



The Current State of Stand Your Ground *An Interview with Attorney Jim Fleming*

Interview by Gila Hayes

In the 15+ years since Florida attracted so much attention for passing legislation that removed the requirement to attempt escape in the face of lethal attack, the arguments for and against, and subsequent changes to state laws, have continued to evolve. With several states

presently addressing this aspect of use of force law, we recently spoke with our Advisory Board member, lawman-turned-attorney, and instructor Jim Fleming about what "Stand Your Ground" really means and how it affects the legal aftermath of use of force in self defense.

eJournal: Jim, I was taught that deadly force laws are considered "mature" or "settled" and not subject to much change. Now, with all I've been reading about new legislation from various states, I'm not sure that applies to laws that do or do not require an armed citizen to retreat before using deadly force in self defense.

For example, recently Ohio eliminated their duty to retreat, lawmakers in Arkansas passed a stand your ground law, the legislature discussed it in Hawaii, New Hampshire expanded their stand your ground law, North Dakota lawmakers sent a stand your ground law to their governor who signed it, Florida and Georgia debated repealing or changing theirs and something of which you'll be very well aware, if I'm correctly informed, Minnesota debated the pros and cons of modifying its duty to retreat a couple of months ago, too.

When laypersons discuss stand your ground laws, it quickly becomes apparent that there is some overlap in stand your ground and the castle doctrine and sometimes people use the two terms as though they were synonymous. Can we compare and contrast the two concepts to start our readers off with accurate definitions?

Fleming: Simply stated, the castle doctrine states that a person has no duty to retreat before using deadly force in self defense, IF they are inside their own dwelling. This is based upon the common law concept that a person's home is their "castle." This obviously goes hand in hand with the legal requirement

that a person has a duty to retreat before using deadly force if they are outside their home. Pretty simple, but that is not where the matter ends.

First, the duty of retreat in the public venue is conditional. You are only required to retreat if you can do so safely. You are not required to put yourself at risk by retreating.

Second, the use of deadly force is conditioned upon meeting the elements of justification –

- Your apprehension of an immediate threat of death or serious injury;
- No provocation on your part;
- If reasonable people cast in the same circumstances would also perceive the threat and use the level of force you did, that is deemed to be a reasonable amount of force given the level of the threat.

In the simplest terms, all "stand your ground" laws do is to expand the "no duty to retreat" provision so that it applies anywhere you are, as long as you are there legally, and are engaged in legal activity. You cannot shoot a homeowner who catches you stealing tools from his garage and rushes to stop you with a baseball bat in his hands. You are a trespasser with no legal right to be in the garage, and you are involved in the commission of a crime. Those differences would be pretty easy to understand, but unfortunately that is not the end of the analysis. Each state has enacted its own version of one or the other of these basic legal frameworks.

What do I mean by that? Well, for example twenty-two states have laws that provide civil immunity under certain self-defense circumstances. These are (at least for now) Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Michigan, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia, and Wisconsin. Six states have enacted laws that do not provide for immunity from civil remedies in spite of stand your ground provisions. The civil remedies are unaffected by criminal provisions of self-defense law. These states are Hawaii, Missouri, Nebraska, New Jersey, North Dakota, and Tennessee.

In Connecticut, Delaware, Hawaii, Nebraska, and North Dakota, the duty to retreat also does not apply when the defender is in the defender's place of work. That is also true in Wisconsin, but only if you own the workplace.

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And all of this presumes that you are justified in using deadly force in the first place, with legal requirements that vary from state to state. In my home state of Minnesota, for example, we have a separate statutory provision permitting the use of deadly force to prevent the commission of a felony “in the actor’s place of abode.” But which felonies and what is an “abode?” A home? How about a motel room, an apartment, or a tent at one of our really beautiful state parks? What about my detached garage?

That has been developed in case law to include any place where you are currently residing and could be your home, a motel room, a tent at the state park, like I said. There have been some cases where places like that came up and the court has said, “Yes, that would be included in ‘place of abode.’”

eJournal: In light of that possible confusion, it occurs to me to ask, are there other aspects of the duty to retreat that you often see misunderstood?

Fleming: People also quite often confuse “duty to retreat” with “duty of withdrawal,” so let’s make that clear. If the defendant is at fault for some type of aggressive conduct which provoked the fight, leading to the use of deadly force, and then did not withdraw from the confrontation prior to using deadly force, the defendant has no right to stand his or her ground. He or she may not claim self defense if the defendant fails to withdraw before using deadly force, even to save his or her own life. This is not the same principle as the duty to retreat. They are related, but distinct concepts.

eJournal: I remember talking with you extensively about first aggressor issues and we published a two-part series last fall to help members understand that issue. Reader, if you missed it, see <https://armedcitizensnetwork.org/initial-aggressor> and <https://armedcitizensnetwork.org/intitial-agressor-2> . I promise, it is worth your reading time.

Now, Jim, thinking back to all the discussion following Florida’s implementation of their stand your ground law, and as other states followed suit, laypersons concluded that stand your ground provided immunity from prosecution (criminal) – if a judge at a preliminary hearing agreed you acted in self defense. How prominent, in fact, is immunity from prosecution in stand your ground laws – or is it mostly a tool for the defense attorney to use at trial to show justification for what their client did?

Fleming: It is quite prominent, depending upon which jurisdiction you are in and what that state’s law says and where it came from (statute or common – court made – law), and not just a defense tool.

