopped short of endorsing [the Driver Immunity Statute]” and stated that “[t]here are any number of laws already in place that are readily available to be enforced.”⁵⁵ When he made this statement, Kunzweiler may have been referencing Oklahoma’s self-defense law, which he cited in his official report announcing his decision not to press charges.⁵⁶

Oklahoma’s bill was created in direct response to the Tulsa truck driver incident in May 2020.⁵⁷ It was also passed under a pretext of misinformation. While introducing the bill to his colleagues during the House floor debate, one of the bill’s drafters made false statements about the incident and left out crucial details. Seeking to impassion his fellow congressmen and garner support for his bill, Representative Kevin McDugle erroneously explained that “[a] firebomb was . . . thrown into the

50. See Press Release, Okla. State Legislature, Governor Signs Bill Updating Motorist Protections During Riots (Apr. 22, 2021, 12:13 PM), https://www.okhouse.gov/media/News_Story.aspx?NewsID=8107.

51. See Press Release, Okla. Senate, Senate Approves Bill Giving Protections to Drivers Trying to Escape Riots (Apr. 14, 2021, 2:29 PM), <https://oksenate.gov/press-releases/senate-approves-bill-giving-protections-drivers-trying-escape-riots>.

52. *Id.*

53. *Id.*

54. See Lee, *supra* note 39.

55. Sean Murphy, *New Legislation Would Protect Drivers Who Hit Protesters*, ABC NEWS (Feb. 20, 2021, 11:01 AM), <https://abcnews.go.com/US/wireStory/legislation-protect-drivers-hit-protesters-76016885>.

56. Memorandum from Steve Kunzweiler, *supra* note 1.

57. Rachel Treisman, *Oklahoma Law Grants Immunity to Drivers Who Unintentionally Harm Protesters*, NPR (Apr. 22, 2021, 2:15 PM ET), <https://www.npr.org/2021/04/22/989856412/oklahoma-law-grants-immunity-to-drivers-who-unintentionally-harm-protesters>; see Streaming Video: Oklahoma House of Representatives First Regular Session of the 58th Legislature, Day 22, Afternoon Session, at 11:39:20 PM (Mar. 9, 2021), <https://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20220131/242/28567> [hereinafter Video: Oklahoma House Session, Day 22].

truck with the horse and burned the horse.”⁵⁸ This was impossible, however, since the trailer was empty.⁵⁹ Later in the debate, when Democratic Representative Regina Goodwin asked McDugle if he knew that the driver was showing off his gun to the protesters before plowing through them,⁶⁰ McDugle admitted he was unaware of this fact.⁶¹ He did not ask Goodwin for more details.⁶² Instead, McDugle continued to expound that the Tulsa driver was strictly an innocent victim and to explain that the driver immunity bill was crucial to protect innocent Oklahoma families.⁶³

Oklahoma’s Driver Immunity Statute promotes prejudice against protestors because it was passed amidst a social backdrop that trivializes and promotes bulldozing over protestors. Within this context, the bill sends a harsh message. During debate over the bill, the bill’s proponents insisted it was necessary to protect innocent families.⁶⁴ But these proponents ignored the social context the law was butted against⁶⁵ and failed to recognize that Oklahoma laws already serve this purpose.

II. Existing Oklahoma Laws Already Protect Drivers

Although Oklahoma’s legislature adamantly maintained that the Driver Immunity Statute was necessary to protect innocent drivers, Oklahoma law already provides numerous protections for a driver who, through no fault of his own, must flee from a riot. The first protection is Oklahoma self-defense law, which justifies a person’s use of physical force against another under certain conditions. The second protection is prosecutorial discretion, which is what District Attorney Kunzweiler used when he declined to press

58. Lee, *supra* note 39; Video: Oklahoma House Session, Day 22, *supra* note 57, at 11:39:30 PM.

59. Memorandum from Steve Kunzweiler, *supra* note 1 (explaining that there was no horse in the trailer despite the pervasive rumors that there was).

60. Video: Oklahoma House Session, Day 22, *supra* note 57, at 11:40:20 PM.

61. *Id.* at 11:40:34 PM.

62. *Id.* at 11:40:00 PM.

63. *See id.* at 12:32:18 AM.

64. *See id.*

65. During debate, Representative John Waldron criticized the bill’s sponsors for failing to address social context. *See id.* at 11:51:28 PM. Also, Representative Goodwin pressed Representative McDugle multiple times about protest over George Floyd’s death and other events in summer 2020 adding relevant context to the bill, but McDugle insisted this context was not relevant. *See id.* at 11:32:34 PM.

charges on the Tulsa family.⁶⁶ Finally, Oklahoma's comparative negligence statute can limit a driver's liability if he injures a protester who is partially at fault.⁶⁷ This Part will introduce each of these protections in turn.

A. Self-Defense Laws

Self-defense is a legal justification to use physical force against another person to protect yourself or others.⁶⁸ In general, if *A* forcefully hits *B*, he has committed a battery, and *B* can sue *A* for the harm he suffered as a result. But, if *A* can show that he hit *B* to protect himself because *B* was about to injure him, self-defense laws recognize that *A* is justified in using force necessary to defend himself. Oklahoma has numerous self-defense statutes that justify a driver's use of force to protect himself against attackers.⁶⁹ This subsection will explain the statutes and how they apply.

1. Civil Self-Defense

Self-defense is a recognized justification to use force in a civil context. Oklahoma law provides that "[a]ny necessary force may be used to protect from wrongful injury the person or property of one's self"⁷⁰ Civil self-defense requires that the person using the force "honestly and reasonably believe[] . . . that under the circumstances it was necessary to use force to protect himself against an actual or apparent threatened harmful or offensive contact."⁷¹ Additionally, he must not "use more force than an ordinary person would . . . use[] under the same or similar circumstances."⁷² If these requirements are met, a person could justify their use of force.

Oklahoma's civil self-defense statute would protect drivers from liability when fleeing a riot because it justifies a person using necessary force to protect themselves.

66. See Memorandum from Steve Kunzweiler, *supra* note 1.

67. See 23 OKLA. STAT. § 13 (2021).

68. Spruill v. State, 2018 OK CR 25, ¶ 6, 425 P.3d 753, 755.

69. See, e.g., 76 OKLA. STAT. § 9 (2021).

70. *Id.*

71. Moosavi v. Crossland Heavy Contractors, Inc., No. CJ-2016-01168, 2019 WL 1094934, at *5 (Tulsa Cty. Dist. Ct. Feb. 26, 2019) (citing VERNON'S OKLAHOMA FORMS 2D: OKLAHOMA UNIFORM JURY INSTRUCTIONS at Instruction No. 19.14, Westlaw OUJI-CIV 19.14 (database updated June 2018)).

