

# \$1,000,000

By Marty Hayes, J.D.

Has a nice ring to it, doesn't it? I am extremely pleased to announce that the Armed Citizens' Legal Defense Network's dedicated Legal Defense Fund now has in excess of One Million Dollars in four federally insured bank accounts, just waiting for a member in legal jeopardy after self defense! This fund is NOT used for any operating expenses, but instead, is earmarked for the legal defense of members after a self-defense incident, as well as helping with bail, if needed.

A few explanatory words may be useful for those who are unfamiliar with how this works for members of the Network. If a Network member is involved in a self-defense use of force incident, the Network will immediately forward up to \$25,000 for retainer to the attorney of that member's choice, if that much is needed. Typically much less suffices for the initial representation, and for several years we limited the initial deposit to \$10,000. That practice has been working fine, but with this million-dollar milestone, we decided to increase that amount, just in case. I find it conceivable that in a high profile shooting, with murder charges in the offing, the member's attorney would require a higher initial retainer, seeing what the member and the attorney might anticipate coming down the road.

Primarily, increasing that limit is a change for the benefit of our members. Across the industry, it also alters the playing field. The Network initially set the standard for immediate assistance at \$10,000 (which several competitors eventually matched); we have now raised the bar considerably.

After that initial retainer is used up, if the member is prosecuted or sued, we will fund a legitimate self-defense case up to ½ the total amount in the Legal Defense Fund, which now means up to a half a million dollars. That is also the highest assistance available in the industry; most other plans don't even come close.



## One Million Dollars!

In fact, we are the only program that I know about that maintains a dedicated Legal Defense Fund to pay legal expenses all the way through incident to acquittal, retrials, appeals, and civil lawsuit. Competing programs either promise to provide attorneys whom they select (pre-paid legal schemes) or promise to reimburse you after you have funded the trial, fighting to achieve an acquittal (insurance models).

Why did we form the Network the way we did? Because, we know that insurance schemes will not work (at least for criminal defense). You need the money up front to fight the legal fight effectively, not as a reimbursement after the fight is over. In fact, it is actually to the insurance carrier's benefit to see you found guilty; that way they do not have to pay out. Now, having said that, the civil tort insurance is not a bad idea, as the insurance carrier will be defending the civil claim (or negotiating a settlement) and would pay off if you were found culpable in civil court. While the Network will assist our members who do not have insurance with the civil trial, too, we cannot pay a judgment if the case cannot be won. Over the past several years we have been looking around the insurance industry for a good civil tort policy we might offer as an option to members. We will continue to look until the right one can be found.

Pre-paid legal schemes are only as strong as the legal firm's willingness to pay for your legal defense. I have yet to see one that defines exactly how they purport to defend their clients. I know that if my freedom is on the line, I want the right to control who fights for me in court. That means hiring my own legal team. Network members will have the backing of the Legal Defense Fund to pay for that fight.

With the Legal Defense Fund reaching its \$1 Million milestone, the Network is able to increase not only the initial fee deposit, but doing the math on how much is now available (up to ½ of the Fund) to defend a member's self defense choices really shows the strength of our organization. Thank you to all our current members who have stuck with us over the years, and helped us fulfill our vision of the Network.

May 2017

## The Role of the Expert Witness—Pt. 2

### An Interview with Emanuel Kapelsohn

*Interview by Gila Hayes*

*Introduction: We return this month to a fascinating interview with Network Advisory Board Member and attorney Emanuel Kapelsohn, who for over 30 years has been a sought-after expert witness in use of force and firearms liability litigation. In addition to his work as an expert, Kapelsohn teaches firearms and use of deadly force, as well as working as an attorney in Pennsylvania.*

*If the reader missed the first half of this educational interview, please start by reading the previous installment at (<https://armedcitizensnetwork.org/the-role-of-the-expert-witness>). We continue now with Q & A to help Network members better understand not only the role of the expert witness in a trial, but also the critical role the expert plays in trial preparation, sometimes starting a year or more before the facts are presented to a jury.*

**eJournal:** Last month, we discussed what experts can say in court, the timeline for bringing an expert onto the trial team, and why it is important to get the expert working on the case earlier rather than later. You explained that as an expert, you often identify factors that require the testimony of other experts, but that in order for that to help it has to occur before the deadline by which the attorneys have to announce their experts. What other benefits are there to being hired on to the team well before time for trial?

**Kapelsohn:** Often, an expert hired early, especially in a civil case, may say to the lawyer, "This is the kind of discovery you should be requesting from the other side. Do you have these records from the police?"

Let's say the defendant has shot someone who was attacking them in a parking lot or a public place and the prosecutor has decided no crime was committed or a grand jury has no-billed the person. Well, that does not mean that the person who was shot may not be crippled or injured for life and may not bring a civil suit, where the standard of proof, as we all know, is very different. In a criminal case, it is beyond a reasonable doubt, in a civil case, it is by a preponderance of the evidence: 51%—slightly more likely than not. A person may bring a civil

suit knowing that they have a better chance of winning it, or maybe if you have insurance, the insurance company will settle it.



Sometimes the lawyers in a civil case wait to the last minute because they're hoping the case will settle and then they are caught short. They have not spent money on an expert and they haven't gotten an expert report. If they call me, I can't whip a report out in three days! I'm not that kind of expert. I am the guy who actually wants to know what went on in the case before rendering an opinion.