The problem with all of this is each state has its own version, and the vast majority of them are different in one or several ways. Florida does it one way; Texas another, and so on. In order to understand what state “A’s” stand your ground law covers, a person needs to research that specific law and what it provides. It is not hard; they are all online.

For example, I just looked up Washington and there was plenty to see, including this:

Washington courts have consistently upheld our right to remain in a lawful location with “no duty to retreat.” Flight, however reasonable as an alternative to violence, is not required. While the wisdom of such a policy may be open to debate, the policy is one of long standing and reflects the notion that one lawfully where he is entitled to be should not be made to yield and flee by a show of unlawful force against him. [See State v. Williams, 81 Wn.App. 738 \(1996\).](#)

But to try to cover all the differences and nuances in one article would be impossible. You don’t have that much room in this journal.

eJournal: You make an excellent point, so for an update our readers may wish to refer to Eugene Volokh’s article at <https://reason.com/volokh/2021/04/08/stand-your-ground-on-track-to-adoption-in-north-dakota/> that includes a link to a more complete article from December 2020. For readers in states that have not passed stand your ground laws, how does the duty to retreat work?

Fleming: As I said previously, it is going to vary somewhat from state to state. I know of no state that establishes an unconditional, no exceptions duty to retreat. States seem to universally recognize that a person should not have to retreat before using deadly force in self defense if the act of retreating puts them in danger of greater harm. So, in those jurisdictions where a conditional duty to retreat exists, the question will be left to the jury to decide first whether, under the circumstances, a duty to retreat existed, and if so, could the defender “reasonably” have retreated out of harm’s way. These are essentially “fact questions” which are left for resolution by the jury.

eJournal: You’ve worked for 37 years as a defense attorney in MN which, if I understand, doesn’t favor stand your ground. How hard is it to convince a jury that circumstances made retreating more dangerous than standing and fighting?

Fleming: The defendant, through his attorney, is going to develop what the scenario was, where he was, and what was going on around him. Then, it is really up to the jury to decide, “Given the information and the evidence that has been provided during the trial to you, jury, you have got to make a determination whether this person was in a position to retreat safely?”

eJournal: Is one’s inability to retreat safely an easy, persuasive part of the story to tell, or has it, in your experience, been hard for jurors to grasp the danger the client faced?

Fleming: That is not difficult to communicate. Let me give you an example from a case I am working on right now. A fellow was leaving a restaurant with his girlfriend and another friend of hers. He almost hit a car that was backing out of a parking spot. The driver of that car got upset, came out, started yelling at the client, and before long was punching him in the head

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through the window. When that started, the girlfriend, who was riding in the front passenger seat, started screaming and jumped out and ran behind the car.

Here you have a guy who is having blows rained on him through the window of his car. He is seatbelted in so he can't get out. He can't go forward because of the other car, and he can't back up because he does not want to run over the girlfriend. He was in a position where he could not safely retreat. He cannot back up because he can hear his girlfriend behind him, but he does not know where she is. Because he can't retreat safely, he ends up shooting the guy – doesn't kill him, but he shoots and wounds him – and he was criminally charged for shooting the guy.

If it comes down to it, the evidence that will be presented to the jury will develop that scenario of where he was, what was going on, the fact that he couldn't drive forward to get away from the guy and that he couldn't back up because his girlfriend – for whatever reason – started screaming and jumped out of the car and ran around behind him. He was boxed in. He had a car in front of him and his girlfriend somewhere behind him. There was no way to retreat.

The key to this is *safely* retreat. This came up in the course of the testimony that I presented as the expert in a different trial last Friday. The prosecutor was trying to argue that the client could have retreated. I contested that. I said, "You've got a guy 10 feet away from you who is very agitated, yelling at you, threatening you and suddenly he yanks up his sweatshirt and dives for his waist band, when you are 10 feet away from him."

The fellow pulled his own gun, shot the guy, and killed him. Well, it turned out that the guy did not have a gun but for whatever reason, he was trying to make the defendant think that he had a gun. That was a fatal mistake for him, but as I explained to the jury, the duty to retreat is conditional. Could you retreat safely? You are confronted with somebody 10 feet away that you believe is going for a gun. Even if the guy didn't have a gun, that mistake could be made. It is still a reasonable belief that you are in danger. Even the witnesses said that the guy acted like he was reaching for a gun when the client pulled his own gun and shot him.

eJournal: How did the jurors react to your expert testimony?

Fleming: It was impossible to pay specific attention to them because they were not in a jury box. The jurors were scattered around all over the court room. I didn't know which ones were jurors and which ones weren't, so I looked straight ahead and focused primarily on just speaking to the crowd.

eJournal: That's not the only weird trial story I have heard in the new era of COVID-19. Like nearly everyone in the court room, it's likely none of the jurors had first-hand experience with physical violence. Getting them to empathize with someone who has looked death in the eyes, seems to me to be a huge challenge.

Fleming: I often tell people, "Look, if you think that you are going to start a trial with a jury of your peers, forget it!" If you just went through a deadly confrontation and ended up shooting somebody to save your life, how many people do you think are out there – let alone will be on that jury – who even remotely experienced anything similar to that? If they have, during the jury selection process they are going to get kicked off that jury so fast it will make your head spin. The prosecutor does not want anybody who knows anything about guns. I had at least one prosecutor tell me a long time ago that she would use a peremptory challenge to kick a prospective juror off the jury if she found out he was a member of the NRA.