72. *Id.*

2. *Criminal Self-Defense*

In Oklahoma, self-defense is also a justification to use force in the criminal context for uses of both non-deadly⁷³ and deadly force.⁷⁴ In both instances, the legal requirements are similar.⁷⁵ A person's threat of or use of force is justified when it is committed by a person about to be injured or by a person defending someone else about to be injured. For such force to be justified, it must "prevent an offense against such person, or any trespass or other unlawful interference with real or personal property in such person's lawful possession; provided the force or violence used is not more than sufficient to prevent such offense."⁷⁶

District Attorney Kunzweiler cited Oklahoma's non-deadly self-defense statute when he decided not to press charges against the truck driver in the Tulsa incident. The statute would have applied to the Tulsa incident because the injuries sustained were non-deadly, and the driver's acceleration with his truck was a use of force. Kunzweiler's reports says that the protesters banged on the truck, threw things at it, and dented it.⁷⁷ From these facts, Kunzweiler likely concluded that the truck driver and his family were "about to be injured," and that the force the driver used to fend off the protesters was "not more than was sufficient to prevent the offense." Thus, assuming the elements prescribed by the statute were satisfied, Oklahoma's self-defense law operated effectively to prevent criminal charges on the Tulsa truck driver.

3. *Stand Your Ground*

Finally, Oklahoma has a Stand Your Ground Law, which expands the basic justification of self-defense by (1) establishing a presumption of reasonable fear in certain circumstances, (2) removing the duty to retreat, (3) providing civil immunity in addition to criminal immunity for uses of defensive force, (4) creating a presumption for self-defense, and (5)

73. 21 OKLA. STAT. § 643 (2021).

74. *See, e.g., id.* § 733 (general deadly force defense); *id.* § 1289 (deadly force justified against home intruder).

75. *Compare id.* § 643 (specifying elements of nondeadly force), *with id.* § 733 (specifying elements of deadly force).

76. *Compare id.* § 643 *with id.* § 733 ("[Deadly force is justified] when the person using force reasonably believes the force is necessary to prevent death or great bodily harm to himself or herself or another or to terminate or prevent the commission of a forcible felony.").

77. Memorandum from Steve Kunzweiler, *supra* note 1.

awarding attorneys' fees and costs to a litigant who successfully invokes self-defense.⁷⁸

The statute creates a presumption of reasonable fear—the prerequisite for establishing self-defense—in circumstances where “[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcefully entered, . . . [an] occupied vehicle.”⁷⁹ Under such a circumstance, a person who uses defensive force will be “immune from criminal prosecution and civil action.”⁸⁰ Such a person “has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force.”⁸¹ The statute even states that a person who claims he acted in self-defense cannot be arrested unless law enforcement concludes there was probable cause that the force was unlawful.⁸² Whereas ordinary self-defense requires a defendant to establish proof that he acted in self-defense, the statute establishes a presumption of that fact because it requires law enforcement to shoulder the burden of proof and have probable cause that he did not act in self-defense.⁸³ Further, the statute provides that if civil charges are brought, the court is required to “award reasonable attorney fees, court costs, and compensation for any loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff” if the person was acting in legally justified self-defense.⁸⁴

In the Tulsa incident, the truck driver would be immune from both civil and criminal liability—with no duty to retreat—if the court found the protestors were attempting to forcefully enter the truck because the court would presume the driver had the reasonable fear necessary under the statute.⁸⁵ Additionally, there would be a presumption that he acted in self-defense, such that an officer could not arrest him unless there existed probable cause that he did not act in self-defense. If the driver was sued civilly and a court found he justifiably acted in self-defense, the court

78. See 21 OKLA. STAT. § 1289.25 (2021).

79. *Id.* § 1289.25(B)(1)(a).

80. *Id.* § 1289.25(F).

81. *Id.* § 1289.25(D).

82. *Id.* § 1289.25(G).

83. Victoria Bell, Note, *The “White” to Bear Arms: How Immunity Provisions in Stand Your Ground Statutes Lead to an Unequal Application of the Law for Black Gun Owners*, 46 *FORDHAM URB. L.J.* 902, 918 (2019).

84. 21 OKLA. STAT. § 1289.25(H).

85. Memorandum from Steve Kunzweiler, *supra* note 1.

would award the driver reasonable attorney fees, court costs, compensation for lost income, and all expenses he incurred in defending the lawsuit.

Thus, Oklahoma laws *already* provide protection for someone who finds himself stuck in the middle of a rioting mob and reasonably fearing death or great bodily harm to himself or others. Oklahoma law also shields a driver from expensive and unjustified litigation,⁸⁶ which were fears that inspired the co-authors to draft the driver immunity bill in the first place.⁸⁷

4. Bystanders

As explained, a driver who flees from a riot might not be liable for the harm he causes to rioters who attack his vehicle if Oklahoma's self-defense requirements are met. When a driver also unintentionally harms innocent bystanders during his escape, however, it is less certain whether the self-defense justification will apply. Some Oklahoma case law suggests that if a person justifiably uses self-defense, the harm they unintentionally and non-negligently cause bystanders will also be justified.⁸⁸ But it may depend on which self-defense statute the driver invokes.

In the criminal context, the Criminal Court of Appeals of Oklahoma held in *Pittman v. State* that, “[i]f the killing of [a] party intended to be killed would . . . have been excusable or justif[ied] . . . [under] self-defense, then [the] unintended . . . killing [of] a bystander . . . is also excusable or justifiable.”⁸⁹ In that case, the defendant entered a bar, walked toward a booth where his wife was sitting with another man, and shot the man and then his wife.⁹⁰ The defendant claimed that he shot the man in self-defense and that the shot against his wife was an accidental consequence.⁹¹ He argued that since he was justified in shooting the man, he could not be liable for accidentally shooting his wife as a result.⁹² The state found there was no evidence to substantiate the defendant's self-defense claims, however, and thus found no justification for shooting the man or his wife.⁹³

86. Foley, *supra* note 33; Andone, *supra* note 34.

87. See Press Release, Okla. State Legislature, *supra* note 50.

88. See *Pittman v. State*, 1954 OK CR 72, ¶¶ 8, 10, 272 P.2d 458, 460 (quoting *Pinder v. State*, 8 So. 837, 838 (Fla. 1891)); *Cook v. Hunt*, 1936 OK 672, ¶¶ 11–12, 63 P.2d 693, 694–95 (quoting *Shaw v. Lord*, 1914 OK 32, ¶¶ 0, 11, 137 P. 885, 885–86).