When they hire an expert at the last minute, they have already taken the depositions of witnesses, and of the other party. Experts can often help guide and educate the attorney about what he or she should be doing to prepare the case. What questions should he be asking the other side at the deposition—things of that sort. Sometimes I've gotten hired by a lawyer toward the very end of the case. I may say, "Why didn't you ask them this? Why didn't you ask them that?" Two weeks ago I worked on an officer involved shooting case in a Western state. They hired me on fairly short notice, so on the airplane on the way I read interviews by the State Division of Criminal Investigation of all the involved officers and other eyewitnesses to this event.

A deputy sheriff shot and killed a suspect who had a knife and was coming toward him. The deputy backed up and backed up, more than 25 yards before he fired, while the other deputies tried to tase the suspect several times. It was very cold out and the suspect had on several jackets and a hooded sweatshirt with three shirts underneath. The Taser® was just not going to go through all the layers. The probes stuck in the suspect's outer jacket, which we had as evidence.

*[Continued next page...]*

May 2017

I read all the transcripts of the interviews and the one thing I didn't see in any of these interviews was a question of how close the suspect was when the deputy finally pulled the trigger. That is the main thing I wanted to know! I would think the jurors would want to know that, too. I thought, "How could you possibly interview this deputy, who backed up and backed up and backed up and issued multiple verbal commands for the suspect to drop the knife, and not ask him, 'How close to you do you think the suspect was when you finally fired?'" That is a major piece of information!

Hiring an expert sooner might get someone to say, "Hey, be sure to ask this. Be sure to find out this piece of information." Sometimes there are things that are important to me as an expert that are not as obvious as that, things that would not be obvious to the average attorney, and I have to say, "I've read all this stuff, I've looked at all this crime scene evidence, I've looked at the incident reports and all that, and I need you to ask these three questions, because these are still holes in the information that we have. Be sure to ask this guy this at his deposition."

So the time to hire an expert is early in the case rather than at the last minute.

Sometimes I am working in defense of police officers and I will say, "I see all the incident reports and evidence reports and crime scene reports and autopsy and toxicology in this case but I don't see the officer's training records," and the lawyer will say, "Is that important?" I will say, "Well, sure it is important!" The lawyer asks, "Why? Because it is going to be a real pain in the neck to get those training records."

Of course it is important, because this is what the officer was trained about how close he should let someone get to him with a knife or not, or how fast the person could cover this distance or how fast this person could turn toward him with the gun. Should he shoot now or does he have to wait until the gun is pointed at him or does he have to wait until the person is right on top of him raising the knife overhead?

The officer's training records may be very significant! Sometimes we are going back years and we are getting lesson plans from when he went through the police academy 18 years ago. They are not even part of his own department's records; they are part of the state academy's records or the county academy's records. That may require a subpoena or a court order and it takes someone time to unearth that stuff if it is still

available. As a non-police officer, your own training records may be important for the same reason, you should be saving them.

**eJournal:** Clearly, the breadth of your professional experience helps you identify all the details the attorney needs to cover. Many experts will have less experience. How does the attorney pick the best?

**Kapelsohn:** It takes some research to find a good expert. Over the years, I've worked quite often as a product liability expert in cases for gun manufacturers. It is no secret that I've worked in a number of cases for Glock, and a number of cases for Mossberg, cases for Sig, cases for Safariland holsters. Often, I run into the same opposing experts. To just take one example, in Glock case, after Glock case, after Glock case, I run into the same opposing experts and we kick their butts again and again.

Now, as you know, I am also an attorney. Let's say as an attorney I had a product liability case involving a Sunbeam toaster oven. If I were looking for a product liability expert, one of the first things I would ask the guy would be, "Have you ever been involved in a case where the product was a Sunbeam toaster oven?" If the guy said to me, "No, never," then my next question would be, "Have you ever been involved in a case where the product was any brand of toaster oven?" If he said no, well then he is probably not my expert.

But let's say he says to me, "Yes, I've been involved in six cases against the Sunbeam toaster oven company," my next question is going to be, "How did you do? How did you make out in those cases?" Let's say he says, "I got my butt kicked in every one." I don't think he is the guy I want to hire. This guy could have every degree in electrical engineering that has been thought of on the face of the earth, but you want to find out what his actual experience is and what his track record is like. Has he worked at this kind of case? Has he been allowed to give this kind of testimony or have the courts excluded it?

It just astounds me, that sometimes I wind up working in case after case after case against the same expert on the other side when I know we've kicked his butt every time. Some lawyer who does not ask those basic questions must have hired him. That is a lesson for any lawyer to learn.

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May 2017

**eJournal:** How do attorneys find you?

**Kapelsohn:** A fair amount of my work is repeat business from the same attorneys, for the same prosecutor's offices, or for the same police departments, or for the same manufacturers. Some of it is word of mouth. A department may call over to the next county and say, "We're being sued because our officer did this. I remember your department had a case like that three years ago, and you won it. Who was that expert you used?" There are different ways, but a lot is word of mouth.

Over the years, I also have had my name listed with a number of expert witness directories and services. This shows how long I've been in this business—they used to be hard copy directories. Nowadays most people look on the Internet. Sometimes I'll say, "How did you find me?" They may say, "I looked online under 'accidental discharge' and I found you."

They'll look up a subject or court cases on line and see this was the law firm that handled it and these are the experts they used. Often my name is mentioned in the reported decision of the case or in newspaper articles about the case. I've had lawyers call me and say, "I got your name because three years ago, when a shooting happened in this other city, there were some newspaper articles about it and you were quoted in one of them. We were very interested in what you had to say then because it may apply to our case."

They may find an article I've written on some subject, say on involuntary muscular contraction causing an accidental discharge of a firearm; I've written a number of articles about that. They may find one of my articles and call and say, "We found an article on the subject that you wrote 11 years ago or 27 years ago, or whatever it might be!" or, "We found your article in the bibliography of someone's book. Do you testify on that subject?"