That means that part of the job of the defense attorney is, through the development of the evidence you are going to present during the defendant's case, to turn them into a jury of the defendant's peers. I do that by educating the jurors and sensitizing them to what self-defense issues are and just how fast they develop. It seems to work pretty well.

eJournal: That education and as you called it, "sensitization" seems like a delicate matter. Some people will be repulsed by any discussion of violence; others won't even understand how it happens.

Fleming: It is dicey sometimes, there is no question about that. It is made harder because there are people out there who will go ahead and react when it is very clear that they had the ability to just get the hell out of there. For example, if they are in a vehicle and the situation is developing across the street, well, they should put that car in gear and get out of there.

Usually, you can tell if it is a situation where this individual just realistically was not going to have the opportunity to retreat. Then, of course, when they are on the stand testifying, part of it is asking him or her, "Did you at that point feel that you had any means of trying to avoid this or retreat away from it and still maintain your own safety?"

They can say, "No, I did not."

"Tell us why."

"Well, I was here; that guy was there, he was doing this, we were close, there was no way that I could avoid him, and I couldn't outrun him" – whatever it is – so the jurors have the opportunity to hear that. Then, of course, the prosecutor has the opportunity to cross examine them and may say, "Well, couldn't you have done this?"

"No!"

"Well, why not?"

"Because I was blocked," or, "I was too close to him; I couldn't outrun him; I was confronting a man with a gun that was 10 feet away from me, if I had turned and tried to run, he would have shot me in the back."

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eJournal: In states without stand your ground laws, how stringently have the courts required self-defense shooters to prove they had no reasonable alternative to shooting?

Fleming: If a duty to retreat exists, the courts are obligated to follow the law and instruct the jury to answer two questions: whether, under the circumstances, a duty to retreat existed, and if so, could the defender “reasonably” have retreated out of harm’s way.

If the duty exists, the court has no discretion in requiring the jury to consider the question. However, “no reasonable alternative to shooting” goes far beyond the question of whether there was or was not a duty to retreat. Remember, it is not the absence of a duty to retreat that justifies the use of deadly force. A person might be confronted with a situation where there is justification for the use of deadly force, and still be first required to retreat before doing so. Those are two separate questions with related but different answers.

eJournal: Ah, good point, although I remain interested in the process through which we reach the determination of “reasonable.”

Fleming: Any time you see the word “reasonable” used in a legal context, think “Jury Question” because reasonableness is a “question of fact,” that only a jury (or a judge, acting as the finder of fact) can answer.

eJournal: People want clear rules, and I see this in myself and the way some of my questions have strayed beyond stand your ground laws. Uncertainty and difficulty determining what will be allowed results in thinking that laws like stand your ground have broader application than they do. I appreciate the way you redirected the conversation.

Fleming: The basic elements of self defense can be found both in judicial decisions (common law) and statutory law. But I must always emphasize that great variation is present in the laws of the various states. There is no uniformity or one size fits all.

For example, all deadly force self-defense laws permit the use of deadly force where the defender honestly and reasonably believed that the assailant had the conscious purpose of killing or inflicting some serious personal injury. But some state pronouncements also permit the use of deadly force to prevent the commission of a serious felony crime. These crimes might be defined as “crimes of violence,” “forcible felony,” “crimes against persons,” or “person crimes,” depending upon where you are. Typically, this means a violent crime perpetrated against a person or persons – assault, rape, robbery, kidnapping.

Georgia defines “forcible felony” to mean murder, felony murder, burglary, robbery, armed robbery, kidnapping, hijacking of an aircraft or motor vehicle. In Florida, “a person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is

necessary to prevent ... the imminent commission of a forcible felony.” In New York, “a person may not use deadly force upon another ... unless

- (a) *The actor reasonably believes that such other person is using or about to use deadly force, or*
- (b) *He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery.”*

At the same time, in Minnesota, among the list of “crimes of violence” are theft of a motor vehicle and felony level possession of marijuana. You do not, however, get to shoot somebody down simply because they possess more than 42.5 grams of plant-form marijuana, or 0.25 grams of marijuana wax. You don’t get to shoot Oatie Fudpucker because he is trying to steal your car. Isn’t this fun? What’s the best rule? Know where you are, and know EXACTLY what the law allows, and what it condemns.

In literally all jurisdictions, a claim of self defense may be brought if the defender had reasonable grounds to believe that the attacker was about to kill or seriously injure the defender, or a third person – whether or not that belief turns out to be true.

So, if your situation meets these criteria and you had the right to stand your ground, then the matter will be handled according to the procedure employed by the jurisdiction in which the incident occurs. In spring of 2021, self-defense laws in at least 23 states, including Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia and Wisconsin, provide immunity from civil suit under certain self-defense circumstances.

Additionally, at this time, some states, including Arizona, Arkansas, California, Florida, Kansas, Kentucky, Louisiana, Mississippi, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Wisconsin and Wyoming, have replaced the common law “reasonable person” standard, which placed the burden on the defendant to show that their defensive actions were reasonable, with a “presumption of reasonableness,” shifting the burden of proof to the prosecutor to prove the negative, that self defense was not, in a particular case, reasonable and justifiable.