89. 1954 OK CR 72, ¶ 8, 272 P.2d 458, 460 (quoting *Pinder*, 8 So. at 838).

90. *Id.* ¶¶ 3, 13, 272 P.2d at 459, 461.

91. *Id.* ¶ 5, 272 P.2d at 460.

92. See *id.*

93. *Id.* ¶ 23, 272 P.2d at 463.

In the civil context, the Oklahoma Supreme Court held in *Cook v. Hunt* that “[o]rdinarily, where a person, in lawful self-defense, shoots at an assailant, and, missing him, accidentally wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence; and the question of negligence is for the jury.”⁹⁴ In *Cook*, the defendant appealed a judgment against him for shooting the plaintiff with a shotgun.⁹⁵ The defendant, who was a president of a bank, inadvertently shot the plaintiff, a bank employee, while firing at armed bandits who were robbing the bank.⁹⁶ The defendant stationed himself outside the bank with a shotgun and waited for the bandits to exit the bank.⁹⁷ When the bandits exited, they were using employees and patrons as body shields.⁹⁸ The defendant shot at one of the bandits and in so doing, accidentally shot the plaintiff employee.⁹⁹ The court recognized that a person is not liable for accidental and non-negligent injuries he causes to a bystander when he engages in self-defense.¹⁰⁰ However, the court explained that it could not overturn the lower court’s finding that the defense was invalid because the defendant was negligent when shooting the plaintiff.¹⁰¹ The court explained that although duty of care is not an element in a criminal case, in the civil context, a defendant must also be non-negligent to receive a self-defense justification when he accidentally injures a bystander.¹⁰²

Although the defense was not successfully invoked in either *Pittman* or *Cook*, Oklahoma law would recognize that if a person responds in justifiable self-defense by fleeing from a riot and inadvertently hurts a bystander, the vehicle operator could still be immune from criminal and civil liability if certain conditions are met.

A recent Oklahoma U.S. district court distinguished this principle, seeming to hold that it did not apply to Oklahoma’s Stand Your Ground

94. 1936 OK 672, ¶ 12, 63 P.2d 693, 695 (quoting *Shaw v. Lord*, 1914 OK 32, ¶ 0, 137 P. 885, 885).

95. *Id.* ¶¶ 1, 7, 63 P.2d at 694.

96. *Id.* ¶ 3, 63 P.2d at 694.

97. *Id.* ¶ 4, 63 P.2d at 694.

98. *Id.*

99. *Id.* ¶ 5, 63 P.2d at 694.

100. *See id.* ¶ 12, 63 P.2d at 695.

101. *Id.* ¶¶ 17–18, 63 P.2d at 695–96.

102. *Id.* ¶ 15, 63 P.2d at 695.

Law.¹⁰³ In *Bellis v. Bryant*, a man was in his truck fighting with a person on foot, and during the altercation, he pinned a bystander against a tree with his vehicle.¹⁰⁴ The driver argued that his actions against the person on foot constituted justified force under the Stand Your Ground self-defense law.¹⁰⁵ Even though the court found that self-defense was properly invoked as against the person on foot, the court held that the person's use of force pinning the bystander to the tree was not justified.¹⁰⁶ The court said that even if the tree pinning was accidental and exclusively a result of his self-defense, the circumstance was distinguishable from *Cook* and its rule did not apply.¹⁰⁷ The court based its distinction on the fact that *Cook* was a civil suit and was not an interpretation of Oklahoma's Stand Your Ground Law.¹⁰⁸ The Western District of Oklahoma, reviewing the decision for improper denial of habeas corpus, did not determine whether the court's reasoning was correct, stating that it could not review the state court's interpretation of Stand Your Ground.¹⁰⁹

Given this recent decision, a court might not grant immunity to a driver for harm he causes a bystander if he is invoking self-defense under Oklahoma's Stand Your Ground law. However, since the issue has not been decided by the Oklahoma Supreme Court, it could be challenged before a court in good faith because of its inconsistency with *Cook*, *Pittman*, and Oklahoma's broadened self-defense policy established by Stand Your Ground. Further, a driver would still arguably receive protection for harm he causes to bystanders under one or all of Oklahoma's other self-defense statutes.

In conclusion, Oklahoma's multiple self-defense laws shield drivers from liability when they respond with necessary force to defend themselves from threats of harm. Oklahoma self-defense laws establish a justification for using force when it is necessary to protect oneself or others and may extend the justification to innocent bystanders inadvertently harmed as a result of such self-defense. Thus, the Driver Immunity Statute is redundant

103. *Bellis v. Bryant*, No. CV-17-01333, 2020 WL 5942317 (W.D. Okla. Oct. 7, 2020), *certificate of appealability denied*, No. 20-6164, 2021 WL 2926117 (10th Cir. July 12, 2021).

104. *Id.* at *1.

105. *Id.* at *3.

106. *See id.*

107. *Id.*

108. *See id.*

109. *Id.*

to existing self-defense law and is not necessary to protect drivers who flee from riots. Assuming the elements prescribed by the self-defense statute were established in the Tulsa incident, the self-defense law already operated successfully in the criminal context to protect the truck driver from criminal charges.

B. Prosecutorial Discretion (Criminal Only)

Prosecutorial discretion is a term that describes the judgment a prosecutor uses to determine whether to press charges on a criminal defendant.¹¹⁰ There are few formal rules guiding a prosecutor's decision to press charges.¹¹¹ A prosecutor is commonly influenced by the "strength of the evidence, [the] seriousness of the offense, and [the] defendant[']s criminal history" as well as other contextual factors like fairness to the victim, defendant, and society.¹¹² This discretion can work in a vehicle operator's favor in several ways.

First, the difficulty of proving a driver's intent is one reason a prosecutor might not press charges. In a separate incident in Aurora, Colorado in 2020, a driver injured protesters by driving through a crowd.¹¹³ Although the prosecutor considered pressing charges against the driver for attempted murder, attempted reckless manslaughter, reckless endangerment, and careless driving, he ultimately did not press any charges because he believed he simply did not have enough evidence of the driver's intent.¹¹⁴

Second, prosecutor's determination of fairness based on the underlying facts of a situation is another reason why he might decline to press charges.

