



The Legal Aftermath of Defense Against Road Rage An Interview with Jim Fleming

Interview by Gila Hayes

After fielding a series of questions about legal defense against road rage, I realized that I needed to clarify some of the concerns in my own mind. Fortunately, I knew just whom to ask! I took the questions to our Advisory Board member James Fleming, a former law enforcement officer, who now works as a criminal defense attorney. His answers were clear warnings and in the interest of sharing his message accurately, we switch now to our Q & A format.

eJournal: Jim, you've been practicing law for three decades, but before that, you were a law enforcement officer, so you have an excellent knowledge and experience base from which to advise members on concerns pertaining to use of force in self defense during a road rage incident.

When an armed citizen uses a gun to defend against someone who attacks them after a real or perceived wrong occurring between drivers on the road, a study of those stories often shows that the attack didn't "just come out of the blue" and that in fact, both drivers exchanged insults via gesture or word prior to the shooting. Today, I greatly appreciate the opportunity to discuss defense of self defense associated with a driving incident so our members more clearly understand the issues in defending these cases.

In general, does shaking a fist or making the obscene gesture of the raised middle finger at someone in traffic constitute an invitation to fight—to engage in mutual combat?

Fleming: Depending upon the jurisdiction in which the action takes place, it certainly can be viewed in that way. Your readers need to understand that the laws governing these types of interactions will change from state to state, and the application of the principles embodied as rules of evidence, as well. You and I have previously talked about examples such as TX, where evidence of aggression can

be used to defeat the argument that the defendant claiming self defense is entitled to a presumption of reasonableness. In the right circumstances, that can be fatal to a claim of self defense.



In IL, evidence of aggression on the part of a defendant can defeat the ability to argue that the defendant acted in self defense. Folks need to know that in many jurisdictions the defense of self defense is not a given in a criminal case. In many jurisdictions the defendant will not even be allowed to argue self defense and have the jury instructed on self defense unless he or she can meet certain threshold showings to the court.

At the same time, actions of this type are extremely dangerous, even if you ignore the legal ramifications. I've reviewed dozens of cases where a raised fist, a shouted insult or a middle-finger salute have been returned with gunfire, having someone smash into a car at high speed, a thrown brick or other violent response that resulted in the death of the person making the gesture, insult, etc., or of another passenger in their vehicle.

Such behavior, no matter what the provocation, is an extremely dangerous, irresponsible act.

eJournal: Is it any different if car windows are open and one driver screams at the other, "Stop and face me like a man! I will break your face!"

Fleming: No, it is not. For the same reason. Many jurisdictions employ the concept of "fighting words." Fighting words are defined as "those, which by their very utterance inflict injury or tend to incite an immediate breach of the peace." To utter those words is an invitation to both

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actual and legal disaster. To respond to such words thrown at you by someone else by engaging in a confrontation that could turn deadly in a split second is totally irresponsible and will most often defeat any claim that a defendant acted in self defense.

Do you notice how I used the words "most often?" That is because the law is unpredictable, despite what most people like to think. What will a prosecutor do with your words and actions? What damage will a judge decide your words and actions do to your claim of self defense? What will a jury decide, irrespective of the law? To anyone who would argue that the law is certain, the law is predictable, I simply say, "Go read fifty cases on self defense from across the country, then come back and talk with me about 'predictability.'"

eJournal: Do the actual words matter? What about, "I'll kill you for ... [what ever the driving offense is]" ...or what about, "Pay attention and drive! I've got a gun/knife/weapon I'll use on ya if ...[again, add the imagined offense]!"

Fleming: No, I do not believe the actual words matter. And, who is yelling them? If it's the other idiot, get away from them without response as quickly as possible and call 911.

If it is you, stifle the desire to yell anything, to gesture, to respond in anyway. There is nothing going on out there that is worth dying over, or spending a substantial part of your life behind bars over, or giving your life savings to an attorney who is going to have to fight to keep you out of prison. Keep your mouth shut, your temper in check and walk away if you can, and run away if you must.

eJournal: From the law's viewpoint, do either gestures or verbal threats equal responsibility for starting or willingly participating in a fight?

Fleming: Here is how that can play out. Gestures and verbal threats are most often considered disorderly conduct. Next thing you know, you have a prosecutor arguing that you cannot claim self defense if you have been engaged in the crime of disorderly conduct. Here is language drawn from one such case:

"The district court appropriately instructed the jury that, if appellant initiated the assault [by engaging in disorderly conduct], self defense was still available to him only IF he declined to carry out the assault, honestly tried to escape, and clearly informed the victim that he desired peace."

That's a lot of "ifs" to cover in the space of a few seconds down at Third and Vine Streets in the heat of the moment. Don't go there, don't do that, don't say that. Use your head.

eJournal: In your experience, what if any criminal charges might I incur if I flipped off a dangerous driver, then stopped in traffic and had to fend off a deadly force attack with which that driver responded?

Fleming: That is entirely fact driven and may span the gamut from first degree murder to simple misdemeanor assault. Without facts to apply, it is impossible to predict.

eJournal: What if I flip them off, then they pursue me off the freeway and we stop and fight. Am I responsible for starting it? At what point, if ever, do I stop being seen as a willing participant? Can I regain [as Massad Ayoob would teach] my mantle of innocence?

Fleming: Again, not enough facts here, but in general terms, using the language from the case I noted above: "... self defense was still available to him only IF he declined to carry out the assault, honestly tried to escape, and clearly informed the victim that he desired peace."