Because of the labyrinth of variables in the law from state to state, it is impossible for us to cover them all during this limited discussion. It is vitally important to remember where you are.

eJournal: If you’re in a state that has a stand your ground law, how do authorities prove stand your ground’s applicability to deciding if a use of force results in charges or trial? Does it take a judge to stop charges against a person who acted in self defense from going to trial? Does it reduce a prosecutor’s likelihood of charging self defense as murder, manslaughter or assault?

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Fleming: This is a complicated question, as a result of the unavoidable application of statutory law which varies from state to state, the common law (created in the appellate courts of the various states) interpreting the meaning of those varying statutes, and the Rules of Criminal Procedure, and the common law I referred to above interpreting the application of those rules to specific cases.

If an accused invokes the protections of a stand your ground law, the court will examine the claim to determine whether it is based in fact. A prosecutor in a given jurisdiction, may or may not recognize the application of the stand your ground law to a given case presented by law enforcement to the prosecutor's office for consideration.

People need to remember, police officers do not "charge" a person with a crime. They do not sign complaints, only prosecutors and judges sign complaints. The police investigate alleged crimes, prepare reports and submit them to the prosecuting authority for consideration of possible charges. So, a prosecutor may decide not to charge a crime, based upon facts that support a stand your ground defense, or the prosecutor may decide to ignore the stand your grounds factors involved, and charge out a crime (by signing a charging document usually known as a "Complaint") putting the accused to the burden of proving the applicability of a stand your ground defense.

A defendant cannot be "forced" to trial in the strictest sense. The prosecutor might possibly dismiss charges, based upon evidence provided by the defense that makes conviction highly unlikely. The defendant might accept a plea to a lesser charge. People often say, "I won't have an attorney who plea bargains." They clearly have no idea how that works exactly. If the prosecutor extends an offer, the defense attorney can be disciplined by the bar if he/she fails to communicate that offer to the client. Only the client is capable of accepting a plea offer.

ALL attorneys engage in plea negotiation, at least those with experience in the profession and a brain in their heads. It is only when the client says, "I will not accept a plea offer under any circumstances!" that a case goes to trial. Having said that, the client always asks, "What are my chances at trial?" There is only one answer to that question, and attorneys know it, whether they are willing to be honest and blunt with their client about it, or not. That answer is, "Fifty-fifty, you are either going to win, or you are going to lose." Any attorney who gives a client a different answer to that question is blowing smoke.

eJournal: Thinking back to when you were a law enforcement officer (and from conversations with law enforcement officers with whom you discuss things with today), I wonder if stand your ground laws would result in changes to how a self-defense gun use is treated by responding law enforcement?

Fleming: Nope. That is not the job of law enforcement. They respond, they ensure ongoing public safety (which may well

include taking the defender into custody), they investigate the incident, and they write up reports to be submitted to the prosecutor's office. Trying to talk yourself out of being taken into custody is both dangerous, and stupid. Year after year, we see and hear countless horror stories of otherwise innocent people who talk their way into horrible legal problems. Sometimes, an experienced attorney can talk them back out; many times, the attorney cannot.

eJournal: Thank you, Jim, that really helps us understand the scope of our stand your ground law's influence. Can you synopsise the basic facts about stand your ground that the average gun-owning layperson needs to know?

Fleming: Stand your ground, in essence, simply expands the exception to the duty to retreat found in the castle doctrine from the actor's residence (or vehicle, or place of business depending upon the jurisdiction involved and the scope of that jurisdiction's statute or common law) to anywhere that the actor has a legal right to be while engaged in legal activities.

Where a duty to retreat is found, it is universally a conditional duty, "If one can retreat safely." This question, "Could the actor have retreated safely?" is treated as a fact question for determination by the jury. For example, in the Connecticut Criminal Jury Instructions, the instruction addressing duty to retreat provides that the defendant must retreat if there is an objectively reasonable belief that the attacker will cause death or serious bodily injury, and a retreat won't unreasonably increase the likelihood of death or serious bodily injury. Where you see the words "objectively reasonable" and "unreasonably" this is an automatic signal that it is a question that the jury will be tasked with deciding.

Obviously, in a stand your ground jurisdiction where the defendant was in a place where he/she had a legal right to be, and was engaged in legally permissible activities, the question of duty to retreat is never going to be addressed to a jury. If, on the other hand, the real question at issue is whether the actor was justified in the use of deadly force in self defense, the option of retreat is not the issue.

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



President's Message

by Marty Hayes, J.D.

My head hurts. Please allow me to explain.

The other day, I was perusing that great source of gun-related knowledge, FaceBook. I came across a post on a 10mm Fan page, that asked this question (this is quoted verbatim with no attempt to fix the

typos or grammar or include the multiple emoticons):

"I love my 10mm...but....i dont think it would be a good idea to end up in court after a self defence shooting ...and try to explain why you carry such i devistating. Load....your thoughts?"

I thought to myself, "This will be interesting" but OMG! I have selected just a few of them for your reading pleasure...

"I'd Rather be Judged by Twelve then Carried by Six"

"You are going to end up in court after EVERY self defense shooting"

"Deadly force is deadly force. Clean shoot is a clean shoot"

"I'm still looking for a round to completely remove the head from the shoulders "

"To make sure I kill the dirt bag in the most humane way as possible..."

"If you have to use it repeat after me, when asked why that gun and that ammo "its just what I had at the time, no rhyme or reason, it's just what I had. I have many other guns, its just the one I picked up that day"

"The Key words "I was in fear for my life" Will be all you need, regardless of what you're shooting with."