110. *Discretion (3)*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the COURT."). A prosecutor is also referred to by the titles of "attorney general," "district attorney," "state's attorney," and others. George Coppola, *OLR Research Report: States That Elect Their Chief Prosecutors*, CONN. OFF. OF LEGIS. RSCH. (FEB. 24, 2003), <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm>.

111. BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUST., *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING 4* (2012), <https://www.ojp.gov/pdffiles1/nij/grants/240335.pdf>; *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[T]he decision whether or not to prosecute, and what charge to file . . . generally rests entirely in [a prosecutor's] discretion.").

112. FREDERICK & STEMEN, *supra* note 111, at 3–4.

113. Elise Schmelzer, *No Criminal Charges for Jeep Driver Who Sped Through Crowd of Aurora Protesters*, DENVER POST (Sept. 23, 2020, 4:50 PM), <https://www.denverpost.com/2020/09/23/aurora-protest-jeep-driver-charges/>.

114. *Id.*

After the Tulsa incident, Prosecutor Kunzweiler used his discretion when he decided not to press charges on the truck driver. In his report, Kunzweiler relied on the overall facts of the situation, including the presence of the children, to determine that charges against the driver would be unfair and inappropriate because of the circumstances.¹¹⁵

Third, in addition to not pressing charges because of insufficient evidence or unfairness, a prosecutor may also decline to press charges because of strong public disapproval. Prosecutors are elected officials in almost every state.¹¹⁶ Because their job security rests in the hands of their electorate, they are politically sensitive to public opinion.¹¹⁷ A comprehensive study of district attorney election cycles spanning multiple decades found data confirming this sensitivity. The study showed that prosecutors are politically motivated and make decisions in response to public opinion.¹¹⁸ The data revealed a sentencing trend where criminal sentencing rates increased during election years, particularly when the elections were contested.¹¹⁹ The study also found that this correlation softened over time, in tandem with the shift in U.S. public opinion to be less harsh on crime.¹²⁰ This finding suggests that prosecutors are responsive to public opinion, generally. Another study also revealed that prosecutors

115. See Memorandum from Steve Kunzweiler, *supra* note 1.

116. Coppolo, *supra* note 110.

117. The decision to elect prosecutors in America was motivated by a desire for citizens to have greater control and influence over the local government. Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012). Prosecutors have duties to statewide voters and local opinion. Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823 (2020); see also Daniel Nichanian, *The Politics of Prosecutors*, THE APPEAL, <https://theappeal.org/political-report/the-politics-of-prosecutors/> (last updated June 2021). While running for re-election Prosecutor Kunzweiler underplayed his discretion and political motivations during his campaign to Oklahomans while also making statements, in contrast to those claims, to the New Yorker about the breadth of his discretion and lobbying against pro-reform legislation. Daniel Nichanian, *On the Challenges of Running as a Reform Prosecutor in Oklahoma*, THE APPEAL (Nov. 15, 2018), <https://theappeal.org/politicalreport/oklahoma-candidates/>; Sarah Stillman, *America's Other Family-Separation Crisis*, NEW YORKER (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/11/05/americas-other-family-separation-crisis>.

118. Chika O. Okafor, *Prosecutor Politics: The Impact of Election Cycles on Criminal Sentencing in the Era of Rising Incarceration* 3 (arXiv Preprint No. 2110.09169v1, 2021), <https://arxiv.org/pdf/2110.09169.pdf>.

119. *Id.* at 36–38.

120. *Id.* at 35–38.

respond to issue-specific public opinions.¹²¹ A 2014 study of Colorado prosecutors found that prosecutors' sentencing behaviors changed in response to the public's changing perception of marijuana.¹²² Since public opinion and local politics play a significant role in a prosecutor's decision-making, Oklahoma prosecutors are likely responsive to public support for driver immunity, which tends to be more popular in Republican-led states.¹²³

Prosecutors have vast discretion that serves as a powerful, virtually unregulated tool. Prosecutors can decline to press charges when they determine there is insufficient evidence to support a claim or that charges would otherwise be unfair. Additionally, prosecutors have historically responded to political incentives and public preferences. Thus, this discretion serves as yet another way in which the justice system may already provide protection to innocent drivers who flee from riots.

C. Comparative Negligence (Civil Only)

If, despite the protections explained above, a driver is sued civilly because he negligently harmed someone, his liability may be limited because of comparative negligence law. Oklahoma's Comparative Negligence Statute provides a complete defense to liability if the victim of the defendant's negligence is more at fault than the defendant.¹²⁴ If the victim is responsible to a lesser degree than the defendant, the defendant's liability is reduced by the percent that the victim was comparatively responsible.¹²⁵ In this way, a driver has a separate and distinct form of protection from civil liability under a negligence claim because if the protester or bystander who is harmed is partially at fault, the driver's liability will be limited accordingly.

In the driver immunity context, comparative negligence is relevant because if a victim were unlawfully blocking a street or otherwise doing something careless to cause their own injury, the driver's liability would be

121. Michael J. Nelson, *Responsive Justice?: Retention Elections, Prosecutors, and Public Opinion*, 2 J.L. & CTS. 117, 118 (2014), <https://www.journals.uchicago.edu/doi/epdf/10.1086/674527>.

122. *Id.*

123. Foley, *supra* note 33; Andone, *supra* note 34; Nitish Pahwa, *Why Republicans Are Passing Laws Protecting Drivers Who Hit Protesters*, SLATE (Apr. 15, 2021, 2:33 PM), <https://slate.com/business/2021/04/drivers-hit-protesters-laws-florida-oklahoma-republicans.html>; Epstein & Mazzei, *supra* note 26.

124. 23 OKLA. STAT. § 13 (2021).

125. *See generally* Smith v. Jenkins, 1994 OK 43, ¶¶ 2, 9, 873 P.2d 1044, 1044–45.

reduced.¹²⁶ Thus, Oklahoma's Comparative Negligence Statute establishes another way that a driver can receive protection from liability under existing Oklahoma law.