**eJournal:** Earlier, you mentioned the courts excluding some testimony, even from experts. What happens when a judge won't allow you to testify about an important topic?

**Kapelsohn:** The kind of expert testimony that is allowed is up to the judge as a gatekeeper. I have worked in some cases where judges have said, "I am not going to let an expert come into court and give opinions that relate to this self-defense case. I don't think experts are needed in self-defense cases."

I'll say to the lawyer, "I give that kind of testimony all the time! I have given it in other courts in this same state. I give it all the time in police shooting cases where the basis for the officer's justification is that he was firing in self defense. Here's a list of cases I've testified in. Here's a huge list of federal court cases where expert testimony on this subject has come in either through me or any one of twenty other experts. This judge obviously doesn't know enough about this subject." Sometimes the lawyers have to make a motion or ask for a re-argument to educate a judge about why this is important, and why his decision to exclude certain expert testimony should be reconsidered.

**eJournal:** Last month you explained restrictions on opinions given by fact witnesses and by expert witnesses. Aren't there subjects on which judges won't let even an expert state an opinion?

**Kapelsohn:** It is common that a judge will not let an expert testify as to what is called the "ultimate issue:" was this justifiable self defense or not? That is for the jury to decide. The jury gets to decide whether or not it was reasonable for this person to shoot the intruder under these circumstances.

Sometimes a skilled expert has to phrase his opinion in terms that are admissible. I will say in my report and in my testimony, "What this officer did is consistent with his training. It is consistent with nationally-accepted standards for use of force." Something like that may be admissible, whereas if you say, "I think he was justified in shooting the deceased," a judge may very rightfully say, "No, no, that is for the jury to decide. You can tell us how fast a man can cover 21 feet; you can tell us what danger this officer was in; you can tell us what aspects of his training related to this; you can tell us why what he did was in keeping with his department's policy or with nationally-accepted standards, but you cannot tell us the ultimate issue."

Then there are the greyer areas. That might be when I am going to talk about some of the stress effects experienced by the officer. The jury may wonder why the officer, or the homeowner, or the storeowner does not know how many shots he fired. There is study after study after study about auditory exclusion. People don't hear their own gunshots even though they have no hearing protection on at the time. They don't know how many shots they fired and all of a sudden they have an empty gun in their hand and they don't realize they fired

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May 2017

all six rounds in their revolver. Grey areas are things like tunnel vision, things like slow motion time, and things like inability to judge distances. We know those things from experience or from statistical studies of shooting victims, but they're harder to prove scientifically.

I once had an officer who said in front of the prosecutor, the police investigators, his attorney, and me, "I was here when I fired. I know I was here because that stairway was right there, and that garbage can was right there." I said, "OK, if you were here when you fired, can you explain to me why the ejected shell casings from your pistol are 35 feet further up the alley?"

The officer was not lying; he was just wrong. He was just wrong. At the instant when he was trying to save his life, the last thing he was concerned about was where the garbage can was or where the stairs of this house porch were. He obviously went further up the alley before he fired.

A jury may not understand. A jury may say, "Why is that person lying to us about how many shots he fired, or how far away he was, or how he can't tell us what color pants the person was wearing, when he can tell us what kind of gun was in the guy's hand?" They may have to be educated about the fact that these are commonly experienced stress effects during a self-defense shooting.

Some judges may say, "No, I am not going to let Kapelsohn or Ayoob testify about that," despite the fact that we have both spent half our lives studying it and have testified about it in many other courts. A judge may say, "No, I think a psychologist will have to come in and talk about that," despite the fact that most psychologists know zip-all about that; it would be the very, very unusual psychologist who does!

The fact that people lose fine motor coordination under stress is something that every good firearms instructor needs to understand. It is part of lesson plans in every firearms instructor-training program that I have seen in years. To design weapons handling techniques—whether it is a reload, clearing stoppages, or how to draw the

gun—that are going to be effective in the stress of an actual self-defense confrontation, you have to understand that people don't have as much fine motor coordination as they might when they are sitting at their keyboard typing an essay. Some judge may say, "No, I think we need a medical doctor to talk about that," despite the fact that most medical doctors don't know about that, but police firearms instructors do.

Sometimes an attorney can convince a judge or educate a judge or show a judge an article on the subject so the judge will understand. Sometimes a judge just makes a bad decision. The trial court judge may make a bad decision, and sometimes they do. Sometimes it is appealable, sometimes it is a reversible error, and sometimes you don't win on appeal or you don't have the money or the time to appeal.

Any member of our organization that gets involved in a shooting, has to not just get a good attorney who knows something about defending this kind of a case, they have to make sure that the attorney gives some careful thought to getting one or more experts who are the right experts.

**eJournal:** This has been a great education for members who may someday need to understand what their attorney is doing and should be doing, and what is involved in defending self defense at trial. Thank you so much for sharing your knowledge and experience with us!

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*The Network is fortunate indeed to enjoy ongoing advice and guidance from Emanuel Kapelsohn, who is a valued member of our Advisory Board. To read more about him, see <http://www.armedcitizensnetwork.org/our-journal/278-december-2012> and <http://www.peregrinecorporation.com>.*

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Please enjoy the next article.]*

May 2017



## President's Message

by Marty Hayes, J.D.