I report and comment on the above for a couple of reasons. First, does anyone here think these types of comments, on a public forum such as FaceBook, linked with the individual's name, is a good idea? One of the first things the detectives do after a self-defense shooting is look up the shooter on social media. Law enforcement is looking for indications of premeditation and/or intent. I rarely post anything on social media, instead relegating my participation to that of a reader (with the exception of the Armed Citizen's Legal Defense Network's FaceBook page). When I do post, I post with the expectation that my words may be read in court and I will have to defend those words. PLEASE, PLEASE, PLEASE if you are a Network member, stay off social media and don't make these types of

comments. Now, I am pleased to report that none of the over 100 comments on this particular post mentioned the Network.

This brings me to my second comment. There were several comments suggesting that people should buy "self-defense insurance," as if having an insurance policy will make everything go away. Insurance will NOT cure stupid, and no amount of insurance coverage will make things right when an individual commits criminal acts.

Just to be clear, the Network is not insurance anyway, so it is not even an issue with what we do. I would like to think our education efforts with our members have been working, because I simply do not see such stupidity associated with Network members. It shows how much work we still have to do to educate our fellow armed citizens, many of whom have not yet benefited from the training we've been fortunate enough to have. Okay, enough on this topic.

No News on Insurance Commissioner Fight

We are in legal limbo, meaning that it would not be prudent to make comments on the legal issues. Suffice it to say that we are working through what appears to be a months-long, if not longer, court battle. I will update when I can, and just wanted to let everyone who has donated to the fight know that we are not backing down, and that we REALLY appreciate your support.

Comments on the Chauvin Trial

When I watched the 9 minute 29 second video showing the death of George Floyd, I knew that there was no way that Chauvin was going to be acquitted. I thought perhaps there would be a hung jury, but even that was not a likely outcome. I was impressed with both sides of the case, feeling that the prosecution was doing a good job presenting its evidence, and that the defense was trying valiantly to counter the prosecution.

In the end it boiled down to the jury looking at the video, and feeling that the force Chauvin used was unreasonable and unnecessary. If I had been on the jury, I too would likely have voted to convict. It will be interesting to watch as the trials of the other three officers unfold.

I have a question to ask of those of you who have studied this case. Wouldn't it have been important for Chauvin to have had some lesson plans, notes he took during training, and/or the testimony of his training officers to tell the jury he followed his training during the incident? Alas, I saw none of that. At least our Network members have our [educational package](#) to fall back on, if they are ever prosecuted.



Attorney Question of the Month

The intent of this column is to increase understanding of the legal defense of legitimate use of force in self defense, sometimes by discussing the laws in force in the various states, other times in discussions of broader topics, like the interplay between actions and attitudes taught to armed citizens in fire-arms training and interaction with the legal system after using those skills in self defense.

This month's question, posed by Network President Marty Hayes, asked our affiliate attorneys about murder charges after a self-defense shooting. He writes –

This question is premised on the hypothetical of a self-defense shooting (involved persons do not know each other) with the shooter firing in self defense and the legal argument of self defense being used in court.

It's been common training doctrine for decades that shooting in self defense is not done with the intent to kill another, but is instead done to prevent/stop a killing or severe injury. But when an armed citizen is criminally charged after such a shooting, they are routinely charged with one or more levels of the crime of murder. In most jurisdictions, "murder" is a crime requiring the element of "intent to kill." For example, Washington statutory law states:

RCW 9A.32.050

Murder in the second degree.

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person;

So, with the above example and utilizing your own state's case law, statutory law, jury instructions, etc. can you discuss --

If an armed citizen is arrested after a self-defense shooting and prosecuted for the crime of murder, why is the charge murder, when there is no evidence that the armed citizen intended to kill his/her attacker?

William O. "Bill" James, Jr.

James Law Firm

1001 LaHarpe, Little Rock, AR 72201

501-375-0900

<https://www.jamesfirm.com>

The question of intent is a fact question that is left to the finder of fact. Often times cases that are not cut and dry or questionable in the mind of the prosecutor will be charged as MURDER leaving the "decision" as to what the citizen was thinking to the jury to decide.

Thomas F. Jacobs, Esq.

Law Offices of Thomas Jacobs

271 North Stone Avenue, Tucson, AZ 85701

520-628-1622

tjacobs@jacobsazlaw.com

Armed citizen involved shootings that do not arise from criminal activity are uncommon. When they do occur, there is quite often an issue whether the shooting was initiated in self defense. The narrow question presented presumes that the shooting was conducted in self defense and, as such, is self-limiting.

In Arizona, as in most jurisdictions, "self defense" is what is known as an "affirmative defense." An affirmative defense is one in which the underlying elements of the charge are admitted, but statutory justification renders the action non-criminal. Employment of a firearm in self defense necessarily involves threatening or using "deadly force." Most self-defense statutes addressing use of deadly force require that such force be objectively reasonable and necessary to prevent another person's unlawful use or threatened use of deadly force, such as assault with a deadly weapon/dangerous instrument against the person claiming self defense, or any other action that may result in serious physical injury or death of the person claiming self defense. There are other types of justification, including crime prevention, but this question addresses only self defense, therefore I will not address those other possible defenses or scenarios.

If we presume that the party charged with murder in this scenario was acting in self defense, his or her intent with respect to causing the death of the "victim" is irrelevant since the action is presumed justified by law. There are many scenarios in which a person may employ deadly force with intent to stop a crime or assault from occurring. In such cases, if such action is deemed justified under law, a court or jury would look past the issue of intent to kill, which is an element of first or second degree homicide.