In conclusion, despite the Oklahoma legislature's insistence that the Driver Immunity Statute is necessary to shield innocent drivers, Oklahoma law already provides several protections. Oklahoma's numerous self-defense statutes create a legal justification for a driver to use the force necessary to protect himself, and additionally, a driver is protected by either prosecutorial discretion in a criminal lawsuit or comparative negligence law in a civil lawsuit. Thus, the Driver Immunity Statute is unnecessary, and instead, it expands existing self-defense doctrine and causes other negative consequences.

IV. Negative Consequences

Rather than creating protection for drivers, the Driver Immunity Statute broadens existing protections by expanding the contemporary doctrine of self-defense. Such a broad immunity will likely result in the statute applying to more people and situations than intended. It also means that there will be great leeway and discretion in its application, which can cause discriminatory and arbitrary results. Lastly, the Driver Immunity Statute sends an improper message to Oklahoma citizens, seemingly affirming the current social bias against protesters.

A. Expands Self-Defense

This unnecessary broadening of self-defense laws threatens to increase the human cost of self-defense and create an opportunity for vindictive drivers to abuse its leniency. One limitation of the self-defense doctrine that is not addressed by the Driver Immunity Statute is the aggressor exception. In general, if a person creates the circumstance that causes their need to use self-defense, they do not receive the benefit of the doctrine.¹²⁷ An aggressor

126. *See id.* ¶ 2, 873 P.2d at 1044.

127. VERNON'S OKLAHOMA FORMS 2D: OKLAHOMA UNIFORM JURY INSTRUCTIONS, Westlaw OUJI-CR 8-50 (database updated Apr. 2020); *Davis v. State*, 2011 OK CR 29, ¶ 95, 268 P.3d 86, 115, *modified*, 2012 OK CR 4 ("The right of self-defense [under 21 OKLA. STAT. § 733] cannot be invoked by an aggressor or by one who voluntarily enters a situation armed with a deadly weapon."); *Ruth v. State*, 1978 OK CR 79, ¶ 8, 581 P.2d 919, 922 ("[T]he right of self-defense [under 21 OKLA. STAT. § 643] cannot be invoked by an aggressor or by one who voluntarily enters a situation armed with a deadly weapon, no matter how great his or per [sic] peril becomes.").

is someone who “by his/her wrongful acts provokes, brings about, or continues an altercation.”¹²⁸ The aggressor exception was not addressed by the legislature despite being particularly relevant to the Tulsa incident. In that incident, the truck driver flashed his gun to the protesters before plowing through the crowd.¹²⁹ Whether the truck driver should have been considered an aggressor was not mentioned in the prosecutor’s report,¹³⁰ nor was it referenced by the law’s sponsors during legislative debate.¹³¹ Without an aggressor exception, vehicle operators could provoke an altercation but nonetheless receive protection under the Driver Immunity Statute.¹³² This oversight creates a way for drivers to abuse the statute by allowing them to enter protests with malicious intent and still receive immunity for harm they cause.

Additionally, the Driver Immunity Statute expands the doctrine of self-defense because it does not define where a driver must be in relation to a riot. Self-defense doctrines require that a threat of harm be imminent to justify a use of defensive force.¹³³ However, the Driver Immunity Statute merely requires that a riot be occurring and that the driver reasonably believe fleeing is necessary.¹³⁴ It does not require that the driver be imminently threatened by the riot, and therefore, a driver could receive protection under the law in a situation where he is merely aware of a riot occurring nearby. By broadly authorizing a driver’s decision to flee, a driver receives greater leniency in his decision.

To illustrate this point, consider a hypothetical. A person might be in his car and reasonably believe it is necessary to flee from a riot occurring close by; but moments after the driver flees, the riot might end or be broken up by

128. VERNON'S OKLAHOMA FORMS 2D: OKLAHOMA UNIFORM JURY INSTRUCTIONS, Westlaw OUJI-CR 8-53 (database updated Apr. 2020).

129. *Pickup Rolls Through Protestors*, *supra* note 3.

130. Memorandum from Steve Kunzweiler, *supra* note 1.

131. See 21 OKLA. STAT. § 1320.11 (2021); Video: Oklahoma House Session, Day 22, *supra* note 57, at 12:30:18 PM.

132. Again, this Note is in no way asserting an opinion about whether the driver was or was not an aggressor or at fault.

133. 21 OKLA. STAT. § 1289.25 (2021); VERNON'S OKLAHOMA FORMS 2D: OKLAHOMA UNIFORM JURY INSTRUCTIONS, Westlaw OUJI-CR 8-48 (database updated Apr. 2020) (jury instructions for 21 OKLA. STAT. § 643(3)); *Mack v. State*, 2018 OK CR 30, ¶ 3, 428 P.3d 326, 327–28 (applying 21 OKLA. STAT. § 733). Imminency is often analyzed with both special and timing components. See V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1242–43 (2001).

134. 21 OKLA. STAT. § 1320.11.

the police. The riot may never have constituted an imminent threat to the driver. Because the statute doesn't require that the driver be imminently threatened by the riot, the statute arguably encourages drivers to respond prematurely to what they reasonably believe *might* become an imminent threat. In this way, the Driver Immunity Law may cause more people to be "justifiably" though not *necessarily* injured by fleeing drivers, thereby increasing the human cost of self-defense.

The Driver Immunity Statute expands a driver's existing right to self-defense by failing to impose the limitations associated with existing self-defense laws. This expansion creates a broad immunity for drivers, thereby increasing the risk of harm to protesters and the public. Also, by creating such a broad immunity, the statute increases the discretion that will be used to enforce it, which may lead to discriminatory and arbitrary results.

B. Increases Discretion

Because the Driver Immunity Statute establishes a broad immunity for drivers, it may apply to more people and situations than the legislature intended.¹³⁵ This broad immunity also creates a risk of causing discriminatory and arbitrary results because it requires more discretion in its application.¹³⁶ This additional discretion leaves more room in the decision-making process for biases to influence a decision maker's choices on when to enforce it.¹³⁷ With respect to potential liability for claims of prosecutorial

135. See generally, Kiel Brennan-Marquez, Essay, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 647–51 (2019) (explaining problems associated with drafting overbroad laws).

136. See Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 610 (2020) ("[Prosecutorial discretion] enables prosecutors to define the law within their jurisdiction."); Stephen E. Henderson, *Should Robots Prosecute and Defend?*, 72 OKLA. L. REV. 1, 13 (2019) ("The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is endless." (citation omitted)); Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 596 (2019) ("Prosecutorial discretion pervades every aspect of prosecutors' work.").