This is going to make people angry, because they want certainty. I can't help that; I can't offer them certainty. That prosecutor may do all in his/her power to destroy that "mantle of innocence." The judge may disregard it. The jury may ignore it.

eJournal: What, if any, actual physical action must accompany a verbal threat to rise to the level of what, for example, CA calls Criminal threats (California Penal Code Section 422) and other states call making terroristic threat? Does a verbal statement alone constitute assault or is a clenched fist and rush to physical proximity required to fulfill the elements of assault?

Fleming: A terroristic threat is not an assault. It is a threat to commit a future crime of assault, and again it is unpredictable. I was once called upon to defend an individual charged with uttering a terroristic threat because while an officer had him on his knees, cuffed, on the ground, he yelled, "Somebody shoot this sonofabitch!"

In most jurisdictions, no physical action is necessary to create a terroristic threat. But remember, too, as discussed above, the verbal statements may also constitute a

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disorderly conduct, which can hamper your ability to use self defense as a justification for the use of force.

eJournal: We live in the real world! Every one gets angry—even good people. In your study of applicable law, is there any way we can separate words or actions occurring several minutes before the other driver begins his or her assault against you?

Fleming: Not realistically. In the sterile atmosphere of the law school classroom, perhaps. In the world of imperfect people sitting as judges and juries, relying upon such an argument is extremely risky. That is the real world.

eJournal: In earlier discussions, you pointed out TX jury instructions discussing “evidence of aggression” and how that affects our argument of justification by reason of self defense, or getting a self-defense jury instruction, if I’m not reading too much into it. Ditto for IL...does flipping someone off during a dangerous driving situation create an initial aggressor issue? Where is the line drawn? Does that also vary from state to state?

Fleming: In the law, that “line” is referred to as a “bright line” rule: *“A clearly defined rule or standard, composed of objective factors, which leaves little or no room for varying interpretation.”* The purpose of a bright-line rule is to produce predictable and consistent results in its application.

In this context there is no such thing as a bright line rule. Because the situations are so heavily fact dependent, and, the horse I am not quite done beating to death, the law varies from jurisdiction to jurisdiction, as does its interpretation by judges and juries.

In a New Mexico case, two drivers became involved in a “road rage” confrontation over some trivial right of way contest. They yelled at each other, exchanged single digit salutes, shook their fists and started chasing each other through traffic. Their reckless conduct resulted in a third driver losing control of her car and she was killed in a collision with yet a fourth driver. Both of these idiots were charged with motor vehicle homicide. Both drivers tried to defend themselves arguing that the other driver started the altercation with gestures, etc. Nobody cared, and they were both convicted and sent to prison.

If there is a bright line rule, it is: “Do not engage in such stupid, irresponsible and risky conduct, no matter what the provocation.”

eJournal: I get a certain amount of feedback from members and potential members who define themselves as being the kind of person who never backs down, you know, manly men who aren’t afraid to fight, never walk away, stand up for themselves, etc. As an attorney who has had to work like a maniac to get defendants out of silly situations that started with a simple aggressive statement or gesture and then devolved into assault or manslaughter, what is your advice to members if cut off in traffic or otherwise threatened while driving?

Fleming: If you are the type of individual who defines yourself as “one who never backs down,” it is time to grow up and flush out your headgear. There is no situation out there that is worth dying over, killing another over, ending up wasting away in prison over, or ruining your family and your family’s financial future by getting involved in one of these mindless confrontations.

I grew up in Western Nebraska, and worked as a street cop in metro areas and out west where cowboys still ride horseback for long hours to make a living—tough cowboys and equally tough cowgirls. I was involved in a lot of fights, and I won most of them and survived the ones I lost. So, my opinion here is not based upon unfamiliarity with fists and boots. It is based upon 45 years of experience as a cop and a lawyer.

If you are involved in an incident out on the road, and you can do so safely, drive away without response, without retort, without gestures. If you are pursued, try to get to a public place, a restaurant, a service station, a government building, where you can surround yourself with witnesses.

Flag down a cop, do all and everything in your power to avoid the confrontation that may result in you having to use deadly force to stay alive. And call 911 just as soon as humanly possible demanding to have an officer come to your location to take a report.

Deadly force is not an “I get to shoot” situation. Deadly force is an “I must shoot to save my life” situation.

eJournal: Putting your former law enforcement officer’s cap on for a moment: What do you teach as best options if someone is standing at your window screaming threats at you? If they are holding an impact weapon and screaming? If they prepare to hit your car window?

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Fleming: Lock your doors, keep your windows up, do not exit the vehicle and, if you can, drive away. If they carry through with an attack and you can still drive away, drive away.

Firing through safety glass, you may hit them, you may miss them and hit some innocent bystander, but the moment you fire through that glass, you will no longer be able to see through the glass to know what is going on outside.

You will also be deafened by the report, which is going to disadvantage you in the critical moments that follow (I've experienced this, it is one of the reasons I wear a hearing aid today). Shooting in such a situation is a last ditch effort.

eJournal: What if our automobile injures them if we try to escape without resorting to deadly force?

Fleming: It is very likely that your use of your vehicle will be argued as the use of deadly force. However, if you can prove that you used the vehicle as a defensive means of avoiding an imminent deadly threat or threat of crippling injury, you will be able to argue that it was self defense. Self defense is not always an attack, sometimes it is something else, such as an avoidance technique.

eJournal: If we're not sure what our individual state laws are governing our actions in response to other drivers, how do we research our own state laws? Are there any particular search terms we might use like "aggressor," or "initial aggressor," "reasonableness," "self defense?" What bread crumbs might lead us through the scads of info on the Internet to the pertinent sections in our state laws that dictate what we're allowed to do in response to road rage?