If the prosecuting agency presented with the case makes the same presumption of justification (self defense) that is made in this question, there would likely be no murder charge in the first place; the case would not be issued as a criminal charge. If, on the other hand, the charge were issued without such presumption, it would be perfectly reasonable for the prosecution to fashion the charge as a homicide if someone was killed by someone else who shot them. If such shooting was not obviously merely reckless in nature, that is if the "victim" was intentionally shot, the charge of first or second degree murder is appropriate, regardless of subjective intent to kill vs. intent to prevent injury/crime, which would later be presented as an affirmative defense. Again, in an affirmative defense case, such as self defense, the elements of the charge are admitted (e.g. intent to kill). The question does not really address the issue of intent to kill vs. intent to injure, which would be the difference between aggravated assault that resulted in a death (where

[Continued next page]

May 2021

the charge might be manslaughter if death was not intended, but resulted anyway) v. homicide where death is the intended consequence. That is not a question that would be presented in a self defense or other justification case.

John R. Monroe

John Monroe Law, PC
156 Robert Jones Rd., Dawsonville, GA 30534-8527
678-362-7650
<http://www.johnmonroelaw.com/>

In my state (Georgia), a self-defense shooting is almost always going to be either murder or no crime at all. This is because if it is a self-defense shooting, that means other possibilities (for example, accident) would not apply. The shooter actually intended to shoot. It is not necessary for the shooter to have an intent to kill. He only has to have the intent to shoot another human being. If he has that intent, and the shooting results in death, either the shooting was "justified" (i.e., self-defense) or it was murder.

Brendan K. Lahey

Lahey Law
502 W. Washington Street, South Bend, IN
574-232-9995 x225
<http://laheyllaw.net/>

In Indiana, juries get an instruction telling them that if someone fires a gun at another person, intent to kill may be inferred from that act.

James B. Fleming

PO Box 1569, Monticello, MN 55362
763-291-4011
<http://www.jimfleminglaw.com/about-1.html>

Prosecutors make charging decisions based upon what they think they can prove to a jury. To simply say, "Well, they can't charge murder, there is no evidence of intent," begs the question. Deadly force was used; the other fellow died as a result of the application of that force. So, the question of whether or not, there was intent to kill, along with the related question, was the defendant's action to use deadly force, which resulted in the death, justifiable as self defense, are questions commonly left for a jury to decide.

In Minnesota, we have two companion statutes. Minn. State. Section 609.06 and 609.065. Minn. Stat. § 609.06, subd. 1(3). States, "A person may use reasonable force when it is "used... in resisting or aiding another to resist an offense against the person." The elements of self defense under section 609.06, subdivision 1(3), are (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of... bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

Minn. Stat. § 609.065 states that a person may intentionally take a life when it is "necessary in resisting or preventing an

offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, or preventing the commission of a felony in the actor's place of abode."

The elements of self defense under this section are (1) The killing must have been done in the belief that it was necessary to avert death or grievous bodily harm. (2) The judgment of the defendant as to the gravity of the peril to which he was exposed must have been reasonable under the circumstances. (3) The defendant's election to kill must have been such as a reasonable man would have made in light of the danger to be apprehended.

But, in both cases, before the proper jury instruction can be provided to the jury, the defendant must provide "some evidence" to the court that he/she acted in self defense. This is known as the "burden of production" – not to be confused with the burden of proof. The accused bears the burden of production. The state always bears the burden of proof.

And, there are two different jury instructions involved.

JIG 7.05 states, "(1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of . . . bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

JIG 7.06 states that the killing must have been done in the belief that it was necessary to avert death or grievous bodily harm AND (1) the absence of aggression or provocation; (2) an actual and honest belief of imminent danger of death or great bodily harm; (3) reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat.

So, if the court rules that the "some evidence burden is met (a burden of production – not proof) and the defendant has stated that he/she did not intend to kill then JIG 7.05 must be provided to the jury.

But, the prosecutor is not going to simply roll over and give up. They will continue to argue a deliberate and intentional killing.

Folks need to remember, this is not about "fair," this is about reality.

This is one of the reasons why it is vitally important for the defender to assert the right to remain silent until their attorney is present. Words matter, choice of words matters to an incredible extent. Right after what is very likely the most traumatic event to ever take place in a person's life is (as has been proven over and over again) not the time for that individual to be responsible for the careful choosing of their words used to describe the incident.

We extend a hearty "Thank you!" to our affiliated attorneys who contributed comments about this topic. Reader, please return next month when we discuss a new question with our affiliated attorneys.

May 2021

Book Review

The Snubby Revolver

The ECQ, Backup, and Concealed Carry Standard

By Ed Lovette

Published by Snub Noir LLC

<https://snubnoir.com/product/the-snubby-revolver-3rd-edition/>
\$29.95 206 pages, third edition

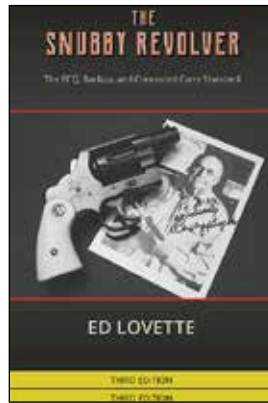
Reviewed by Gila Hayes

This month, I read the third edition of one of the first books we reviewed in this journal, Ed Lovette's [The Snubby Revolver](#). This edition expands on topics that came up in a great [inter-view Lovette gave](#) us in the April 2019 *eJournal*. That interview addressed threat avoidance, while the book's title suggests revolver instruction, but in reality, the book is much, much more.

