Initial Aggressor: Losing the Right to Argue Self Defense

Part 1 of an Interview with Attorney Jim Fleming

Interviewed by Gila Hayes

When we consider criminal cases that follow use of force, a common problem area questions whether a confrontation that devolved into a physical fight or a shooting was started and fueled by the defendant's combative, aggressive words or actions. The legal terms vary slightly state to state and between jurisdictions, generally being described as being an initial aggressor. In light of how often good, normally law-abiding people find that they have committed serious crimes by initiating a fight, we spend time this month studying under the tutelage of our Advisory Board member attorney and firearms instructor Jim Fleming.

eJournal: Jim, we are not addressing people who regularly go to dive bars and scrap with the other drinkers on weekend nights! Far from it–so we need to learn to identify, avoid and recover from the slip ups that trap people when a human interaction goes off the rails and a normally good, law abiding person has inadvertently started a fight, maybe by trying to stop victimization before it escalates into risk of death or grave, unrecoverable injury. Where is the line between being the aggressor who started a fight and being one who has assertively stopped a threat before it gets so far out of hand that serious injury or death is probable?

Fleming: There is no one size fits all answer to a question like this. It is highly fact dependent, and the law, as is always the case, varies from state to state on both the definition of an initial aggressor and what impact that characterization will have on the analysis of the application of self defense. For example, different states vary between using the term "initial aggressor" or simply "aggressor."

In general terms, a person loses the right to defend themselves from an attack and becomes an initial aggressor when they are the first to physically attack another person or initiate a fight by threatening to physically attack the other person. But some states (such as North Carolina and Oklahoma) further qualify the initial-aggressor limitation by adding the requirement that the attack or threat of attack must be "calculated" to induce a deadly attack by another so that the aggressor may employ what would otherwise seem to be a justifiable use of deadly force self defense. That word "calculated" screams out "THIS IS A JURY QUESTION!"

People need to seriously contemplate the fact pointed out by legal scholars such as Joshua Dressler in *Understanding Criminal Law,* "The issue of whether a defendant is the aggressor ordinarily is a matter for the jury to decide, based on a proper instruction on the meaning of the term." Appellate courts end up with appeals based upon the use of jury instructions all the time.

eJournal: How difficult is it to regain the right to self defense (and thus merit a self defense jury instruction) if you're the one who made the first aggressive action or words, then regret it and withdraw? Are there specific reasons a court would say an attempt to withdraw was insufficient? Is there a time in a confrontation after which it is too late to withdraw and claim that you said you were stopping? How does the initial actor demonstrate a good-faith withdrawal and regain right to use force in self defense?

Fleming: In most jurisdictions, initial aggressors may regain the right to self defense by clearly communicating to their adversary their intent to withdraw and overtly withdrawing from the fight in good faith. You could spend days drawing up scenarios in which the actions and words employed to "assertively stop a threat" would or would not be deemed to be a clear communication of a withdrawal from a conflict. It would still not produce a bright line rule.

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eJournal: Members wonder if verbally challenging someone they find sneaking around their back yard or rooting through their car at 3 in the morning is the act of an initial aggressor. They ask how to deter crime without sacrificing the right to self defense, because they recognize they are willingly leaving the safety of their homes to contact someone who is up to no good. No one goes out to prevent vandalism or car prowl intending to start a life-and-death fight.

Fleming: Based upon my answer to your earlier question, you can see how fact and location dependent this all is. A verbal challenge may or may not be perceived as an initial aggression depending upon the circumstances and the words and actions used. For example, waving a gun around while yelling, "Get the hell out of here or I'll shoot you!" is very likely to be seen as an act of initial aggression in many jurisdictions. Yes, even on one's own property, since the act of shooting someone for a simple trespass is an unlawful act. The same words and actions used after another person has attacked or made a threat to attack is not likely to be seen as an initial aggression, but instead, a *response* to an initial aggression.

On the other hand, "What are you doing here? You need to leave or I will call the police!" absent the flourishing of a gun, is not an action a jury is likely to see as one "calculated" to induce a deadly attack by another.

People like simple answers; they find them comforting. In this context, there really are no simple answers. The answer is going to depend upon how the challenge is constructed in the context of the law controlling in the jurisdiction where it occurs.

In an extreme example, in the Oman case, from Arizona, recently discussed on the ACLDN Facebook page (https://www.facebook.com/groups/221594457860509), Oman yelled into the victim's car, "I have my hand on my gun and I am going to shoot you!" To me, it seems pretty obvious that this is incredibly irresponsible. But, as I noted earlier, the statement "Get the hell out of here or I'll shoot you!" is just as likely to be seen as the words of an aggressor, provoking a deadly response, whereas "What are you doing here? You need to leave or I will call the police!" which contains no threat of violent action, is not.

People have an infinite capacity for misreading other people's actions. What to one person may seem the actions of someone "up to no good" might to another seem to be perfectly innocent or at least explainable. An example is the case of Renisha McBride: a 19 year old girl was killed in Dearborn Heights, Michigan in 2013 when she approached a home, seeking help after a car accident. The homeowner wound up shooting her in the face with a shotgun, killing her instantly. The homeowner was later convicted of second-degree murder in the death and sentenced to serve 17 years in prison.