Fleming: I seriously doubt that you will find anything in the laws of any state that will relate specifically to road rage. You will only find those statutory sections that deal with self defense and the use of force and deadly force. The application of those laws to the road rage situation will only be found in case law unless and until some legislator introduces a bill specific to the road rage situation, and I don't see that happening any time soon.

Legal research by individuals not trained in the law is always risky. Part of the problem is the reliability of your sources. The Internet contains a wealth of accurate information. It also contains a wealth of garbage and really bad information. For example, I just ran across an article where some idiot stated that "...being shot in the

abdomen with a load of #4 buck shot is like being punched by a professional boxer. It won't penetrate the body, but it will stagger you."

Understanding the nuance, the application, interpretation of legal principles and concepts takes years of experience. And then, even lawyers and judges will often disagree.

If the member has already identified self-defense legal counsel (a practice I strongly encourage), take your questions to your lawyer for the best advice. For those folks who just have to do it on their own, you are going to have to look at case law, and a lot of it. You are going to have to be sure that you understand the issues in the case, understand that the application of the law is often altered by differences in fact patterns, understand the differences in cases dealing with substantive law and procedural law. And be sure that the cases you are reading have not been overruled by later cases.

Frankly, most people have better things to do with their time. That is why it is often said, "If you do not know the law, know a lawyer."

eJournal: And from your viewpoint as an experienced attorney, being considerably better versed in what one is allowed to do in response to a driver in the grip of road rage who thunders out of his car to enact a little road-side justice, how would you handle it yourself?

Fleming: I am going to stay in my car, and get away from the situation, driving as safely as I can. If I am followed, I will drive defensively, and I will not go home for obvious reasons. I will drive to the nearest public place that I can find, and I will go there and surround myself with witnesses.

If someone is with me, they will be speed dialing 911 while I concentrate on driving. They will be reporting the 5 W's and requesting immediate LEO assistance. If I am fired upon while driving (and that actually shows up in a number of these cases) I will take evasive action as best I can to get to a public place. I will NOT engage in a rolling gunfight. That nonsense is for the movies. I will focus upon driving to get to cover. Realize that an automobile offers concealment, it does not offer cover.

There are too many scenarios to cover adequately. What about if I am alone, on a lonely stretch of road in the dark of night, miles from anywhere? I might, under such

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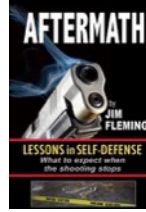
circumstances, decide to leave the car and move into the darkness to avoid a confrontation, or if need be, make my fight in the dark, where I can use its concealing qualities as an advantageous defensive tool. But, such situations are ruled by the facts, and not by the law.

eJournal: That's a good reminder of a point you've stressed in your earlier answers—no one can give exact answers about what do to because each situation is different. You've also given us a great reality check about self discipline and staying cool behind the wheel as well as explaining how gestures and words can remove our ability to argue self defense.

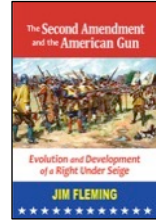
There's a lot to go back and read over in your answers and think over. Thank you so much for sharing your knowledge and experience with us. I really appreciate it!

Attorney and Network Advisory Board member Jim Fleming practices law in MN, an attorney of more than 30 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 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

Do you practice safe gun handling?

by *Marty Hayes, J.D.*

As more and more people turn to guns for self defense, a large number of whom have

no previous experience with guns, and with the mandatory state licensing programs for obtaining concealed carry licenses requiring little actually firearms training, it is more and more likely that otherwise certified good guys with guns will, on occasion, experience a mishap. My column this month will address this issue and I implore you, especially those of you without a lot of years experience as a gun carrier, to give what I have to say some real introspective thought. It is a deadly serious topic. Let me give you an example.

About 20-plus years ago, I got a call from the wife of a former student who related a story to me. I had never met her, but she wanted me to know what had happened in her household. I sat on my couch (office in the home) and listened with horror as she related that her husband had shot their daughter in the head with a .357 magnum revolver. This student, as it turned out, had a drinking problem, and was at the time of the shooting, drunk. He carried a revolver in a horizontal shoulder holster, and for some reason, was at home and was handling the gun, while drunk. Predictably, he ended up discharging the gun while holstering in the horizontal shoulder holster, and the bullet went through an interior wall and struck his daughter in the head. Fortunately for all concerned, the daughter lived, although I know nothing more of the extent of her injuries.

What went wrong? Well, two things. The alcohol reduced his cognitive and physical skills to the extent that the discharge occurred, and that, combined with the gun being pointed at an UNSAFE direction resulted in the tragedy in the home. What is an unsafe direction? Any direction that if the gun discharged, serious damage, injury or death could occur. And that folks, is a pretty big part of the world.

When you take your gun out of your holster, where is it pointed? First, probably at the floor of the building you are in or at the ground. Assuming there are no people below the floor (as would be true in a second story room) you are okay at that point. But when you orient the gun horizontally, the muzzle is now pointing at all kinds of things. If you are indoors, you are pointing it at a wall (either interior or exterior) and that wall will likely NOT stop the bullet. You are still likely responsible for the damage caused by the bullet. I would say with complete conviction, that this is the most common violation of gun safety and it occurs with alarming regularity.