Why should you read a book entitled *The Snubby Revolver*? Lovette's introduction explains, "We're slowly losing all that good revolver 'how-to' we learned the hard way over a good many years, often at great risk, sometimes paying the ultimate price. I am concerned that the requisite revolver skills are not being passed on to those who need them." If I may be so bold, I would add that Lovette also writes from personal knowledge about many tactical concerns facing the armed citizen, expanding the book's value far beyond those going armed with short-barreled revolvers.

Lovette is now retired after working as a CIA paramilitary operations officer, law enforcement officer and U.S. Army Special Forces captain. *The Snubby Revolver* blends the lessons he learned by experience or from the experiences of others with scholarly research. He explains, "It is interesting to note that while gunfighting equipment and training have evolved considerably over the years, the gunfight that is resolved by a handgun today looks no different than its historical predecessors." Lovette's particular concern is defense at extreme close quarters. From his studies of armed encounters, he identifies the likelihood that "you will face a single assailant, and you will be alone...Your assailant will probably be armed with a handgun but may possibly be armed with a knife or blunt instrument. The distances will usually be less than 10 feet. It will be over very quickly. Reloading is rarely an issue."

Lovette notes that his CIA work closely mirrored private citizens' defense needs. "During my agency service, unlike the police officer, I had the options of confrontation avoidance and strategic withdrawal (running away) available to me," he writes. "My work required me to be constantly aware of what was going on around me. As one of my Special Air Service (SAS) friends likes to say, 'We had to be invisible, not invincible.' This is an especially important distinction to make because, in theory, if you practice good tradecraft as well as good personal



security, you should be able to avoid any unpleasantness," he explains. During his career, the necessity of remaining invisible drove gun selection as well as behavior.

Lovette's priorities are applicable to a private citizen's weapon choices. "My first requirement for the ECQ (extreme close quarters) handgun is that it must be reliable...not only in terms of function but also in terms of reducing the chance for operator error, in terms of reducing the number of things that can go wrong. In a word,

simplicity. In a word, operator-proof," he writes. He requires –

- Reliability when fired from a variety of positions, including through coat pockets, if the muzzle is jammed against an assailant,
- Not dependent on a proper firing grip, and
- No manual safety that may be inadvertently engaged.

"If you are forced to grapple with your assailant, the weapon must have strong retention capabilities and still be able to fire," he explains, relating an incident in which an officer couldn't depress a 1911's grip safety, another in which a pistol's manual safety was inadvertently engaged, and a report of a struggle during which a pistol's magazine disconnect deactivated the trigger when the magazine was inadvertently ejected.

The Snubby Revolver's topics range from carry methods and holsters to revolver frame size, and much more. Lovette gives the nod to pocket holsters, acknowledging the wide variety of holster preferences in the revolver community. He stipulates that holsters must allow good access when seated in a car.

Pros and cons of various grips and how well they accommodate speed loader use lead into drills to diagnose grip fit issues. Of revolver sights, Lovette acknowledges, "Some will even suggest that given the role of the short-barreled revolver, it really doesn't need sights at all. I disagree." He endorses modifying revolvers to double action only but warns, "The double-action-only trigger does not make the gun safe," proven by reports of negligent discharges after police agencies mandated double action only guns. He adds, "The double-action trigger does provide the user with a little greater margin for error. I recall several cases where officers told me they were able to stop the double-action firing stroke before firing the handgun when a suspect dropped the gun or knife, or their partner stumbled into them. In other situations, they were able to block the trigger during a struggle for the weapon by inserting a finger into the trigger guard behind the trigger."

Lovette discusses ammunition selection in detail, as well as reloading technique, although he urges a realistic perspective, reminding his readers, "Most gunfights are resolved within the capacity of the five or six rounds the revolver carries. Reloading is necessary in about 10 percent of the documented gunfights involving revolvers. There is also a great deal of truth to the fact

[Continued next page]

May 2021

that if you have to reload during the gunfight, you are either missing a lot or you brought the wrong weapon.”

Nonetheless, “Reloading after the shooting stops amounts to good tactics,” he teaches. When you practice, “Spend most of your time on hitting. Get in the habit of reloading quickly ... (the reason being that if you need to reload, you’ll probably have to do it pretty quickly), and your speed will develop naturally,” he writes, offering techniques to maintain a danger scan during reloading, tips to guide the cartridges into the chambers without looking and more.

Lovette’s discussion of tactics focuses on defense at extremely close quarters. Although he addresses revolver use, these pages have broader applicability. He uses illustrative vignettes throughout, explaining, “You may note as you read the incident and then the lessons learned that the actual encounter (reality) bears little resemblance to any of the training you’ve had ... Most of our training deals with close quarters combat (CQC) technique. We can use verbal commands, gain distance, seek cover. We have the time and distance to apply tactics. However very little of our firearms training deals with extreme close quarters combat (ECQC). In extreme close quarters, we do not have the time and distance to apply tactics. We are fighting with our hands, a knife, a handgun, our training, and our mind-set. These are the dynamics of deadly force encounters most common to the legally armed citizen...” He urges readers to integrate physical defensive skills and alternative weapons training with firearms skills in preparation for circumstances under which shooting isn’t practical.