I use this column to pretty much express what is on my mind at the time of writing. What is on my mind at this moment is the accompanying photograph of the new stickers on the door of

my local credit union. They were not there when I opened the account, but obviously there has been a spate of political correctness afflicting the management of the TwinStar Credit Union, in Onalaska, WA. My first thought was to simply go down and close the account, and open another somewhere else. That would be the easy thing to do. But, having thought about it for a few days, I think I will take another tactic. I think I will use the opportunity to educate the directors of this 100,000 person credit union about the power of the armed citizen.

So first off, I have included a link to their FaceBook <https://www.facebook.com/TwinStarCU/>, where if you are as annoyed as I am, you might just want to "Like" their page and ask them what's up? If a thousand or so people started asking them to explain their policy, I think that might have some influence.

Then, I will ask to meet with the president of the Credit Union to vent my concerns about their policy, and of course, give them a choice. Take down the sign or lose my business. And in addition, perhaps a letter to the editor of the local newspaper, along with a phone call discussing the issue on our local radio talk show might also bring this issue to light. I will let you know how it goes.



### Are you a shooter?

I know, we are all shooters. But I mean a REAL SHOOTER, one who shoots several thousand rounds a year? One who the rest of your gun club looks up to? You know the guy, that when you show up for an event at your club everyone figures they are shooting for second place.

If you are THAT type of shooter, then the following may be of some interest. Richard Davis, of Second Chance Body Armor fame, for years put on a Bowling Pin Shoot that was the most fun, and if you were a good shot with a heavy kicking handgun, a possibly rewarding time, too. For a myriad of reasons, the shoot was not held for a number of years, (see more at [www.pinshoot.com](http://www.pinshoot.com)) but now it is back AND the Network is going to be a part of it!!

Massad Ayoob and I will be at the new Pin Shoot as competitors, and the Network will be participating as a sponsor, because the type of serious shooter seen at this match is also the type of person we want in the Network. Besides, this is simply a grand time for shooters, as not only is the shooting fun and exciting, but the friends you make and memories you make are priceless.

Here is a video from an early match [https://www.youtube.com/watch?v=mh\\_DyN96\\_8I&list=PLIZWlzZfndUr767nCwHg\\_i6b1qTjPQI6s](https://www.youtube.com/watch?v=mh_DyN96_8I&list=PLIZWlzZfndUr767nCwHg_i6b1qTjPQI6s), circa 1986. The pin set-up changed from the flat table to a multi-tiered table in the early 1990s, but the essence of the match remains the same.

I wonder how many Network members are pin shooters, and if any others will be at the match. If you show up, bring your hat (or look me up, show me your membership card, and ask me for a new hat. I will bring a few). Hope to see you there.

And, speaking of hoping to see you there, I am looking forward to meeting everyone who stops by the Network booth at the NRA Annual Meeting this weekend. See us in booth #2515.

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May 2017



## Attorney Question of the Month

The Attorney Question of the Month currently under discussion is based on a fairly common question asked by Network members and non-members alike. Questions about “good Samaritan” duties come up so often that last month, we asked our Network Affiliated Attorneys the following question to help members better understand where their responsibilities as armed citizens begin and end. So many great answers came in that we carried half of the responses forward and wrap up the topic this month. Here is the question–

*In your state, does the private armed citizen have any legal obligation to act in a situation where he/she observes and might be able to stop a violent attack against another person? Are you aware of any case in which a citizen has been held liable for injuries or harm to another to whom he or she had no prior obligation, as would be created between doctor and patient, for example?*

Our affiliated attorneys responded–

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Thankfully, this situation is rarely encountered in the real world. We had an incident just a few weeks ago in the Phoenix area where a legally armed citizen came upon the scene of a fatal motor vehicle accident wherein a drug-crazed, illegal-immigrant driver, after rolling his vehicle and murdering his girlfriend (the exact order of those two acts remains unclear) then decided to open fire, ambush style, on the responding Arizona state trooper.

After wounding the trooper and (apparently) running out of ammunition, the bad guy was straddling the trooper and bashing his head against the pavement when the armed citizen arrived on scene, asked the trooper if he needed help, and after receiving an affirmative answer, ended the assault once and for all with a few carefully aimed rounds. Chalk one up for the good guys. The officer survived, and the armed citizen has received the appropriate praise and “attaboys” from local law enforcement.

Running up on the scene of an officer-involved shooting, however, especially when carrying a gun, is typically fraught with potentially fatal problems. Remember–YOU know you’re a good guy, but no one else does. The officer under attack may reasonably assume that you are yet another attacker, and you could find yourself the object of gunfire from the very officer (and/or his/her fellow officers) you are attempting to rescue. Extreme caution and good tactics must be employed (another reason to train?) to avoid a horrific outcome.

Leaving officer-involved shootings aside for a moment, it is important to remember that in ANY/EVERY third-party situation we insert ourselves into, we may very well have “missed the beginning of the movie,” so to speak. Do you REALLY know who the good guy is? Is he/she wearing a white hat? Doubtful. And even if they are, how do you know they didn’t just snatch it off of the head of the other guy seconds before you came around the corner?

Are you willing to pay the price if you make a mistake? Are you willing to give the rest of your life in prison, or worse yet, your life itself, to assist a stranger (that you might have correctly chosen as the good guy, or maybe not) in the often-misguided belief that they will actually be grateful? Ask any officer how many times he has pulled an abusive husband off of the wife he was pummeling only to have the wife turn on the officer and attempt to scratch out his eyes. It happens to the “good Samaritan” armed citizen more often than we’d care to admit. Not only the victim, but the system, will often turn against the well-meaning armed citizen. Sheep hate sheepdogs and often don’t see much difference between them and the wolves.