The key is going to be how the "challenge" is constructed, and the words and actions used in that challenge.

eJournal: Jim, your instruction in how verbal warnings should be formed is very useful. If I leave my house to confront and direct an intruder to leave, but that elicits a violent counter response have I, by ordering the person off my property, initiated the fight, even though my words were not themselves a threat of violence?

Fleming: Part of the key is going to be what actions did you take at the outset. If you were simply verbally confronting the individual, perhaps you were saying, "Hey, you have no business being here! Who are you? What are you doing? If you don't leave immediately, I am going to call the police" or something to that effect, you are not making any threats of violence at that point. You are making a threat, of course, but it is a threat to use legal means to address what is taking place. "If you don't get out of here, I'm going to call the police," as opposed to somebody that comes flying out into a situation who immediately begins threatening, "I'm going to shoot you!" or "If you don't get out of here, I'm going to blow your head off," or whatever else they come up with. When the courts look at this, they consider that language calculated to engender some type of an aggressive response.

If you tell the average person, "If you don't do what I tell you, I am going to shoot you," while there are some people who will listen to that, take it seriously, and turn around and run away, there are other people who will also take it seriously and they are going to react to that and say, "Hey, you just threatened my life. No matter how wrong and misguided I may be, I feel justified in doing what I am doing and now you are telling me you are going to kill me if I do not stop?" Well, that is likely to trigger a fairly violent response, because if you are going to threaten me like that, I am going to beat you to the draw, or at least I'm going to try.

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There is a dividing line between words you might say and actions you might take. You have challenged someone who is acting suspiciously, for example, maybe I have found someone who has their head buried in the back seat of my car [chuckles] and I challenged him. If I end up with a situation where deadly force is used, the authorities who are reviewing that situation may decide for whatever reason they are going to bring charges and prosecute, and then what was said in that situation is part of the analysis.

People ask how likely is that to happen? I'm justified in what I have done. In response, I point to the example of a client I had who was totally justified in using deadly force because he was attacked in his own home by an individual who was about 6' 9" and weighed over 325 pounds who kicked the door completely out of the frame and into the living room of the house and came in and attacked the guy without saying a word. Eventually, untrained as he was, my client wound up shooting the fellow. He got charged. I confronted the prosecutor and said, "What are you doing? Why are you bringing these charges?"

He said, "Well, he could have run out of the house."

I said, "You have been a prosecutor long enough to know he has absolutely no duty here in Minnesota to retreat from his own residence. You know very well we have the Castle Doctrine in place here in Minnesota and that is what it says: you have no duty in your own residence to retreat."

He looked at me and said, "Well, the bottom line is that we don't want people here taking the law into their own hands."

I said, "So, you would rather have this guy run the risk of being beaten to death by a guy who is easily twice his size who is physically attacking him because you don't want him taking the law into his own hands?"

He said, "I don't like the way you phrase that!" and I said, "I will see you in trial." Eventually, he thought about it and began to realize how that was going to come across to the jury and he came back and dismissed those charges. We worked things out.

People ask, "How likely is that to happen to me? Well, it is 50-50. It is either going to happen to you, or it's not. If it does, now those actions that you took in mere seconds while you were using whatever decision tree you use to bring you to make a decision as to how you are going to react are going to be reviewed, analyzed, discussed and talked about over a period of months, if not years before the thing is finally resolved. That is very difficult for people to understand.

People say, "Well, I will be able to explain it to the jury." No, you are not! As the defendant in a criminal case, the only time that you ever get to address the jury is when you are on the stand and you are responding to questions. If your attorney has properly prepared you for that, your answers to the questions are going to be very simple, very direct, and very short.

You do not get to talk to the jury! That is never going to happen. The perception that is going to work is totally off base.

On the one hand, you have to think about how you are going to respond to the person you are confronting. On the other hand, you need to be aware of the fact that people on the jury are going to view decisions you made and the actions that you took, and they may have very different perceptions of what they think would be appropriate under those circumstances.

When I said, "What was the language that was used by the defendant in this case? Was that language calculated to bring about a deadly attack?" I quoted from the AZ jury instruction that had to do with whether the words were used that would be or could be considered to have been calculated to have introduced a deadly attack. If that is what the jury decides, then your argument about self defense is gone. In some jurisdictions, if the judge decides that's what it was, you will not be allowed to introduce a self-defense jury instruction to the jury and then argue those facts during closing arguments.

You have got to be really careful about how you are going to approach this person and how you are going to approach this issue. It is going to be made more difficult by the fact that at the time you are going to have to do this you are not going to be Mr. or Miss Calm, Cool and Collected. You are going to be stressed out; you are going to be fearful; you are going to have adrenaline pumping and so you have to be really, really careful in thinking ahead about how you might approach something of that nature.

eJournal: Some have equated innocence with not being the initial aggressor. Is it that simple? If a person said the first harsh words, is he or she the one at fault?

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Fleming: It is nowhere nearly that simple. An initial aggressor who withdraws and effectively communicates their intent to withdraw will not lose the right to claim self defense if they are forced then to use deadly force against the other party to the confrontation–provided that the elements justifying the use of deadly force are present.

However, very few human beings have the discipline, temperament and training to remain dispassionate in an argument. As anger and/or fear mount, judgment is skewed and reactions can become exaggerated. As a result, we end up hearing over and over again, "I was in fear for my life." "I thought I saw a gun," or "I thought he was reaching for a gun." Maybe you did, but you must realize that ultimately a jury looking at the situation may very well not agree with your perception of events.