137. See Sawyer, *supra* note 136 at 613; Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795, 822 (2012); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2102 (2004) ("Because the decisions fall to the subjective judgment of the prosecutor, potential abounds for unconscious racial biases to influence outcomes.").

bias, Supreme Court caselaw “leaves prosecutors almost entirely insulated from liability.”¹³⁸

There are many decisionmakers involved when enforcing a law; including law enforcement, prosecutors, judges, and juries. To a certain extent, these players are called upon for their ability to reason and employ discretion to particularized situations. But too much discretion can lead to outcomes that are more influenced by bias than the legislature’s original intent.

Explicit prejudice has been recognized and disapproved by the judicial system for many years,¹³⁹ but implicit prejudice is a more recent concern.¹⁴⁰ Implicit biases are “unjustified assumptions about other people and related evidence that can distort a person’s judgment” and that operate “without awareness, intent, or conscious control.”¹⁴¹ Although “[p]ersonal attitudes and acquired knowledge often help individuals function more efficiently by making it easier for the brain to recognize and respond quickly to new people or situations . . . some attitudes . . . distort decision making by unfairly influencing judgment about others.”¹⁴² As noted by a recent law review article, “Researchers have found that subjects can consciously embrace ideas of fairness and equality” but “on tests that measure subconscious tendencies, still show a strong propensity to lean on stereotypes to fill in the blanks about people they don’t know.”¹⁴³ For instance, disparate sentencing,¹⁴⁴ unequal rates of imprisonment,¹⁴⁵ and

138. Sawyer, *supra* note 136, at 613.

139. Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV.: J. AM. JUDGES ASS’N 190, 190 (2013), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1446&context=aja_courtreview; see Sawyer, *supra* note 136, at 613 (citing *Batson v. Kentucky*, 476 U.S. 79, 86 (1986)).

140. Elek & Hannaford-Agor, *supra* note 139, at 190.

141. *Id.*

142. *Id.*

143. Bell, *supra* note 83, at 929 (quoting Tom James, *Can Cops Unlearn Their Unconscious Biases?*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996/>).

144. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J.F. 391, 400–03 (2017); Danielle L. Macedo, *What Kind of Justice is This? Overbroad Judicial Discretion and Implicit Bias in the American Criminal Justice System*, 24 J. GENDER, RACE & JUST. 43, 72 (2021); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI., 383, 384 (2006).

unfairness in the courtroom,¹⁴⁶ have been generally attributed to implicit biases regarding race.

Importantly, another bias likely to influence decision makers in their application of the Driver Immunity Statute is prejudice against protests.¹⁴⁷ Media trivializes drivers plowing through protests¹⁴⁸ and generally covers violent protests more frequently than peaceful ones.¹⁴⁹ This contentious environment will likely impact decisionmakers' perceptions and attitudes toward protesters and make them more likely to discriminate against these groups when making decisions.

Thus, the Driver Immunity Statute's broadness creates a significant risk of discriminatory and arbitrary outcomes. As a result, the statute creates

145. Margaret Bull Kovera, *Racial Disparities in the Criminal Justice System: Prevalence, Causes, and a Search for Solutions*, 75 J. SOC. ISSUES 1139, 1144, 1147 (2019).

146. Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1246 (explaining that biases impact jurors' decisions); Stephanie Russell-Kraft, *Diversity in the Judiciary Isn't Just about Representation. It Impacts How Cases Are Decided*, INSIDER (June 30, 2021, 8:30 AM), <https://www.businessinsider.com/diversity-in-the-judiciary-impacts-how-cases-are-decided-2021-6> (“[J]udges’ gender and racial identity impacts how cases are decided. . . . In sex discrimination cases, women are 15% more likely to rule in favor of the claimant than men.”).

147. A recent report polled people's perceptions of Black Lives Matter protests and indicated that, although ninety-three percent of these protests are peaceful, about forty-two percent of the respondents in the study believed “most protesters . . . are trying to incite violence or destroy property.” Sanya Mansoor, *93% of Black Lives Matter Protests Have Been Peaceful, New Report Finds*, TIME (Sep. 5, 2020, 11:47 AM EDT), <https://time.com/5886348/report-peaceful-protests/>.

148. See *Fact Check: Drivers Don't Have the Right to “Plow Through” Protesters*, REUTERS (June 4, 2020, 4:05 PM), <https://www.reuters.com/article/uk-factcheck-running-over-protesters-blo/fact-check-drivers-dont-have-the-right-to-plow-through-protesters-idUSKBN23B39U> (responding to a series of social media post om the legal consequences of plowing down protestors).

149. See Jake Lahut, *Protests This Past Week Have Been Largely Peaceful, but Fox News Continues to Show Old Footage to Rile up Viewers*, INSIDER (June 11, 2020, 2:30 PM), <https://www.businessinsider.com/fox-news-replays-violent-old-protest-footage-actual-protests-calm-2020-6> (explaining that Fox News continually played reels of violence at protests even when they were untimely); Douglas M. McLeod, *News Coverage and Social Protest: How the Media's Protest Paradigm Exacerbates Social Conflict*, 2007 J. DISP. RESOL. 185, 185–86 (explaining that media favors coverage of sensational, violent protest compared with peaceful protest); Tracey L. McCain, *Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601, 603 (1992) (suggesting that sensational crime coverage increases the chances of prejudice in the criminal justice system).

more problems than it solves and sends a particularly dangerous message to Oklahoma drivers—that people may be immune from vehicular manslaughter when the victims are protestors.

C. Sends an Improper Message

By passing the statute, the legislature seems to respond to the media's trivialization of driving through protests with a license for doing so.¹⁵⁰ As a result, Oklahoma drivers are likely to interpret the Driver Immunity Statute as sending a message that their rights are superior to protesters'. But this subversion of protestor's rights in favor of a freestanding right for vehicle drivers is inconsistent with America's deeply rooted constitutional values.¹⁵¹ The right to peacefully protest, one of the core tenants of the First Amendment, ensures the rights to free speech and assembly.¹⁵² These rights are "fundamental" and crucial to a free democracy.¹⁵³ A fundamental right is one that is so engrained in the fabric of our democracy as to be considered fundamental to it.¹⁵⁴ On the other hand, the right to drive is *not* a fundamental right.¹⁵⁵ Driving is often described as being a privilege, rather than a right, since it is highly regulated and driver's licenses can easily be restricted and suspended.¹⁵⁶ Accordingly, other policy considerations aside,

150. See *U.S. Current Trend*, *supra* note 32 (arguing that driver immunity laws often support drivers who instigate conflicts with protestors).