Third party involvement should only be undertaken when one is completely sure they correctly understand the situation and there is no other choice to prevent the imminent loss of innocent human life. The system too often fails to differentiate between a good Samaritan and a so-called vigilante. Be wary.

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May 2017

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If the citizen happens upon an altercation, it is helpful to know for certain which participant is the aggressor. The person being attacked is the one who has the right to defend himself.

Just to make things more complicated, if the aggressor clearly signals that he is stopping the attack, he then can become the victim if the other person keeps it going.

Also, the amount of force used in defense of the third party must be reasonable. You can't kill or severely injure someone to prevent a minor fistfight. A person may be better jumping in without a weapon, at all, if he or she can determine who the good guy is.

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It is correctly stated that an armed citizen does not have a duty, but rather has the right to act. Citizens have the right to defend third parties from criminal attacks. But keep in mind, deadly force may not be used to stop a threat unless the criminal actor presents an imminent threat of death or serious bodily injury.

It is also important to know that the basic rule stated above applies equally to the police as well as the armed citizenry. There are not special rules of self defense for police officers. Although, in practice the police may receive a more liberal interpretation of what presents an imminent threat.

There are black and white situations such as walking in on a criminal actor robbing and waving a firearm at a salesclerk. But what if the actor has a knife instead? Suddenly, the context becomes gray, and facts matter. How close is the criminal to the salesclerk? Is there a counter-top separating the two? What if the actor turns towards you, pointing the knife at you? The distance between you and the knife becomes the relevant question. Is the criminal within striking distance?

You can only use deadly force to stop an imminent threat and the question will always come down to: Was your life or another's in actual, imminent danger?

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In West Virginia, you can use deadly force to defend another if they would have the right to do so. If you choose to do so, however, there are several potential problems.

First, you may not have seen the whole series of events. Who was the initial aggressor? Did you have good vantage point to see the critical events? These are critical concerns.

Second, the encounter in which you may be involving yourself could be a domestic matter. Such matters add personal factors that may result in the person you just defended claiming she "loved" the attacker, and you just shot him. You may then face the situation in which the person you saved is the primary witness against you. Domestic disputed are almost always more factually complicated and perilous for the good Samaritan.

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The private citizen acts completely at his or her own risk. Depending on the circumstances, they could be exposed to both criminal and civil liability, for example, if they cause damage or injury to persons or property, even though their action(s) were taken in good faith, without malice.

In the event a local police department and/or prosecutors office deems the individual to have acted recklessly, the individual could be arrested and charged. Additionally, even if they are not charged criminally, or if they are ultimately acquitted of any criminal conduct, they could be sued civilly by the wrongdoer and/or any third parties collaterally involved/injured as a result of the action taken by the armed citizen.

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May 2017



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As in all scenarios, the courts look to whether the conduct was "reasonable." A person in this situation would be given more leeway since he is considered a good Samaritan. Most states have good Samaritan laws that protect people who come to the aid of imperiled individuals.

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Depending on the arresting officer and the police department's method of handling these issues, and depending on other factors (is it a 6' 6" linebacker who is defending others with a gun, or a 5' 0" grandmother), the protector may or may not be charged. Often an officer will err on the side of caution and make the arrest. If not dropped before trial, the defendant has an affirmative defense of defense of others, but of course that means paying an attorney to go to trial.

If the attack is with anything not considered dangerous or lethal (as those terms are defined in your jurisdiction) you can't repel the attack with greater force than was threatened, so the gun should remain concealed.

We need to act with EXTREME caution in this area.

**Jerold E. Levine**

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Getting involved is tricky, because things are not always as they appear. But the same rule applies when defending others with force as with defending yourself: You may use only such physical force as is necessary to stop unjustified physical force being used against the victim, and may use deadly force only to oppose what you reasonably believe to be the use or imminent use of force which can cause death or serious physical harm to the victim. In some jurisdictions, there also is a limited privilege to use deadly force in other rare situations,

such as to prevent arson, but this depends upon the jurisdiction.

Use of excessive force is criminal, as well as actionable in civil court. There also are other penalties for lesser uses of unjustified force. Offenses with names like brandishing, threatening, reckless endangerment, and the generic disorderly conduct, may be charged against the armed intervenor. Also, enhanced penalties may exist when any of those activities involves a gun.

Lastly, be alert to applicable insurance policy clauses that limit the scope of coverage. Your policy might well contain a provision disallowing coverage where your actions are found to be illegal. An insurance company may still be required to defend you in a civil action, perhaps, but they also might not be required to reimburse you for any damages won by the person(s) suing you, or for damages over a certain amount.

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In Maine, the pitfalls fall into four categories: civil, criminal, administrative, and a more vague category that I call "reputational."

You might be prosecuted for:

- unjustified use of force against the intended subject;
- reckless infliction of harm, or endangerment of bystanders
- unjustified THREAT against the subject;
- various laws, state or federal, against possession of firearm in a particular place
- if an official, and the target is some other race or national origin, prosecution under 18 USC 242 (the Rodney King statute).

You might be sued for assault, battery, intentional or negligent infliction of emotional distress, negligent infliction of harm, or a violation of Maine's civil rights act. For harm intentionally caused, standard liability insurance policies will not defend or indemnify. Fortunately, if ANY count of a complaint is covered, the insurer must defend the whole thing.

Administratively, one might lose one's concealed handgun permit, license to operate a group home,

*[Continued next page...]*

municipal cab license, liquor license for an establishment, Department of Health and Human Services group home or daycare operating license, or federal firearms license. One might also lose, or have restricted, a professional license (law, medicine, psychology, pharmacist), or a license to operate under DOT, FAA or maritime/Coast Guard.