Harsh words that a judge might conclude were "calculated to induce a deadly attack" can rob you of the ability to use self-defense as a justification for otherwise criminal conduct.

eJournal: Let's make sure we understand: actual assaultive actions aren't required; you could forfeit your right to self defense by what you say alone.

Fleming: Words alone can constitute that level of aggression, if they are found to have been "calculated" to induce a deadly attack.

eJournal: Are there fewer restrictions on making the first aggressive act if on one's own property?

Fleming: This is a lot trickier because across the country, the rule is that non-deadly force can be used to protect property that is in the owner's lawful possession–if the force that the defendant uses reasonably appears to be necessary to prevent or stop an unlawful intrusion onto, or interference with, that property. But–and this is a huge limitation on that ability to use force–deadly force can never be used simply to defend property against someone else's interference with that property, even if that interference is unlawful and even if there is no other way to prevent that interference.

So non-deadly physical force, or words used to warn that non-deadly force will be employed to protect property, are not the words or actions of an aggressor.

eJournal: Let's say that your contact with the would-be criminal whose crime you interrupt lasts for three minutes, starting with you coming out of your house and saying, "What are you doing? Get out of there, or I will call the police," and in that segment of the episode, you correctly did what you are allowed to do. If the intruder responds violently or with real threats of violence and you defend yourself, when the prosecutor or DA charges you and you subsequently explain your actions to the court, are you going to have to explain everything you did from the first moment up to your use of force in self defense, or will you be judged on that half-second in which the intruder came boiling toward you and you believed you were about to be killed so you drew your gun? Are we defending that last half second as if it is a freeze-framed segment in a video or the entire three minutes?

Fleming: The broad answer depends on the experience of the attorneys that are involved and their understanding of what I have started referring to as "true" self defense. You see, everybody arrested for some type of assaultive conduct or a murder, is going to start screaming about self defense at the very first opportunity that they get. Case after case that pled the affirmative defense of self defense is rejected because in the vast majority of situations, it was not self defense; it wasn't even close to being self defense.

You better have an attorney who understands true self defense because any defense attorney can throw that dart at the wall to see if they can hit something but the attorney that understands true self defense is one who understands all the variables that might be involved. They don't necessarily have to be experts: the attorney doesn't have to be their own expert witness but has to be able to understand and be able to recognize the types of issues that are involved. Is this a crime scene issue? Is this blood spatter issue? All of the different things that become part and parcel of true self defense so that the attorney recognizes the issues and reaches into their quiver to find the experts they can bring in to articulate the different things that go into properly analyzing the issue.

eJournal: If I may add to your points the fact that while the Network is blessed to be associated with you, with our other Advisory Board attorney Emanuel Kapelsohn and all our affiliated attorneys across the nation, when one looks at the larger population of armed citizens distributed all across the United States of America, there very likely aren't really enough attorneys like you to serve the burgeoning number of armed citizens. I'd like to direct readers to something you taught me about

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years ago that we published at https://armedcitizensnetwork.org/44-our-journal/263-finding-the-right-attorney that allows the Network to bring in a deeply experienced attorney like you to defend the member by working in concert with the member's local attorney. That way we combine familiarity with local practices with the experience of defending self defense. I'm guessing that there exists a fair bit of "local flavor" to the way initial aggressor issues are recognized and dealt with.

Fleming: A lot of this is going to be contingent on where you are. There is no universal law out there on these issues. The different states handle initial aggressor issues in different ways. Their jury instructions are different. The different states have different standards and they set up these shifting burdens differently so it is really difficult if someone says, "I want an answer to this question that is going to apply anywhere in the country."

People are running around with carry permits or a combination of permits and sometimes someone tells me their permits give them "reciprocity in 47 different states." That's great, but just remember if something goes down you are going to be judged and handled by the law in the state where you are. That happens! If you do not understand the law in that jurisdiction, you put yourself at risk.

Now, does that mean that if you are going to go on a vacation trip and drive around the country that you are going to have to spend six months studying the law in all of these jurisdictions? No, but it does mean that you are going to need to be thinking about it in terms of general principles and then making sure that you have the ability to use resources such as the Armed Citizens' Legal Defense Network because members can call and say, "I'm a member and I got into trouble in Arizona," and the organization can help them identify the attorney or attorneys they want to be working with in AZ.

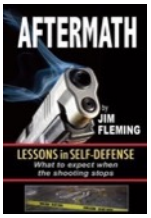
The Network can identify someone that knows this area of law, as opposed to some businesses that say, "Well, we are going to provide you with legal counsel," and you say, "Well, wait a minute! Don't I get to pick my own?" and they say, "No, we have got that taken care of!"

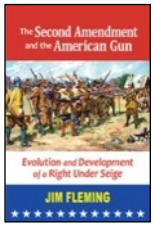
When they do that, how the hell do I know whether I'm going to end up with somebody who actually knows what they are doing? It is really important to be in a position to know that when I make the call, they are actually going to get me in touch with somebody who actually knows what they are talking about.

eJournal: Jim, we are running short on time and space in this journal edition and yet I have a number of questions about how the principles that prohibit arguing self defense if you were the initial aggressor apply to related situations like mutual combat as well as more about the jury's task of determining that use of force was true self defense.