151. Lee Rowland & Vera Eidelman, *Where Protests Flourish, Anti-Protest Bills Follow*, ACLU (Feb. 17, 2017), <https://www.aclu.org/blog/free-speech/rights-protesters/where-protests-flourish-anti-protest-bills-follow>.

152. U.S. CONST. amend. I.

153. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

154. *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

155. Jeffrey T. Walter, Annotation, *Validity and Application of Statute or Regulation Authorizing Revocation or Suspension of Driver's License for Reason Unrelated to Use of, or Ability to Operate, Motor Vehicle*, 18 A.L.R. 5th 542 (1994); *Roberts v. Colorado*, No. 00-1212, 2000 WL 1275606, at *2 (10th Cir. Sept. 8, 2000); *Matthew v. Honish*, 233 F. App'x 563, 564 (7th Cir. 2007); *Abuhouran v. Soc. Sec. Admin.*, 291 F. App'x 469, 473 (3d Cir. 2008); *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 534 (6th Cir. 2007); *Caddell v. Helena Elder Hous., Inc.*, 494 F. App'x 809, 810 (9th Cir. 2012) (citing *Miller v. Reed*, 176 F.3d 1202, 1205–06 (9th Cir. 1999)).

156. *General Information – Suspension/Revocation of Driving Privilege*, OKLA. DEP'T OF PUB. SAFETY, <https://oklahoma.gov/dps/faqs/suspension-revocation-of-driving-privilege-faq/general-information-suspension-revocation-of-driving-privilege.html> (last modified Oct. 5, 2020) (referencing driving as a "privilege" several times); *Reasons for an Oklahoma Driver License to Be Revoked, Cancelled, Denied or Disqualified*, OKLA. DEP'T OF PUB. SAFETY,

the right to protest is a more deeply rooted and significant right than the right to drive. The Driver Immunity Statute misappropriates these values.

Instead of clarifying the law like Representative West claims was the purpose of the statute,¹⁵⁷ the Oklahoma Driver Immunity Statute is an “anti-protest” law because it perpetuates an existing bias against protests and endangers the lives of people exercising their right to free speech.¹⁵⁸

Aside from the fact that it may embolden drivers and promote vigilantism, it also has subtler, although no less important, consequences. Because of the Driver Immunity Statute, an innocent protester may have no recourse for injuries caused by a driver if the driver is able to meet the broad conditions of the law. Even though the statute only applies when there is a riot, it will impact innocent bystanders who are peacefully exercising their right to protest. By expanding the doctrine of self-defense, the statute increases the risks associated with peaceful protesting because it may cause more bystanders to lose their right to retribution from harm caused by an offensive driver. In this way, the legislature discriminates against protesters by making them cost-bearers of the repercussions caused by rioters. This outcome is contradictory to the policy established by the judicial system, which has held that innocent protesters should not be held responsible for the violence of others.¹⁵⁹ Thus, the practical effect of the Driver Immunity Statute is that it creates a deterrent for law-abiding citizens who wish to exercise their First Amendment right to protest.

When introducing Oklahoma’s Driver Immunity Statute, Representative Standridge stated, “My hope is that this law never is utilized.”¹⁶⁰ But even if the statute is never invoked at trial or by a prosecutor, it already impacts Oklahoma citizens because it changes their perceptions of their rights¹⁶¹ and risks disincentivizing the exercise of free speech rights.¹⁶²

<https://oklahoma.gov/dps/driver-license-suspensions.html> (last modified Dec. 9, 2020) (listing numerous reasons a driver’s license may be suspended).

157. Lee, *supra* note 39 (“This measure would clarify a motorist’s rights in a similar situation going forward.”).

158. See *Analysis of US Anti-Protest Bills*, ICNL, <https://www.icnl.org/post/news/analysis-of-anti-protest-bills?location=&status=&issue=&date=> (last updated Jan. 12, 2022).

159. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982).

160. Epstein & Mazzei, *supra* note 26.

161. During debate, Representative Monroe Nichols explained to the floor the consequences of the law for himself and his constituents, noting that the law sends a message that the system is not willing to change for people like him and the only recourse is to “shut up.” Video: Oklahoma House Session, Day 22, *supra* note 57, at 12:11:00 AM.

162. See *infra* Part IV.

IV. Similar Legislation Has Proven Detrimental

Stand your ground laws and driver immunity laws are conceptually similar, and therefore pose some of the same problems and risks in application. This Part introduces the similarities between stand your ground and driver immunity laws and explains the negative consequences that have resulted from states passing these types of laws.

Stand your ground laws and driver immunity laws are alike because they both expand the historical doctrine of self-defense and do not require an individual to consider alternatives before using force.¹⁶³ Under a stand your ground law, a person does not have to retreat and may use force without a duty to retreat.¹⁶⁴ Under a driver immunity law, a person does not have to wait for an imminent threat or look for an opportunity to retreat; this person can accelerate their vehicle as soon as they believe it is reasonably necessary. Further, the debate surrounding the Driver Immunity Statute and stand your ground laws is almost identical: proponents of the law urge that the statute is necessary to affirm innocent people's rights to self-protection, while opponents contend that it encourages violent force and vigilantism.¹⁶⁵

Stand your ground laws have been in place in various states for about fifteen years,¹⁶⁶ and several studies assess their success and prudence. For example, in 2015, the American Bar Association (ABA) recommended that all states repeal their stand your ground laws because it discovered that in addition to being ineffective, the laws create discriminatory, inconsistent results.¹⁶⁷

163. See Lydia Zbrzezni, Notes & Comments, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231, 265 (2012) (“[Stand your ground] law[s] encourage[] individuals to resort to retaliatory violence instead of seeking other alternatives such as police intervention.”).

164. *Dawkins v. State*, 2011 OK CR 1, ¶ 6, 252 P.3d 214, 217 (“A person may use deadly force with no duty to retreat when he has the lawful right to be where he is, and when he reasonably believes the use of deadly force is necessary.” (citing 21 OKLA. STAT. § 1289.25(D) (Supp. 2006))).

165. Compare AM. BAR ASS'N, NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS: FINAL REPORT AND RECOMMENDATIONS 21–23 (2015), with Lee, *supra* note 39 (explaining that proponents/opponents of the Driver Immunity Statute have almost the same debate).