Further, it regularly happens with another violation of standard gun safety protocols: that being NOT keeping your finger off the trigger at all times, until you are actually in the process of intentionally shooting the gun. You see, the hand closes naturally around the grip frame of the gun, with the index finger (trigger finger) also wanting to close around the gun and go to the trigger. The number one violation of gun safety rules that I see in training courses is the finger on the trigger at the wrong time. We routinely tell students to get their finger off the trigger, multiple times. And the worst offenders are the experienced gun owners, people who have been shooting a long time.

We are just human beings...

And humans make mistakes. Heck, I made a mistake tonight refereeing a football game, a stupid one. But it happens and we have to accept that. We also make mistakes when handling guns, so that means we as humans need to put into place gun-handling protocols that become physical habits. In order to build the physical habits of good gun safety protocols, NEVER handle a gun unsafely, regardless of whether or not you have physically unloaded it and double-checked it. Build up the habit of gun safety, and to do that, ALWAYS handle guns in a safe manner.

In addition to always pointing the gun in an identified safe direction, you must also religiously practice indexing your trigger finger on the side of the frame, not

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inside the trigger guard. Doesn't matter if it is single or double action, or whether there is a safety on the gun. The finger is the true safety, and it must remain off the trigger until you have decided to fire the gun.

Lastly, there is the very real identification problem, when you are actively shooting the gun. In practice, make sure you know where that bullet will strike, and you can live with that bullet strike. Bullets are singularly mean spirited, meaning that regardless of your intent, wherever it lands after you pull the trigger, the bullet will attempt to damage or kill that thing. If you live in an urban environment, then you have a much harder task

ahead of you than those of us fortunate to live in rural America. Then, even if you are not actively shooting the gun, the bullet will still damage or kill if one inadvertently hits an object or a living creature.

Now, having said all the above, consider this. In addition to the moral issues regarding injuring or killing someone you didn't intend to (like the example above) there is still the legal consequences of that stray bullet. Next month, the **eJournal** will address this issue.

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Attorney Question of the Month

This month's Attorney Question of the Month comes from a Network member who is an attorney practicing civil law with a background in insurance. As a state-approved instructor for the TX license to carry, he asked a very interesting question, which we directed to our affiliated attorneys. The first of their answers ran in the September issue of this journal and we wrap up the rest of the responses this month. Our member asked—

If a gun owner carries a handgun into a prohibited area (designated by statute or signage) and is involved in a self-defense shooting, would the fact the gun owner violated the law by carrying the gun into a prohibited area be admissible as to the mens rea of the shooter?

For example, a gun owner in Texas (with a license to carry and carrying a concealed firearm) knowingly passes a clearly displayed sign prohibiting guns, which meets the statutory requirements. At this point, the gun owner has committed a Class C misdemeanor.

Now suppose that same gun owner uses the gun in self defense. Is the fact the gun owner violated the armed trespass law admissible to the finder of fact in determining an element to murder or manslaughter?

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The Class C Misdemeanor would not be a prior conviction at that point, it would be a concurrent charge pending with the murder charge, if the prosecutor decided to bring that charge. Proof of knowledge and intent would be necessary by the prosecutor on both charges. The assumption of the question is that there exists some evidence or proof that the concealed carry licensee had knowledge that he was in a gun free zone, if it was private property or a business that posted signage, as opposed to the statutory pistol free zones. If, however, it was a pistol free zone then the licensee is

required to know where the gun free zones are and knowledge is assumed as a matter of law.

The analysis then is whether the evidence of the violation of the pistol free zone law is admissible to prove the *mens rea* element of murder. In looking at the Texas Rules of Evidence, Michigan and Texas Rule 43 appear virtually the same and are no doubt taken from the model rules or federal rules of evidence.

It may be excluded under "Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons." The most likely reason a licensee violates the pistol free zone rule is because they make a decision that their moral right to defend their life is worth risking a class C felony, or in our state, Michigan, it is only a civil infraction (like a parking ticket). On its face, absent more facts, it would be a stretch for the prosecutor to argue successfully that the mere decision to disobey the pistol free zone translates into an intent to kill or murder. Although relevant, it may be unfairly prejudicial and therefore excludable. Research of the annotations under rule 403, including any cases on point dealing with the same fact pattern would be helpful. If the judge rules it admissible, the argument that would likely sway the jury and make more sense is that the licensee, like many concealed carry licensees, made a conscious decision to violate the pistol free zones, for the same reason the licensee decided to carry, to protect his or her life.

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You ask if a violation of law in the form of disobeying a "no firearms" sign would be admissible in a self-defense case, and my response as far as Florida law goes would be that currently it "should" not, as it would not ordinarily be considered a "trespass," although there is no case law on it.

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On the other hand, if it were a trespass, or other violation of law, then it would be an open question as Florida law would then certainly impose the “retreat rule” under the 2014 changes to C.776. The next issue would be whether F.S. 90.803 would bar admissibility, or otherwise modify the way it was admitted, and any jury instructions on the duty to retreat, or whether it is really a “prior bad act” or simply too easily confused by the jury as an attack on character. In other words—at least in Florida—the legal issues are extremely complicated.

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Oregon has a prohibition against carrying a firearm on private property if the signage (prohibiting that possession of a firearm) is conspicuously marked. If someone is trespassing onto the property they risk being charged with a Class A Misdemeanor - Trespass with a Firearm. Although it wouldn't look great, this would in no way outweigh someone's right to defend themselves. I also think that any evidence that this was a “trespass” would be irrelevant to the individual's right to defend themselves if it were to proceed to trial.

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The question may depend on whether Rule 403 of the Rules of Evidence (see below) applies, which in turn would depend on appropriate pretrial motions trial objections. If there was preexisting “bad blood” between shooter and “shootee,” and shooter knew he was there and went into the place despite that, his “knowingly being armed and then proceeding anyway” would be a problem.