Readers, Jim has agreed to continue this lesson, so in a month please be sure to look up the October edition of our journal for more information about initial aggressor issues, all illustrated by Jim's experience working in the criminal justice system.

Attorney and Network Advisory Board member Jim Fleming practices law in MN, an attorney of more than 37 years trial and appellate court experience in MN, NE and has argued both civil and criminal appellate cases in the State appellate courts as well as before the Eighth Circuit Court of Appeals. He is the author of several books: Aftermath: Lessons in Self-Defense and The Second Amendment and the American Gun: Evolution and Development of a Right Under Siege. Jim and his wife Lynne Fleming operate the firearms training school Mid-Minnesota Self-Defense, Inc. where Jim is the lead instructor. Learn more about Fleming's books at http://www.authorjimfleming.com and his law practice website at http://www.jimfleminglaw.com/about-1.html .





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President's Message

First Degree Murder Charges Against Member Dropped

by Marty Hayes, J.D

I am writing this at Gunsite Academy where I am attending training. While on my way south from WA State, I received an urgent call from the home office, telling me of a member-involved shooting, and the need to get working on the case. I pulled over at a rest stop on I-5 in California and got to work on the Boots on the Ground phone. Within a couple of hours, we had lined up an attorney for the member, and a couple hours after that, the attorney and member got together at the jail to start the member's defense. I will leave out the particulars of the situation, and will only note that immediately after the incident, the member did not have an attorney to call, so he called the Network first and our immediate task was connecting him with an attorney.

Fast forward a week. After spending a week in jail pending filing of formal charges, the member and his attorney sat down and discussed the case with the lead detective. The sheriff's department subsequently decided they lacked sufficient evidence to go forward with formal charges. Our member is now free with no hammer over his head, and frankly, is pretty thankful for his membership in the Network. You will likely hear from him personally in these pages if we can tell the story without incurring further legal jeopardy for the member. This experience was a great example of how membership in the Network can benefit the lawfully armed citizen.

What could have gone better? While I cannot be certain, I suspect that if the member's phone call from the jail could have gone to his previously selected attorney (not to the Network) he might have been able to avoid the days in jail. His attorney could have responded immediately, gone over the facts with the member and then discussed the case with the lead detective and perhaps later with the prosecutor. It is possible that the member may not have been arrested and booked in the first place, although we will never know.

If you don't have the cell phone number of an attorney in your wallet, you could be arrested and booked after self defense as was our member.

If you're a Network member, we will start working on your incident as quickly as we can, but you will still have to wait in jail, something everyone would prefer to avoid.

We have worked diligently over the years to enroll attorneys in the Network who are willing to help our members, and most are gun owners themselves. Our Network team includes a dedicated Affiliates Manager, Josh Amos, who works very hard on this facet of Network membership. If you have not yet contacted an attorney and would like to know more about our nearby affiliated attorneys, please contact Josh at Josh@armedcitizensnetwork.org and check if we have affiliated attorneys in your state. We probably do. In addition, don't forget that the Network never requires you to use a Network affiliated attorney, so you also enjoy freedom to select an attorney of your choice from your local defense bar, too.

Insurance Commissioner Fight Update

It has been a busy month here at the Network. First, let me provide an update on the fight with the WA Office of Insurance Commissioner (OIC). (If this is the first you've heard of our fight in WA, please browse to https://armedcitizensnetwork.org/join/fight-against-wa-insurance-commissioner for the background.)

We lost our legal fight that we presented to the OIC's own hearing officer to get the Cease and Desist Order stayed, and we decided not to appeal that decision. We made this choice because first, the C & D order is not affecting any current Network members, so we're no longer worried about caring for our existing members. The order just affects our ability to sign up new members in WA. It is annoying and we are losing money because of it, but we have a more important fight.

What is important is winning the appeal on the larger issue of whether or not Network benefits constitute insurance. To this end, our attorney, Spencer Freeman, and I have spent the last month working on the appeal, and most recently working our response to the OIC's response to our appeal. This takes a bunch of time and energy.

Recently, we contacted a dozen WA members who had written to Insurance Commissioner Mike Kreidler when

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the notice of the C & D order came in March. We asked these members if they would sign a declaration stating that when they joined the Network, they knew they were not buying insurance. Let me tell you, YOU GUYS ARE GREAT! Everyone helped out and by the time this report is published, their declarations will have been forwarded to the presiding officer, an administrative law judge employed by the OIC, for consideration.

We still have some work to do on this end before we get a ruling, and the battle starts over in Superior Court if we do not get a favorable result from this appeal. As I have said before, we are in it for the long haul. I will, of course, keep you all apprised when we have something of substance to share.

Speaking of Gunsite Academy

Gunsite is where I go for my training. I find the instructors here top notch and the whole experience is very welcoming and rewarding. As I write this, I have been at Gunsite for two classes in a row. In the first class, 66 percent of the students were already Network members, and in the second class (under way as I write this), half of the students are members. I was happy to share the good news with them when charges against our member were dropped.

Another nice experience during this trip was getting to spend some time with Rob Leahy (shown in photo below, center) at his Simply Rugged Holsters (https://www.simplyrugged.com/) workshop, when he invited the class I was in to an open house last Sunday evening. Simply Rugged Holsters is a Network Corporate Affiliate and Rob and his crew help us promote membership in the Network.