Reputationally, one might be denied employment, lose customers, be denied a future license application, liquor license, business license or a zoning variance depending on the circumstances.

In Maine, the extent of criminal "justification" is statutory and based on the model penal code. Civil immunity and justification is common-law based, and not so clear. There is usually no remedy for a reputational injury where the action is based on a belief, even incorrect, based on a use of firearms. There are remedies for license denial in the public sector, but little or no remedy besides the marketplace in the private sector, for passive decision-making.

Each of these is worthy of an all-day seminar in its own right.

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Armed citizens may understandably feel a moral duty to come to the aid of another person who appears to be a victim of a criminal attack. However, inserting oneself into a confrontation is fraught with potential legal peril. When you come to the aid of another person, you have essentially the same rights that person would have in that situation. If the person being attacked has a right to

self defense, you can intervene on their behalf to the same extent.

The problem is that when you are a stranger to a rapidly developing situation, it can be difficult to discern exactly what is happening. Do you know for certain who is the aggressor? Did you see the situation develop? Is it possible the person trying to subdue the apparent victim is an undercover law enforcement officer? If you overstep the bounds of self defense because you misunderstood the situation, that is not a legal excuse. You can be subject to criminal prosecution, and a civil lawsuit. While we arguably have a moral duty to protect the innocent, that duty must be exercised with extreme caution.

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A private citizen coming to the defensive aid of another stands in the shoes of the person being assaulted. You had better fully appreciate the situation before stepping into the fray with deadly force. There is no pass to a citizen for having a good intention. If it turns out that deadly force was not appropriate, then another well-meaning citizen is now defending their own interest rather than somebody else's.

Thus, threat recognition and assessment is crucial. If there is no apparent weapon, use a cell phone. Don't be officious. If you are in a situation where there are weapons, you may yourself be in danger and have to decide based on your own safety.

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*We extend a big "Thank you!" to all of the Network Affiliated Attorneys who contributed to this interesting discussion. Please return next month when we have a new question to ask our Network Affiliated Attorneys.*

## Book Review

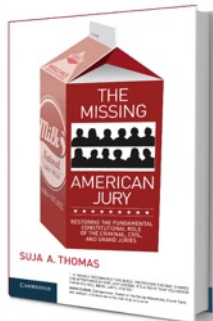
### The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries

By Suja A. Thomas

Cambridge University Press, 2016

262 pages, 6x9 softbound, or eBook

ISBN: 978-1316618035



*Reviewed by Gila Hayes*

Throughout April, I was immersed in a fascinating book that taught how the U.S. Constitution intended for juries to balance the power of the various branches of government. Today, we are ruled by bureaucratic mandate, judicial activism and legislation that early American juries might well have declined to enforce against their fellow citizens. In *The Missing American Jury*, Suja Thomas introduces her concerns that, “The jury has essentially vanished,” showing just how few cases are decided by a jury, compared to the vision of the Founding Fathers. “The executive, the legislature, the judiciary, and the states...have caused the decline of the jury by usurping its authority,” Thomas accuses.

How? The executive branch, represented by the prosecutor, “charges, convicts, and sentences,” she explains, while the legislators write new laws and limit damages in civil litigation, and the “judiciary circumvents juries,” through motions to dismiss, summary judgments, acquittals, and judgments as a matter of law, none of which existed when the U.S. Constitution was penned, Thomas explains. Juries were intended to determine the facts or the truth of assertions from a plaintiff or a defendant, she relates. Arbitration and out of court settlements, while not bad under some circumstances, prevent juries from deciding guilt or liability. A jury cannot insist upon hearing a case that a court has dismissed, she explains, and this vests enormous power in judges.

During the Constitutional Conventions, and the first and second Continental Congresses, juries were put forward as safeguards against the oppression the colonists had recently escaped. Fearing the right of a jury trial was insufficiently assured despite Article III, Section 2 of the Constitution, these early Americans further outlined its role in the Bill of Rights’ Sixth and Seventh Amendments, and gave grand juries responsibility for indicting for serious crimes in the Fifth Amendment.

These amendments are not incorporated against the states, Thomas explains later, so few non-federal issues are decided by juries.

At its most powerful, a grand jury might decline to indict a defendant “for a variety of reasons including: an unjust or unconstitutional law, an unwise law or application of law, biased or unwise allocation of prosecutorial resources, or improper governmental motivation,” Thomas explains, so it is not a big surprise that grand juries are no longer required in many states, a practice the Supreme Court condones. This is no modern phenomenon: for example, Wisconsin abolished grand juries in the 1870s. Thomas charts Supreme Court decisions about jury authority, and the trend is decidedly toward putting power in the hands of the judiciary, especially after the 1930s.

Thomas explains that with the 1930 Congressional creation of District Courts, trial by judge, not jury, greatly increased. The Supreme Court allowed the trend and in so doing, “took power from the jury and placed it in its own hands without any appreciation for the check that the jury was to play with respect to the judiciary.”

Early juries checked the power of overreaching judges, but today, we seem to accept that the judge supervises and guides the jury. Reasons for bargaining, summary judgment, and other judicial intercession today are usually related to the cost of jury trials, as well as suggestions that juries produce inaccurate results. Thomas counters that the cause of the “missing jury” is more simply a power grab, blessed by the Supreme Court for many decades. She argues for a return of power such that the American jury might become a fourth branch of government to hold the other three accountable.