At some point, the probative value of this technical violation would be swallowed up by the prejudicial effect. This might well be the case where the shooter was a patron of a bank/convenience store and a robbery happened that the shooter had no reason to suspect.

The relevant tort case law suggests that for an intentional shooting, the illegal possession might well be irrelevant even in a civil case.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

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In my mind it should not be admissible if it's a straight, unprovoked, self-defense situation. However, it gets a bit messier if the person carrying the gun starts some sort of provocative (even if nonviolent) interaction to goad another person into a fight. Then it could be said that he may have been trying to set up a situation where he could kill—and get away with it. This fact pattern could also be relevant in assessing whether or not (if not self defense) there was premeditation and if the homicide is therefore manslaughter or murder.

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The assumption in the question is that the gun owner used the gun in self defense, which if assumed, answers the question. The shooting would be justified and the fact of trespass would not defeat it. Trespass by violating the “no guns” sign would likely be admissible if the State challenges the self-defense claim, depending on the State's theory. If the State challenges the self-defense claim on the theory that the gun owner went to the location intending to provoke a confrontation and did in fact provoke the confrontation with the person he killed, which would require other evidence and could defeat a claim to self defense if proved, the fact that the gun owner took the gun to the prohibited area would be admitted as part of the proof of intent, a plan to commit to kill the other person, and could result in murder conviction. This would also be the case if the State could

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show that a gun owner took a gun to a place it was legal to carry with a plan to use it to kill a person, but the fact that the gun owner violated the law might add credibility to the State's claim. In some states, taking the gun to a prohibited place would impose a duty to retreat on the gun owner because he was not in a place he was legally entitled to be. If the gun owner could have safely retreated and did not, his self-defense claim might fail.

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Assuming that the shooting was proven to be self defense, a big if. The carrying of the gun could be explained, depending on the circumstances as:

1. I didn't see the sign;
2. I saw the sign, but I was alerted to possible danger by—whatever lead to the shooting of the attacker—or
3. I reasonably fear being in a gun free zone as evil-doing people chose such areas to prey on the unarmed.

There are probably more that fruitful minds can come up with.

But, how did carrying the gun constitute a *mens rea* to commit a murder? I think it leads to a circular argument. If he did not have the gun, he and/or others would likely have been murdered. The attacker (I'll make an assumption) was armed when he pursued his attack that gave the armed citizen to fear for his life. If armed with a gun, he also was likely violating the gun free zone and since he was the aggressor was exactly the kind of person who the defendant feared. Had the bad guy not attacked, the violation by the good guy would have lead

to no adverse consequences except a violation of a statute.

If gun haters are in the prosecutor's office or on the jury, they would get hung up on the fact that the concealed license holder violated a law. Because he had a gun while violating the law, he deserved to be killed by the criminal and since he wasn't, the legal system should do him in.

Peter Taussig

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My gut reaction—without having done any research necessary to reach a legal conclusion as to the applicable law in any jurisdiction—is that carrying a handgun into a prohibited area should be inadmissible as irrelevant in any criminal or civil case about whether the defensive use of the firearm in such an area was appropriate and justified. However, if the shooter were to be convicted on the misdemeanor carrying charge (either in a trial or on a guilty plea), there is a further question of whether such a conviction could be used to impeach his testimony (to call his credibility into question) in any subsequent legal proceeding, and the answer to that question would depend on whether in a given jurisdiction, a misdemeanor conviction can be used for that purpose.

A big "Thank you!" to all of the Network Affiliated Attorneys who responded to this question. Please return next month when we ask our Network Affiliated Attorneys a new question on a very interesting topic.

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

Book Review

Reasonable, Justified and Necessary: Exploring the Professional, Physical and Psychological Complexities of Deadly Force

by Dan Bernoulli

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Reviewed by Gila Hayes

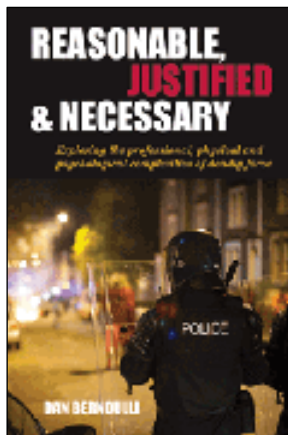
I bookmarked Dan Bernoulli's study of police use of deadly force, *Reasonable, Justified and Necessary* after reading an attorney law blog that recommended, "If you're a serious student of the dynamics of the use of deadly force in defense of innocent life, your bookshelf is not complete until this book is resting on it."

Bernoulli focuses primarily on police use of deadly force training. The lessons I sought were often beneath the surface, and long segments address police academy curriculum, so I will stipulate that there are segments our members may just skim over. Of greatest interest was Bernoulli's repeating theme that much could be learned if survivors of violent encounters taught others what they experienced.

Police who have been involved in deadly force incidents so rarely speak candidly even with other officers about the details of their incidents, that much of the deadly force incident survivor's experiences remain shrouded behind his or her own reticence and fear of additional legal consequences, he explains.

Essential knowledge is lost, Bernoulli writes, admitting, "We rarely go to the officer involved and discuss the incident with them. Thus we appreciate their experience of having prevailed, but we paradoxically do not send the message to the individual involved that they, and their experience, are valued. Instead, we treat them as a criminal suspect in the immediate aftermath of a deadly force incident and almost like a cancer patient afterward, avoiding all references to the incident in their presence."