Dealing with Mob Violence

After reading last month's interview with Massad Ayoob about mob violence, one of our members asked a question that was so thought provoking and important that I wanted to share it with all of our members. The question centered around a hypothetical incident, where a member, needing to respond to a threatening mob who was closing on him, decided he needed to use deadly force to save himself or his family, and unfortunately ended up wounding or killing an unintended person because he missed his target. Would the Network assist him with his legal defense, he asked?

The answer is, it depends. ANY Network assistance to members after a use of force incident has to be decided based upon on the facts of the case. We have to explore details, like: 1) The reason the member used force, 2) was that force reasonable? 3) Was the member breaking any laws at the time of the incident, and if so, what laws? 3) Was the member the initial aggressor (did he place himself in a situation where he then needed to use force in self defense)? Without knowing the answers to those questions, we are not going to be able to immediately grant assistance. We talked earlier about having an attorney, and the answer to many of those questions can be provided by the member's legal counsel.

If the case is complicated by a person being unintentionally injured or killed, additional questions have to be explored. For example, 1) Does it appear that the member was "reasonable" in the nature of his response to the threat? (Think: aimed fire v. spray and

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pray). 2) Was the unintended target a part of the mob violence?

The Network assists wrongfully prosecuted members after a legitimate act of self defense. Until we can make a value judgment as to the righteousness of our member's response to the threat he faced (and that decision will be made based upon the details of the case known to us at the time of the request), I cannot answer whether the member will receive support from the Network.

Each case of use of force must be considered through exploration of the details of the case, both by law enforcement and, if we are to fund the legal defense, also by the Network. I cannot immediately say, "Sure, we will help" until I've seen enough to conclude that the member acted responsibility.

The best way to make sure this doesn't occur to begin with is to be well trained, so that if you have to shoot, you don't miss. This is one of the reasons I take my own training so seriously, spending about $3,000 a trip to Gunsite.

Now, you don't have to go to Gunsite for training (although it is well worth it). I am sure you can get excellent training near your home city. Check out our Network Affiliated Instructors and go take some training. A few hundred bucks (or even a few thousand) verses spending time in jail seems like a no-brainer to me.

[Photo, left: In a class I took a few years ago, Gunsite Instructor Bob Waley demonstrates pivot turns that keep feet firmly planted in a power stance.]

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Attorney Question of the Month

In late July the news was full of reports that rioters and other protesters had attacked citizens and law enforcement officers with lasers that can permanently damage vision. Some reports predicted Federal officers interdicting rioters in Portland, OR would suffer permanent blindness although the story moderated somewhat in the early days of August when word came out that the officers suffering eye damage were recovering after "suffering days-long blindness."

Internet forums and social media continue to boil over with discussion of and suggestions about shooting rioters who aim lasers at a person's eyes. Some of the discussion spilled over temporarily to the Network's Facebook page. Because of the intense fear created by rioters' use of lasers to blind those who oppose them, we sought knowledgeable responses from our Network affiliated attorneys to this question:

If attacked by a person aiming a high-intensity laser at the eyes, does fear of permanent eye damage justify shooting the person wielding the laser?

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In Georgia, you can use deadly force to prevent death or great bodily injury. It would be up to a jury to decide if being blinded permanently is great bodily injury, but I would think it would be. But I also note that you can be blinded by lasers that are not visible to the naked eye, and it takes less than a second for serious, permanent eye damage to occur.

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New York is a retreat with safety jurisdiction, so if retreat can be done safely, retreat is required. Since a laser in this instance cannot do any damage unless it contacts the eyes, the victim can turn around and make a safe retreat.

The real question of interest is what happens when no retreat is possible, and the aggressors make known their intention, or their intention otherwise is clear: to blind the victim. As example, the victim must fend off blows from surrounding attackers, one of whom is trying to blind the victim with a laser. Obviously, the victim cannot defend himself while keeping his eyes closed.

Blinding is a serious physical injury for deadly force purposes, so under these circumstances I would feel rather confident arguing that deadly force had to be used against the laser villain. But without such extreme circumstances, deadly force should not be used.

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In Tennessee, the use of deadly force is not permitted under TCA 39-11-611 unless there is imminent threat of death or serious bodily injury. Since there does not appear to be reports of the laser attacks causing death (other than perhaps as incidental to temporary or permanent blindness or obstructed vision), the question becomes whether the laser can and does cause "serious bodily injury." The term "serious bodily injury" is defined in the statutes. Tennessee Code Annotated § 39-11-106 defines the term:

(36) "Serious bodily injury" means bodily injury that involves:
(A) A substantial risk of death;
(B) Protracted unconsciousness;
(C) Extreme physical pain;
(D) Protracted or obvious disfigurement;
(E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or
(F) A broken bone of a child who is twelve (12) years of age or less.

Looking at this list, the most relevant consideration might be under subpart "E" if there is clear medical proof that such lasers would cause the protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty. If medical experts would agree that such lasers do cause the type of harm that by statutory definition causes or creates an imminent risk of

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serious bodily harm, then that consideration might be met.

But there are other considerations under Tennessee law before one can resort to deadly force. There are, unfortunately, a number of statutory issues that are relevant such as where was the potential located, was the potential victim in her home or another place that was under her dominion, was the potential victim engaged in any illegal activity, did the potential victim have a duty to retreat, and others. The answers to these other factors are also important to evaluating under Tennessee law whether deadly force is justified.