Laypersons and scholars alike have mistaken juries as merely an element of the judicial branch, but Thomas argues that the mistake contributes to neutering the jury until it cannot perform its duty of protecting citizens against bad laws, biased judges or excessive executive power. She writes much of the intent of the Founders, and I thoroughly enjoyed the history lesson. “In the constitutional text, specific authority is granted to the executive, the legislature, the judiciary, the states, the criminal jury, the civil jury, and the grand jury. Moreover,

*[Continued next page...]*

May 2017

limitations are placed on all of those actors, often in relationship to one another," Thomas explains. She later writes that scholars and Supreme Court justices fail to "acknowledge such an authoritative role for criminal, civil, and grand juries."

At one time, "juries presided over almost every serious criminal case," Thomas writes, but today, a prosecutor charges the defendant by "information or complaint with resulting guilty pleas without any trial whatsoever," in state and federal courts. Famed English jurist William Blackstone warned that prosecutors should not be allowed to offer reduced punishments, warning, "The right to punish belonged not to an individual but rather to society or the government that represented society," because innocent people might be compelled to plead guilty. Today, Thomas writes that prosecutors offer reduced sentences if a defendant agrees to forego a jury trial, but may punish a defendant who insists on jury trial by charging him with far more serious crimes. This all happens outside the oversight of a jury, she complains.

These "negotiations" are unequal, Thomas observes, because of "the disparity in resources in these criminal settings, which includes the prosecutor with the state backing him, forcing the often publicly defended defendant into a plea without a finding of guilt, makes the circumstances even more unfair." Nowadays, fully 90% of defendants accept a plea bargain: in her words, the state "almost invariably leverages a plea." Mandatory minimum sentencing and mandatory sentencing guidelines contribute, she adds.

After cataloguing diminishing jury roles, Thomas writes that today's juries hear far more complex litigation with evidence in far greater detail and depth than early juries, and that the courts have to manage a lot more work than two centuries ago. On the other hand, early juries were far more participative, asking their own questions and sometimes even justifying their verdicts publicly. In addition, the cost of defending one's actions in a trial is today far greater than in those simpler times. Sometimes economics drive a settlement, she notes.

*The Missing American Jury* also broaches the hot-button topic of jury nullification. "The Supreme Court has refused to recognize this 'nullification' power," she accuses. "Juries cannot be told that they govern in this respect, and instead they are instructed to follow the law. This misinformation significantly curtails the American jury's power to restrain the executive, which has brought the charge, and the legislature, which has established the law."

Thomas suggests that re-empowering the American jury would reduce distrust of government, encourage citizen involvement and make juries actually more accountable for decisions like monetary awards. She also argues for grand juries to "decide whether charges proceed against criminal defendants in state courts prior to any plea discussions by the government," and that juries, not judges, should make the decisions at criminal and civil trials.

I was pleased when Thomas examined whether too much has changed beyond original Constitutional standards to return that authority to today's juries. "Could the balance of authority be re-established without eliminating the existing procedures?" she asks. "For example, acquittal replaces the jury's decision with the judge's. And summary judgment substitutes a judge's judgment for a jury's. So, the rebalancing must include addressing these procedures that take away significant jury authority," she offers.

You have to hand it to Thomas: she thinks big: recommending, "eliminating the procedures of judicial acquittal, summary judgment, and judges deciding money damages, as well as adding grand juries in states." Her sixth chapter goes even further, imagining entirely different court structures for prosecuting crime and settling civil disputes. She compares the role of laypersons in criminal and civil matters in ten other nations, and it is quite interesting to read to what extent different governments will allow citizens a hand in meting out justice, especially in tasks like sentencing. In other nations, lay jurors almost never hear civil complaints, for example, and Thomas comments that is dangerous since a judge may rule for reasons of personal advancement—re-election or appointment to a higher court—while jurors don't stand to enjoy any gain.

I believe I could have spent several months studying Thomas' book, had time allowed me to follow all of the case citations she includes to support her assertions. *The Missing American Jury* would be great for a study group interested in expanding understanding of American justice, or perhaps a quarter-long college class dedicated to that topic. As a casual reader, I would have loved to read up on the many cases she cites. *The Missing American Jury* does what few books do—inspire study beyond its cover.

[End of article.  
Please enjoy the next article.]

May 2017



## News from Our Affiliates

by Josh Amos

Hello, Network Affiliates!  
This year is starting off as one of the best years ever

for the Armed Citizens' Legal Defense Network. The Network's success means that there are great new benefit increases that affiliates need to be aware of. The first change is that our initial attorney fee deposit benefit has increased substantially. We can now pay up to \$25,000 to the attorney of the member's choice immediately after a self-defense incident. That is up from \$10,000 previously!

Next, we are proud to say that the Network's Legal Defense Fund is now over \$1,000,000! Since we commit up to ½ of the fund for a single member's defense, that means up to \$500,000 to fund a criminal defense and, if necessary, civil defense.

This month's affiliate shout out goes to Craig Terry of Big Top promotions. Big Top Promotions hosts a series of 48 gun shows from big venues to small venues through out Washington State every year. Craig keeps his gun shows family-friendly with low entrance fees, military discounts, and no membership fees, while still bringing in the region's best dealers who are focused on guns and ammo. Craig explains: "Big Top events are designed with the belief that when you go to a gun show, you would like to see guns. Seems like such an obvious thing, but all too often today's gun show has vendors selling clothing, prepper supplies, even items that have nothing to do with firearms at all. This was one of the reasons Big Top was founded—to get gun shows back to the basics. Guns shows should be about guns. Come to one of our shows to see what a gun show is meant to be!"