Instead, he urges, these survivors of violent encounters should become mentors to guide other officers, explaining later in the book, "The ability to describe the reality of a gunfight from the perspective of one who has been involved is invaluable." Officer survival training



requires much more than learning if A happens, do B. "Law enforcement deadly force scenarios are too complex and fluid to be dealt with simply by memorized maneuvers. The officer's brain is their most valuable weapon and we must inculcate that fact from the very beginning of their training in weapons craft," Bernoulli writes.

The physiological and psychological phenomenon

experienced in a lethal force encounter are rarely discussed, outside a few valuable works, the foremost of which, this reviewer believes, is Alexis Artwohl and Loren Christensen's 1997 book, *Deadly Force Encounters* (http://www.paladinpress.com/product/Deadly_Force_Encounters) from which Bernoulli cites a long list of physical responses, perceptual distortions, automatic behaviors and more, summing up, "Some officers have had multiple, conflicting experiences in the same incident. These experiences are varied and can be exceedingly off-putting for the unprepared. They can engender questions, self-doubt and personal second-guessing on the part of the officer, all of which can lead to a general feeling of helplessness. The important thing to note, particularly from a training perspective, is that they do happen and should not be allowed to be a surprise to the officer involved. We must address this potential outcome during deadly force training."

Bernoulli explains that his experiences occurred during his military service, not his current police career. He briefly outlines experiencing tunnel vision, auditory exclusion, greatly increased respiration and heart rates, loss of bladder control, and describes the physical, emotional and cognitive effects arising once the physical threat was past. "One solution for lessening psychological injury appears to be the simple expedient of warning the officers before it happens, to tell them during training what to expect," he warns.

Although Bernoulli addresses police training, armed citizens can find a roadmap to better preparation in his book, as well. He recommends, concurrent with teaching weapons skills, instruction in the psychological aftermath of use of deadly force, encouragement to seek

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counseling after a critical incident, and advice from those who've been there that most of the disruptions fade after time, but for the trauma that does not abate, "more extensive treatment may be required so that their injury does not worsen."

Bernoulli discusses his internal conflict over survivor's euphoria, and this passage is best read in the context of the entire book, not quoted in a brief review. Upon his return to the United States, he further experienced social withdrawal, hyper vigilance, sleep disturbance, irritability and emotional "flatness," and a profound lack of motivation, which he countered by pushing himself to pursue academic studies, and accepting support from his family. Buy and read *Reasonable, Justified and Necessary* as, perhaps, a way to honor this soldier and police officer's willingness to lay bare his experiences.

I benefitted from and wished for more of the mindset discussion Bernoulli broached by contrasting society's conditioning to avoid violence with his personal knowledge that, "Sometimes a person's actions just cannot be stopped without the use of a level and type of force that stands a chance of causing death or serious bodily injury." He adds later, "Let me be clear: Violent, decisive response is the only way currently extant to provide a person, any person, with a chance of surviving a deadly physical attack."

Reasonable, Justified and Necessary goes on to ponder crime, victimization, counter violence to stop attack, deterrence and punishment, concluding about his law enforcement contact with "numerous violent felons, including murderers, armed bank robbers, and child rapists," that "The only safe thing to do is to train and prepare as though the next one will be the one who tries to kill me," echoing many a private citizen who studies the skills needed for self preservation.

Bernoulli acknowledges that law enforcement is reactive, and notes that absent creation of a police state, proactive law enforcement is not only an unrealistic goal, but also a highly undesirable one. He acknowledges,

"The only person I know will be present during my personal emergency will be me," adding later, "Depending on law enforcement to stop a violent criminal should they decide to attack someone (other than a law enforcement officer) is misplaced trust." Preparation to use deadly force in self defense is, he asserts, essential.

A combat veteran of the First Gulf War and Afghanistan, professional law enforcement officer, firearms instructor at VT's police academy, and competitive pistol shooter, Bernoulli has much to contribute to a discussion of use of deadly force. He has the chops to write this decade's version of Jim Cirillo's *Guns, Bullets & Gunfights* (<http://www.paladin-press.com/product/Guns-Bullets-and-Gunfights/Handguns>) as in my personal training experience, Jim Cirillo stood alone in his willingness to discuss candidly the very experiences Bernoulli believes should be taught concurrent with firearms instruction.

Though determined to teach by doing, Bernoulli remains reticent to discuss his deadly force incidents, writing, "Talking about it seems, for lack of a better word, dirty. As though one is bragging about having taken the life of another person. It 'feels' wrong, almost embarrassing, to talk about, particularly with those who have not had the experience. Even now it is difficult for me to accurately describe."

Bernoulli's work seems to me to be an initial volume in a multi-volume study. I wish, not out of prurient curiosity, but rather a profound desire for better preparation to survive deadly violence, this book could be expanded and followed up with additional studies based on the experiences and testimony of survivors of violent encounters. This is not an easy goal, and perhaps asks too much of those who suffered the lessons first hand. Dan Bernoulli's book, *Reasonable, Justified and Necessary*, is an excellent first step.

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



News from Our Affiliates

Compiled by Josh Amos

Hello and a happy October! I can hardly believe that fall is here...where has the year gone? Here at the Armed Citizens' Legal Defense Network we are already gearing up for a great 2017. We have a number of new programs and new opportunities to keep bringing the cream of the armed citizenry into our Network.

One of my favorite things to do as the Network affiliate liaison is recognize how my affiliates are doing great things on behalf of the Network. There were many, but the first affiliate to really catch my attention this month is Brian Dolly. Brian is an independent instructor from River Ridge, LA. I have spoken with Brian over the phone a few times in the past few months, and each time Brian leaves no doubt that he is a good fellow who knows his business. I would not hesitate to recommend Brian to a student.