Finally, you always have to be aware that the decision to use deadly force often has to be made in a matter of seconds. On the other hand, the evaluation of that choice in the legal system will often take months if not years of hindsight and critical evaluation particularly if a death is involved.

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In Maine, yes. There's both a direct and an indirect reason why.

1) In Maine, the definition of “deadly force” includes “serious bodily injury.”

“Serious bodily injury” means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ, or extended convalescence necessary for recovery of physical health. https://www.mainelegislature.org/legis/statutes/17-A/title17-Asec2.html#:~:text=Dangerous%20weapon.,death%20or%20serious%20bodily%20injury.

2) In a “one on one” situation, if someone is attempting to blind you, knowing you have a firearm, it is the same argument as regarding tasers. If they can incapacitate you, they get your firearm, with which they can end your life.

Is the eye damage permanent? Possibly relevant to item 1 but irrelevant to item 2. Also, there's no way to tell until time has passed. Trust someone trying to blind you with a laser? Among other things, that violates the actual, real, rules of war. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule86

"I wasn't gonna' let him blind me, maybe permanently" would seem to resonate with a jury. That would be especially true for law enforcement dealing with multiple arsonists chanting, “Kill the pigs, fry 'em like bacon.” One could reasonably anticipate not being allowed to go to a hospital and recover once being incapacitated.

On the other hand, use of a “blinding laser” would be deadly force, but possibly JUSTIFIED deadly force, under the right circumstances.

Bottom line: the use of blinding lasers is a basis for reasonably believing a bunch of things that would justify deadly force. Blinding lasers, even in a military environment–indeed especially in a military environment–usually violate the international rules of war.

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This is a fairly straightforward question but it’s difficult to answer. As with many of these “It depends” is almost certainly the best response. So what exactly is the scenario:

1. You’re driving your kids to school, some protesters come up suddenly and one tries to blind you with the laser as they surround the car.
2. You’re walking down the street by yourself and a protest is occurring 100 yards away and you see a guy with a laser trying to blind you.
3. You’re standing in front of your business during a protest to protect it and you see someone with a laser trying to blind you.

All three are going to get different responses from me depending on: what is your ability to take the shot, how likely do you think you will suffer permanent injury, who are you protecting, what else is around the protester that might get hit, and what is your ability to avoid the laser? I guess, ultimately, it comes down to this old paraphrased adage: is it better to be judged by 12 [and incarcerated for up to the rest of your natural life] than be [here insert a) slightly inconvenienced, b) really inconvenienced by, or c) very and critically

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inconvenienced] by moving head/body to avoid laser. I can see a scenario where replying with deadly force might be authorized, but remember that, unlike some justified shootings, you are almost certainly going to have to go to court to justify your potentially, or actual, lethal response to this threat and this means justifying the difference between a bullet's and a laser's impact.

And as a final note, firing a round(s) in the air to scare people is almost never a justified response no matter what ex vice presidents say.

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In New York State, a person may use deadly physical force upon another individual when, and to the extent that, he/she reasonably believes it to be necessary to defend himself/herself from what he/she reasonably believes to be the use or imminent use of [unlawful] deadly physical force by such individual.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the general meaning of the following terms: "deadly physical force" and "reasonably believes."

DEADLY PHYSICAL FORCE means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

Serious physical injury means impairment of a person's physical condition which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

The determination of whether a person REASONABLY BELIEVES deadly physical force to be necessary to defend himself/herself from what he/she reasonably believes to be the use or imminent use of deadly physical force by another individual requires the application of a two-part test.

That test applies in the following way: First, the defendant must have actually believed that the person pointing the laser was using or was about to use deadly physical force against him/her, and that the defendant's own use of deadly physical force was necessary to defend himself/herself from it.

Second, a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have had those same beliefs.

Thus, under our law of justification, it is not sufficient that the defendant honestly believed in his own mind that he was faced with defending himself/herself against the use or imminent use of deadly physical force. An honest belief, no matter how genuine or sincere, may yet be unreasonable.

To have been justified in the use of deadly physical force, the defendant must have honestly believed that it was necessary to defend himself/herself from what he/she honestly believed to be the use or imminent use of such force by (specify), and a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have believed that, too.

Based upon the foregoing law, it would be extremely difficult in New Yok to justify the use of deadly force upon a person pointing a laser into another person's face. The above explanation is a very general overview of New York law. Each case is extremely fact specific oriented and there are numerous caveats and exceptions.

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After Texas passed its license to carry law the first self-defense case was a man attacked by a much larger man. The defender was punched in the eye which detached the retina. The defender drew and fired. He was found not guilty because the attacker had detached his retina. This was damage to an organ. Deadly force was therefore appropriate.

I fail to see the difference in burning someone's retina.

A big "Thank You!" to our affiliated attorneys for their very detailed contributions to this interesting discussion. Please return next month when we ask our affiliated attorneys for their thoughts on a new topic.