166. Elizabeth Chuck, *Florida Had First Stand Your Ground Law, Other States Followed in 'Rapid Succession'*, NBC NEWS (July 18, 2013, 9:03 AM CDT), <https://www.nbcnews.com/news/us-news/florida-had-first-stand-your-ground-law-other-states-followed-flna6c10672364>.

167. AM. BAR ASS'N, *supra* note 165, at x, 8.

Several independent studies criticize stand your ground laws for promoting violence.¹⁶⁸ In 2012, Cheng and Hoekstra found that states with stand your ground laws experienced an eight percent increase in the number of homicides relative to non-stand-your-ground states.¹⁶⁹ Another study from 2017 echoes Cheng and Hoekstra's conclusion, finding that stand your ground "laws are associated with an increase in homicides in the White male population by about thirty per month."¹⁷⁰ Most recently, in 2022, researchers concluded that stand your ground laws were "associated with an abrupt and sustained 8%-11% national increase in monthly homicide and firearm homicide rates, contributing an extra 58 to 72 homicides each month."¹⁷¹ These data points support the hypothesis that stand your ground laws encourage people to react violently in threatening situations.¹⁷²

Additionally, critics worry that stand your ground laws cause discriminatory outcomes. On this point, research is less definite. A recent study found no significant evidence that stand your ground laws exacerbate racial disparity,¹⁷³ but many earlier studies have.¹⁷⁴ For instance one study found that from 2005 to 2011, justifiable homicides of Black citizens doubled in stand your ground states, but remained constant in others.¹⁷⁵ Jack Cutrone, President of the National Criminal Justice Information Authority, explained that Black-on-Black homicides did not increase, but that there was an increase in White-on-Black homicides as a result of stand

168. *Effects of Stand-Your-Ground Laws on Violent Crime*, RAND (Apr. 22, 2020), <https://www.rand.org/research/gun-policy/analysis/stand-your-ground/violent-crime.html>; Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and Its Racial Implications*, DUKE CTR. FOR FIREARMS L. (Jan. 18, 2022), <https://firearmslaw.duke.edu/2022/01/the-dangerous-expansion-of-stand-your-ground-laws-and-its-racial-implications/>.

169. Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence From Castle Doctrine 4* (Nat'l Bureau of Econ. Rsch., Working Paper No. 18134, 2012).

170. Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries*, 52 J. HUM. RES. 621, 637 (2017).

171. Michelle Degli Esposti et al., *Analysis of "Stand Your Ground" Self-Defense Laws and Statewide Rates of Homicides and Firearm Homicides*, JAMA NETWORK OPEN 8 (Feb. 21, 2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789154>.

172. Barbara R. Arnwine, *Minorities and "Stand Your Ground Laws"*, NBA: NAT'L B. ASS'N MAG., Fall/Winter 2013-14, at 8, 19-WTR NBAM 8 (Westlaw).

173. Esposti et al., *supra* note 171, at 8.

174. Chavis, *supra* note 168.

175. Bell, *supra* note 83, at 924 (citing MAYORS AGAINST ILLEGAL GUNS ET AL., SHOOT FIRST: 'STAND YOUR GROUND' LAWS AND THEIR EFFECT ON VIOLENT CRIME AND THE CRIMINAL JUSTICE SYSTEM 3 (2013), <https://perma.cc/ND2B-LBJN>).

your ground laws.¹⁷⁶ Another study found that after Florida enacted its stand your ground laws, rates of adolescent homicide and the murder of Black persons increased, especially when compared to White homicides.¹⁷⁷

Additionally, racial groups may invoke the stand your ground defense with disparate success rates. A study conducted by the Urban Institute in 2013 found that nationally the likelihood of a White-on-Black homicide was almost ten times more likely to be ruled justified than a Black-on-White homicide.¹⁷⁸ Another study in 2021 that used data from 2014-2019 found that White-on-Black homicides were five times more likely to be justified in a court of law than Black-on-White homicides.¹⁷⁹

Rather than improving safety as legislatures may have intended, studies suggest stand your ground laws increase violence and may discriminatorily impact certain racial groups. Since stand your ground laws and driver immunity laws are conceptually similar and raise similar concerns in application,¹⁸⁰ the same negative effects may also accompany driver immunity laws and create similar negative consequences.

V. Conclusion

Oklahoma's legislature may have had good intentions when it passed the Driver Immunity Statute last April, but as Prosecutor Kunzweiler stated, "There are any number of laws already in place that are readily available to be enforced."¹⁸¹ The statute's expansion of Oklahoma's self-defense law creates a broad immunity for drivers, which makes the statute susceptible to discriminatory and arbitrary enforcement. The statute was passed under a pretext of misinformation and against a background of media trivializing the violence of drivers bulldozing over protesters. Passing the Driver Immunity Statute in light of the current social climate sends a message to

176. AM. BAR ASS'N, *supra* note 165.

177. Michelle Degli Esposti et al., *Increasing Adolescent Firearm Homicides and Racial Disparities Following Florida's "Stand Your Ground" Self-Defense Law 3-4* (n.d.) (unpublished manuscript), https://ora.ox.ac.uk/objects/uuid:90b625b8-0d99-4637-a927-5ec029e8da1d/download_file?file_format=pdf&safe_filename=Revised%2520manuscript.pdf&type_of_work=Journal+article.

178. JOHN K. ROMAN, URBAN INST., RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA 6 (2013).

179. *A License to Kill: Shoot First Laws, Also Known as Stand Your Ground*, EVERYTOWN RSCH. & POL'Y (Sept. 8, 2021), <https://everytownresearch.org/report/stand-your-ground-laws-are-a-license-to-kill/>.

180. *See supra* Section III.B.

181. Murphy, *supra* note 55.

citizens that driver's rights are superior to both protesters' bodily autonomy and their constitutional rights. This message both emboldens drivers to respond to protests with vigilantism and is inconsistent with the First Amendment's right to assemble.

Oklahomans should be aware that the risks associated with the Driver Immunity Statute are significant and that similar legislation has proven both unsuccessful and detrimental. Although the law was presented as a protection for innocent Oklahomans, it will likely have the opposite effect: it may cause more bystanders and peaceful protesters to be injured than is reasonably necessary to protect a driver's rights. Legislators that consider passing these driver immunity laws should not do so, and legislatures that have already passed them should repeal them. In the least, courts should narrowly construe these laws and apply them using the same constraints associated with self-defense laws.

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