Not long ago, Brian really caught my attention when he told me that he put up a display of our booklet, *What Every Gun Owner Needs to Know About Self Defense Law*, along with a little sign on which he wrote an offer to provide a coupon giving \$25 off new Network membership to anyone who completes his concealed carry license class. Brian is making an extra effort to support the Network and give his students the incentive to join the Network. Good on you, Brian!

Speaking of affiliates getting creative in getting the Network's message out to their people, David and Donna Cover from Shelby, AL, have not let their rural location slow them down. The Covers own the shop *Cowboys Again* in Shelby, AL and are very active in the Single Action Shooting leagues all over AL. When they go to a shoot, they take the Network's booklets with them. In addition to giving out Network booklets with purchases at their shop, the Covers also vend at gun shows and pass out the Network booklets there, too.

I recently had a great interaction with Thomas Wiedenbeck of *Great Lakes Firearms* in Oregon, WI. I had called about other matters, but when I mentioned that each affiliate needs to have up to date editions of the Network booklets to give to their customers, Thomas

made it a point to go check his stock of booklets and replace outdated versions with the current edition. It turned out he still had some of the 2015 stock, so I was relieved to get those out of circulation and replace them with the current, 2016 version.

The extra effort he put into verifying which edition of our booklet he had tells me that Thomas and the folks at *Great Lakes Firearms* pay attention to detail and want their customers and students to have the most accurate information possible. So when I refer people to *Great Lakes Firearms* for training or gun purchases, I know that Thomas and his people will be thorough in everything they do for them. Thanks for the great job, Thomas!

Readers may be wondering, just who are these great affiliates and how did they hook up with the Network? Our first guideline is that affiliated instructors are operating a training enterprise as a business open to the public and or a retail gun shop reaching minimum of 200 students or customers per year. We understand that this can be a challenge for some of our affiliates, especially those who live in sparsely populated areas! If an affiliate is not able to tell approximately 200 clients a year why Network's membership is critical to armed citizens, we encourage them to get creative! We have members who take our booklets to skeet shoots, single action shoots, hunting clubs, gun shops, ranges, and dojos...there seems to be no limit to the creative ways that Network affiliates are promoting membership as they go about their activities.

As was the topic of my discussion with Thomas at *Great Lakes Firearms*, I am working hard to be sure affiliates are distributing the current edition of *What Every Gun Owner Needs to Know About Self Defense Law* to students, customers, and the armed citizens within their sphere of influence. Using the up-to-date, 2016 edition is very important and I am continuously encouraging affiliates and members to check their stock to be sure the copyright date inside the front cover reads "2016." If you're out of booklets or find that you are carrying around expired booklets, please don't hesitate to give us a call or email and we will get a supply of the current edition out to you at no charge.

Our affiliates are listed on the Network website, in pursuit of our goal to send as many clients to our

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affiliates as possible! Keeping those affiliate webpages current is a challenge, so we ask you, affiliates, to check your listing at <http://www.armedcitizensnetwork.org/our-affiliates/instructors> for the affiliated instructors and <http://www.armedcitizensnetwork.org/our-affiliates/gun-shop-affiliates> for affiliated gun shops. Please phone or email me any updates or corrections needed for your affiliation listing. Important details that we want shown in these listings include full contact information so clients can reach you, as well as affiliates' websites to better introduce you to all of the Network members and visitors to our site. In return we ask that our affiliates post the Network link or one of our banners (<http://www.armedcitizensnetwork.org/links-to-acldn>) on your site. Contact me for links if you need assistance.

Finally, it occurs to me that you may have not yet seen the video introduction to the Network that our president Marty Hayes recorded. We uploaded it to YouTube here: <https://www.youtube.com/watch?v=WQFqQoS43NU>. Go check it out, I think you'll enjoy this reminder of why he started the Network and how our organization works for

the legal protection of our members after self defense. It is a great refresher for anyone who may be able to tell a friend, family member or associate why Network membership is so important, and it is also an easy way to direct people to the right details about the Network, so please share the YouTube link!

Ok, folks...that will do it for this month. Please keep on supporting the Network and rest assured that we are busy supporting you in return. As always, if I can provide you with booklets, brochures, point of sale posters, or clarification on details about Network membership benefits, please let me know!

If I can provide any of these materials, or answer your questions, please call 360-978-5200 or email me a josh@armedcitizensnetwork.org. Thank you for helping me spread the word!

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



Editor's Notebook

by Gila Hayes

Several circuit court decisions drew my attention recently. One concerns restoration of firearms rights to plaintiffs who were convicted of non-violent felonies and another addresses restoration of gun rights denied as a result of involuntary commitment for mental health treatment decades ago.

I first read about these decisions in the *Volokh Conspiracy* (don't judge based on the name; it is a consortium of law professors and attorneys who write the most interesting commentaries, even if I don't always agree!). Anyway, getting back to restoration of gun rights, the latest victory comes by a 6th Circuit Court ruling that a gentleman who was committed for mental health treatment in the long-forgotten past should not be prohibited from possessing firearms today if he is now of sound mind.

18 U.S. Code § 922 prohibits a whole slew of folks from possessing firearms, including (but certainly not limited to) someone who "has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;" and anyone who has been involuntarily committed to a mental institution.