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Book Review

Blind Injustice:

A Former Prosecutor Exposes the Psychology and Politics of Wrongful Convictions

By Mark Godsey
Paperback, 264 pages, $18.99
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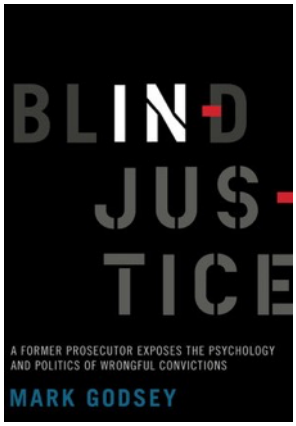

Reviewed by Gila Hayes

How do wrongful convictions occur in a criminal justice system as extensive as that of the United States of America? Some posit that prosecutors and police fail to thoroughly investigate, do not correct their mistakes, and at the extreme end of the speculation, we hear accusations of evil, malice, greed, slothfulness and other evils.

Author Mark Godsey, himself a Federal prosecutor for many years, gives an insider's view of the resistance common to prosecutors and police when presented with evidence that the wrong person is locked up. This former prosecutor, who in 2003 joined Ohio's then-new Innocence Project, writes knowledgeably about issues like confirmation bias, cognitive dissonance, memory, eyewitness errors, tunnel vision, threats to status quo and positions of authority, political pressures and other "flaws in the human psyche" that cause "police officers, prosecutors, judges, and defense lawyers to behave in bizarre and incredibly unjust ways without being aware that they are doing so." He later adds that, "All of us would act in similar ways were we in their shoes, without the proper guidance and training" and encourages readers to understand and combat "our human limitations—our psychological flaws and the structural, political flaws of our system," to practice humility and convert the criminal justice system to "a true system of justice."

The innocence movement, Godsey opines, contributes much more than freeing blameless victims of the system from prison. By spotlighting what caused wrongful convictions, it encourages exploration of psychology to better understand how wrongful convictions could happen to an innocent person, and leads "social scientists to study human perception, memory, and error with renewed vigor, resulting in a better understanding of the human mind." Besides punishing the innocent, wrongful convictions accommodate human denial and ignorance about our own blindness.

When humans have to interpret evidence, pre-established beliefs are hard to override, resulting in confirmation bias. The problem is "pervasive," Godsey writes. Juries suffer from confirmation bias, as do police, prosecutors, defense attorneys and witnesses. Forensic sciences are surprisingly subjective, he adds, and preexisting beliefs about desired outcomes influence interpretation of smeared fingerprints or distorted bite marks, tire tread comparisons, handwriting expertise, and other purportedly scientific analysis, he illustrates.

"Faulty eyewitness identification testimony—caused by errors in human perception and memory—is the single greatest cause of wrongful convictions," Godsey notes, in a chapter about how easily memory can be modified by outside suggestions or self-image corrections. Deliberate lies are excluded from the estimate, and cases cited entail genuine belief that the version of events to which the witness testified really happened. Witness "memories may be nothing more than a contaminated collection of past memories and expectations that their brain used to fill in the picture so that it could focus on more important things," he explains. The longer the time between the experience and the retelling, greater the likelihood of "forgetting and incorporation of inaccurate information," he adds.

Once an initial suspicion has taken root, people experience a form of tunnel vision that excludes any facts not supportive of that first conclusion. We "become wedded to that belief, and then interpret or even twist all subsequent information we encounter in order to confirm it," Godsey observes. As a prosecutor, he admits, that he and his colleagues sometimes adopted mere theories as "proof beyond a reasonable doubt." Prior to prosecution, similar tunnel vision leads law enforcement to ignore evidence that suggest their initial suspicions are incorrect, too, he notes.

Even defense attorneys sometimes doubt their client's innocence, he adds. "In my work with the Ohio Innocence Project, I cannot count the number of times when, after we have opened a case and begun reinvestigating it, I have called the client's original trial attorney to seek information about the case, only to receive a condescending laugh and a comment like, '…That guy is totally guilty.' When I have then asked them how they had investigated the case…the answer is

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often, 'No. I didn't do any of that because it just seemed clear that the guy was guilty. I'm not gonna ask the judge for funds for investigators and stuff like that in a case where he's so obviously guilty. I'd get laughed out of court.'"

Participants in organizations tend to honor accepted practices over the dictates of conscience, Godsey writes. "Humans act differently, and less justly, when they are part of a large system that diffuses responsibility and creates certain bureaucratic mindsets. Such behavior is inevitable to some degree, and sometimes even necessary," he admits. He later discusses a related tendency he dubs "noble cause corruption," that arises when the criminal justice system turns a blind eye to or expects members to participate in acts like hiding exculpatory evidence, pressure filled questioning that suggests the desired responses and other misdeeds because they believe they are "fighting for a righteous cause."

Partisan politics, campaign advertising, funding and the need to be seen as "tough on crime" to win election sways judges and prosecutors alike, Godsey continues. He criticizes the practice of elected prosecutors endorsing judicial candidates, and comments that in his state, it is sometimes impossible during elections to remember that the judiciary and prosecution represent different branches of government and are supposed to act as counter-balances.

An unbiased jury is the answer, right? Godsey disagrees, citing the extreme disparity in resources available to most appointed counsel compared against funding available for the prosecution. In addition, jurors want to convict someone for heinous crimes, empathize with victims, and find it difficult to "truly embrace the presumption of innocence," he quotes federal appellate Judge Alex Kozinski.