If you are in WA State, check out Craig Terry and Big Top Promotion's gun shows, and find that one-of-a-kind gun or specialty ammo! <http://www.bigtoppromos.com>

I would also like to recognize Armed Citizens' Network Affiliate "Deputy" Joel Northrup and his company Firearms Academy of Redding. Joel started his law enforcement career as a deputy with the Trinity County Sheriff's Department and is currently the Marshal of Shasta County, CA. His law enforcement experience spans more than 20 years and his training résumé is

impressive. Joel has attended Gunsite, Lethal Force Institute, Glock Firearms Instructor and Armorer School, NRA Law Enforcement Instructor School, NRA Handgun and Long Gun Schools, California Peace Officer Standards & Training (POST) Firearms Instructor, Rangemaster, Tactical Firearms Instructor, and Armorer Schools. Joel is also certified by POST to teach tactics and techniques for responding to an active shooter situation. He has spent countless hours on the shooting range as an instructor, rangemaster and range officer. Not only has Joel taught thousands of students in Northern California, but he is also an armorer and gunsmith. Joel is a published author in the area of firearms, self-defense and firearms training, as a contributing author to Combat Handguns magazine.

The Armed Citizens' Legal Defense Network is proud to have someone of Joel's extensive experience and training recommending Network membership to those within his sphere of influence! <http://reddingfirearms.com>

We close by discussing administrative details with which we need our affiliates' cooperation. The first is that we are encouraging our affiliates to share an Armed Citizens' Network coupon to save \$25 off new memberships purchased by their customers and students. It also is a handy way to track and determine where our new members heard about the Network.

The next administrative change is necessary. Due to the volume of contact that we need with our ever-growing number of affiliates across the country, we must insist that affiliates have a working email address through which we can communicate. Using email is the fastest and most effective way to share business updates with our affiliates. We limit our email to the bare minimum, so you don't need to worry about getting multiple emails a day from me, but there are matters we need to address periodically, so we ask for your understanding and cooperation. After all, affiliates, if you don't know the Network's latest upgrade to benefits, how can you accurately promote Network membership? Please send your questions, supplies orders and comments to [josh@armedcitizensnetwork.org](mailto:josh@armedcitizensnetwork.org).

*[End of article.  
Please enjoy the next article.]*

May 2017



## Editor's Notebook

by Gila Hayes

Several calls and emails these past few weeks made me ponder the overall personality of our Network members. Oh, we're diverse—men and women, armed citizens of all races, young couples taking their first

concealed handgun licensing course and senior citizens enjoying every minute of retirement. Beyond the self-reliant attitude common to folks who realize that they are responsible for the immediate safety of themselves and their families, I am often reminded of the "We're-All-In-This-Together" cooperative attitude so apparent in Network members.

Sometimes that realization comes to me backwards—when an interested shopper asks us to promise support that may benefit him or her specifically but harm the larger membership. We must exclude people who apparently want it all for themselves, and get upset by the policy we've stated from the very beginning that at no time will we commit more than one-half of the Legal Defense Fund to fight prosecution or civil law suit against a member after a single self-defense incident.

Apparently, the most recent example of this believed there were no underlying expenses to building a 13,000+ member organization with over \$1 million in its Legal Defense Fund. He asserted that money should be put in the Fund, instead of advertising and outreach to bring in more members, paying skilled team members to

answer phone-in questions from members and potential members, and keep the organization growing to support existing members. Since I keep the budgets balanced and make sure the Network never goes into debt, I took it personally. I felt his demand was a lot like telling you to drive from Ft. Lauderdale to San Diego, without allowing you to spend money on gasoline!

The growth and development of the Network has always focused on how to provide the best post-incident support for the member, while maintaining the strength of the organization for the aid of the next member who has to use force in self defense. In paying attorney fees for 14 members since we opened in 2008, we have not yet had to limit payment of legal fees—the members' attorneys received the funding that was requested.

I would not want to be so desperately "penny wise, pound foolish" that I pushed the Network into making concessions to one individual and risked or diminished this organization's ability to provide our ever-growing level of assistance to the other 13,000 members. To those who can't see the big picture or care for the rest of their fellow members, too, I can only say, "We're too far apart on our view of what is good and right. Let's part now before you take us for a half-a-million dollar ride."

To the vast majority of our good Network members, I say thank you for keeping the greater good always in mind. We truly are all in this together.

*[End of May 2017 eJournal.  
Please return for our June 2017 edition.]*

May 2017

## About the Network's Online Journal

The **eJournal** of the Armed Citizens' Legal Defense Network, Inc. is published monthly on the Network's website at <http://www.armedcitizensnetwork.org/our-journal>. Content is copyrighted by the Armed Citizens' Legal Defense Network, Inc.

Do not mistake information presented in this online publication for legal advice; it is not. The Network strives to assure that information published in this journal is both accurate and useful. Reader, it is your responsibility to consult your own attorney to receive professional assurance that this information and your interpretation or understanding of it is accurate, complete and appropriate with respect to your particular situation.

In addition, material presented in our opinion columns is entirely the opinion of the bylined author, and is intended to provoke thought and discussion among readers.

To submit letters and comments about content in the **eJournal**, please contact editor Gila Hayes by e-mail sent to [editor@armedcitizensnetwork.org](mailto:editor@armedcitizensnetwork.org).

The Armed Citizens' Legal Defense Network, Inc. receives its direction from these corporate officers:  
Marty Hayes, President  
J. Vincent Shuck, Vice President  
Gila Hayes, Operations Manager

We welcome your questions and comments about the Network.  
Please write to us at [info@armedcitizensnetwork.org](mailto:info@armedcitizensnetwork.org) or PO Box 400, Onalaska, WA 98570 or call us at 360-978-5200.



May 2017