As a result, a septuagenarian who thirty years ago spent a few weeks in a mental hospital was denied his gun rights and the BATFE (to which the Attorney General delegates responsibility to consider petitions for removal of the disability) refused to consider his petition for restoration of rights. The 6th Circuit Court decided that the government's interest in keeping guns out of the hands of mentally ill or suicidal people didn't apply to this situation. "No government may permanently deny rights based on generalizations stemming from classifications about any individual who once was institutionalized," opined Judge Jeffrey Sutton. See (<http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0234p-06.pdf>)

The decision that may open a path for restoration of rights to people who long ago accessed mental health treatment resonates with me a bit more than the other decision, this one from the 3rd Circuit Court of Appeals,

finding that people who today are upstanding citizens but convicted of minor crimes decades ago, should not be denied their Second Amendment rights (see <http://www2.ca3.uscourts.gov/opinarch/144549p.pdf>). Still, both decisions are encouraging in that they challenge the government to explain why it has become essentially impossible to remove these prohibitions despite the assurances in 18 U.S.C. § 925(c) "A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws ... and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

Other issues arising this month seemed unusually focused on regulatory law, too. I keep telling folks, "The Network is not a law firm!" This we make clear on our website, yet we are regularly asked questions about state gun laws and some of the questions are extremely complex. Consider a recent example:

"I have a carry permit issued in Rensselaer County, NY. The court places a restriction of hunting and target on the permit. I am told that there is nothing in NY law allowing for the restriction, and if I were carrying while not hunting I would only be in violation of a court order, not unlawful carry. So I ask for your opinion on this as well as, if I were to join, and carry, and have to use deadly force in a self defense situation, would I be provided legal representation and other benefits from my membership?"

Oh, boy, there is a lot of room for error in that question! It echoes what Jim Fleming emphasized in this month's lead interview about the difficulty laypersons face in drawing accurate conclusions if researching the law themselves. Are you reading and interpreting the law correctly? What case law explains the intent of the law? Is the case law you found the most recent? Jim made a great point, and I wish I'd had that conversation before trying to answer the NY non-member's question. Well, I did the best I could, responding, in part:

*The answer to your unlawful carry question should come from an attorney practicing in New York State,
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as it's my impression that NY does not have state-wide pre-emption as regards gun laws (<http://www.gibsondunn.com/publications/Documents/Tartakovsky-Firearm-Preemption-Laws-ML-09.2013.pdf>). If that's so, your local authority can impose restrictions on your pistol permit... These are complex questions about very complicated laws... consult a NY attorney!

Provision of Network membership benefits hinges on whether you were legal under the local laws to be in possession of the weapon used in the self-defense incident. If it was illegal for you, for example, to carry a gun concealed in a parking lot where you drew and displayed the firearm or shot an assailant, then the Network would have no choice but to withdraw Network support after becoming aware of that fact. Hypothetically, I expect that the Network would likely have first provided the member's attorney with an initial deposit against fees to consult with the member, and provide counsel and representation as quickly as possible after the self-defense incident. We would likely learn of the violation when conferring with the attorney prior to assisting with funding for bail. If the member was in violation of the law, we would certainly have to decline to participate financially further in their legal defense.

I had exchanged several emails with another correspondent who subsequently joined the Network. He had asked if the Network would pay attorney fees for gun-related but not self defense legal entanglements:

"Is there a provision if a member is charged with brandishing? I have been 'made' a couple of times while shopping [when a] cover garment gets caught on [a] grip...it can lead my fellow citizen(s) to summon law enforcement, which may not go well for me."

I brought this discussion over to this column because we are so frequently asked if the Network will pay attorney fees to defend a member's gun law violation. To this particular question, I responded:

In an instance of actual brandishing—more accurately called defensive display of a weapon—as part of a self-defense incident, yes, absolutely, the Network provides membership benefits of an immediate fee deposit paid to your attorney. We could not do the same for accidentally letting the gun show, leading to a complaint occurring outside

*of a self-defense incident. If we were to draw money out of the Legal Defense Fund to provide an attorney every time members have a gun regulation issue **not** involving self-defense use of force, we quickly wouldn't have funds for the considerably more serious and more costly representation when a member needs an attorney after the disturbing experience of using force to stop an assailant who is trying to kill or cripple the member.*

I'm sorry, but we really do need to reserve the Legal Defense Fund to pay legal expenses for members after the more serious issues that follow self-defense use of force.

After I commented on fielding several similar questions over the weeks that followed, our Network President commented that there are armed citizens, especially those living in extremely restrictive, gun-hostile areas, for whom pre-paid legal services for representation over regulatory matters may actually be more attractive than having their big-dollar legal needs paid for through Network membership benefits. I guess I "get it."

I'm a big fan of the free market system! Many a small business has gone bankrupt after losing sight of their mission and scattering their energy and resources by trying to be all things to all people. The Network promises to continue to be good stewards of the Legal Defense Fund, so our members have the assistance they need with attorney fees in the days immediately following use of force in self defense, assistance with bail, payment of fees for a fully-staffed trial team, local attorneys and attorney specialists, expert witnesses and other services needed if criminal charges or civil litigation ensues. This is our mission and has been since Day One. That commitment stands unchanged today.

Several pre-paid legal services would be delighted to harvest ten to twenty dollars a month to send an attorney with whom they've contracted to address these folks' gun regulation violations. While I personally don't want to be stuck with an assigned attorney for the exponentially more serious issues attaching to use of force in self defense, it does make sense that for those with the money to afford it, prepaid legal could help if they need to get out of regulatory law entanglements. Like I said, *viva la free market!*

*[End of October 2016 eJournal.
Please return for our November 2016 edition.]*

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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.

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