Godsey goes on to debunk the popular opinion that jurors naturally distinguish truth from lies. "In reality, we are pretty bad at measuring truthfulness from watching another person's demeanor or listening to their voice as they recount their story. The things we accept as barometers of truthfulness, such as steady eye contact and confidence, are simply not good barometers. And things we accept as indicators of dishonesty—appearing nervous, fidgeting, a lack of eye contact, or a cracking voice—are not great indicators of lying. These are just notions we have been taught and have accepted as they have been handed down for centuries—folklore—that are now refuted both by new understandings of human psychology and by the simple facts about human error brought out through the innocence movement," he comments.

"The system then relies on the jurors as human lie detectors to sort out the mess and determine which side's theory is right, with many jurors tending to start with a preexisting bias in favor of the prosecution. And with the defense operating at a serious disadvantage in terms of resources, often without investigators or experts to back up its competing theories. That's just how our adversarial system works," he later adds.

Blind Injustice is a pretty grim book until about the three quarters point when Godsey begins to suggest solutions. "We need to recognize that the criminal justice system…is comprised of human beings and is deeply infused with the psychological flaws that humans bring to it. We need to embrace our humanity and not be afraid to acknowledge and mitigate human error. In other words, we need humility and the ability to accept our human limitations," he introduces, calling for "structural and procedural changes in the criminal justice system to compensate for our psychological flaws."

Key suggestions for change include:

- Videotape and make other changes to the way eyewitness IDs are made from police line ups.
- Videotape interrogations in all cases of serious crimes from beginning to end without interruption.
- Control or stop using "incentivized" witnesses (snitches).
- Give forensics experts only limited information about a case before they make their analysis so that they don't know the "right" answer before they start.
- Provide defense attorneys with more resources to level the playing field between the prosecution and defense.
- Train police and prosecutors about psychological pitfalls like cognitive dissonance and confirmation bias.
- Change how judges and prosecutors are chosen to immunize them from political pressure.

Citizens need to acknowledge the risks the current criminal justice system entails, Godsey warns, explaining, "The public is happiest when their public officials flex their law enforcement muscles and convince them that the occasional wrongful conviction is a great aberration that could never happen to John Q. Public. That's what the public wants to hear, and they believe it. Until it happens to them."

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Editor's Notebook

by Gila Hayes

A panicked dog may explode into what is commonly called "fear biting," a recognized canine response to perceived vulnerability even when the object of the poor creature's fear aggression intends no harm. Animal scientists attribute fear biting to the poor animal's earlier life experiences (post-traumatic stress), poor or non-existent socialization, or in some situations, genetics get the blame. Animals depend on fear responses to keep their species going. Perhaps humanity is not much more advanced in this regard.

While an animal's instinctive fear response manifests in many forms, threat displays include the hard stare, growling, barking, snarling, lunging, snapping and the full-on, irrational blitz attack by an animal that has concluded–no matter how misguided–that it has to fight or be killed. Like a vulnerable teacup poodle biting its groomer, we're hearing a lot of growling and seeing a lot of teeth-baring that suggests frightened citizens are at risk of launching into a panicked response, much like a canine fear biter.

This summer's riots and violent demonstrations triggered the mother of all fight or flight reflexes in many citizens. Like panicked dogs, the growling from both sides has grown to deafening levels and is so raucous as to interfere with rational thought! Frankly, I have little interest in arguments and counter-arguments about blame or proofs about the truth or falsehood behind threats of all the various methods of attack heralded in social media and what passes for news reporting. In my opinion, society no longer has a reliable meter for truth.

As the book review this month discussed, once a belief is adopted, it is nearly impossible to override it with fact supported by evidence. Whether or not commentators, social media participants and reporters believe their comments to be truthful or if they're just spreading their preferred propaganda is really of no matter to me. It is all suspect.

I believe the critical element in surviving violence is how we respond to threatened danger, not our reaction to our participation in all the growling and snapping. Instead, we would do better to prepare by increasing our individual skills and abilities, improving our equipment and facilities, and strengthening our mental fortitude to weather both expressed threats and real violence against ourselves and our loved ones. There is no shortage of real work to be done!

If our goal, honestly and genuinely sought, is to thrive and survive the challenges inherent in social upheaval and violence, being part of all the growling and snapping is only a distraction from the real work of improving our readiness and preparation. Do we fear rioters attacking residents in their neighborhoods? Of course, we do! Fencing or barrier plantings, fire-fighting and implementing measures to increase fire-resistance, eliminating weak points in the home's perimeter are all productive efforts into which to invest that anxious energy so many are pouring into stirring the social media pot.

Are rioters headed for your neighborhood? They may be, but the important question is not, "Are they?" but instead, "What have you done to prepare?" There is a lot more to personal defense than shooting, and by hardening the protective shell around you, questions about being arrested for shooting into a crowd of rioters become less pressing because your protective barriers have afforded you a little reaction time. If individuals from the crowd break through those barriers, the threat changes from a quickly moving crowd (that may include innocent people trying to make it to the safety of their homes) to a manageable number of genuine threats in whom you have identified the factors of ability, opportunity and jeopardy that justify use of deadly force.

Please, in all the emotion, do not willfully misunderstand me! I am not advocating being vulnerable to violent intruders. Make the violent criminal actors break out of the crowd and work their attack strategy openly so your decision to use deadly force results from rational thought, articulable reasoning, and is proportional to the threat. Don't be a fear biter.

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