Lovette’s ideal training curriculum would include threat awareness to recognize both criminal and terrorist dangers, mindset, communications, unarmed defensive tactics, pepper spray, knives, handguns, flashlights and weapon retention. His priorities start with maintaining an appropriate level of awareness, acknowledging dangers, preparation and planning, and being a good witness. “Consider the following errors, which quite often snatch defeat from the jaws of victory: failure to correctly assess the threat, failure to control the subject, failure to watch the hands, failure to use cover, failure to shoot soon enough,” he writes, urging that awareness is the highest priority. He then teaches basic tactical decision making at the speed of real life, first applying those priorities to attacks in the home. These, he notes, are far more common than public affrays but have different warning signs, which he subsequently identifies. “Missing the danger signs is the difference between winning and losing,” he stresses. Because many do not carry a gun inside the home, if you need to run get a gun, time may run out, he warns, arguing for early detection.

Lovette teaches strategies to detect and escape attacks in public buildings. Maintain proximity to an exit, leave decisively without dithering when unsure if it is safe, move toward safety by assessing danger of being crushed by a panicked crowd,

check for obstacles or attackers between you and the exit, and continue to scan while getting out, he writes. “Look before you leap, think clearly and quickly, keep your balance, and scan.” He discusses when to run and when to slip away unnoticed, identifies the risks inherent in shooting or having a gun in hand at the scene of a public attack, and discusses dangers that may wait outside.

Many years ago, I was privileged to attend a block of instruction in which Lovette demonstrated defense from inside vehicles. He comments in *The Snubby Revolver* that it is difficult to find reliable “information on when to use the vehicle as a means of allowing you to escape safely from a situation instead of using your gun.” The courts “will look upon you more favorably if you can demonstrate that you did everything you could to get away from the threat,” he adds and outlines when to use your handgun, when to drive, or when to simply let the assailant have the car.

He outlines carjacking or kidnapping pre-attack cues, writing, “What usually jams the untrained driver up in a carjack attempt is not driving ability—the skill that is missing is attack recognition.” He teaches that vehicular escape is often as simple as “taking decisive action and either getting the car in motion or keeping the car moving. This gets you away from the attack site, and as a moving target, you’re harder to hurt.” He discusses driving to a safer place, getting around cars and other things blocking you, and dismisses fancy evasive driving like J-turns, calling them a “waste of valuable training time.” Under stress, you can only do what you know best, he reminds. Sometimes acceding to a carjacker’s demands for the vehicle is best, he points out, so outlines tactics to get out of the car.

Much of Lovette’s hard-earned wisdom is distilled in *The Snubby Revolver*. I fear many who would otherwise benefit may fail to read the book because they don’t think it applicable to their needs. Revolver shooters are definitely a minority these days, yet many a gun hobbyist owns several (or more) revolvers, often carries a short-barreled revolver, but shows up at classes and matches with a semi-automatic to keep up with the other shooters. I think that’s unfortunate!

The Snubby Revolver’s third section closes out the book with an analysis of revolver size and weight, the history of revolver options and more. Lovette summarizes the advantages the snub nosed revolver brings to daily carry for personal protection, concluding, “For many of us, it is the bottom line in defensive handgun selection. It is the perfect combination of size, weight, power, concealability, and reliability. Street tough and combat proven.”

As I finished reading *The Snubby Revolver*, I can only echo Ed Lovette’s wish that revolver shooters continue to share their knowledge and experience as he has in this third edition of his book. Copies of *The Snubby Revolver* are sold at <https://snub-noir.com/product/the-snubby-revolver-3rd-edition/>.



Website and Technology Update

by John Murray, IT Director

One of the Network's major missions is education! This is precisely why our Network eJournal is available to the public, and not just members. We strongly encourage you to share this information. Browse to <https://armedcitizens-network.org> then select Journal from the red menu bar across the

top of the web page and share.

The more observant of you may have noticed some significant enhancements, mainly in our website's search capabilities.

This was partly driven by a request by our Network president Marty Hayes in response to our defense against the Washington State Insurance Commissioner's unwarranted actions against our membership benefits organization. He came to me and asked how many times on our website and its publications we had explained the Network's assistance to members and stated it was not insurance.

That was pretty challenging, because starting in 2008 through January 2011, the Network eJournal was published as a PDF download. To this day, we have many members enjoying and using the downloadable PDF format. The problem with the PDF format is the inability to search PDFs. We want anyone to be able to immediately search and enjoy access to all the educational content on our site, without any impediments. To achieve this goal, we have converted all previous PDF content to HTML text. In addition to the new "search" field, you will now see an annual journal article synopsis, a "rollup," if you will, at the top of each year's journal index.

As Marty has often stated, "Member education is the core of our mission," so we cannot encourage you enough to take advantage of this! Again, please share this with friends and family; it's open to all!

Members Access Features

We do hold back some services for members only. When you log on to our website as a member, you have access to our affiliated attorney list, what to do in case of an emergency (with our after-hours phone number), and more. We have now enhanced that with your current

membership information, including your membership's expiration date, the address we have on file for you, email and phone. Nearly a third of our calls, emails and other inquiries involve checking the status of your membership, or asking if you've updated your new address with us. While we enjoy talking to you, we hope this features will help you in determining that information at any time of the day or night!

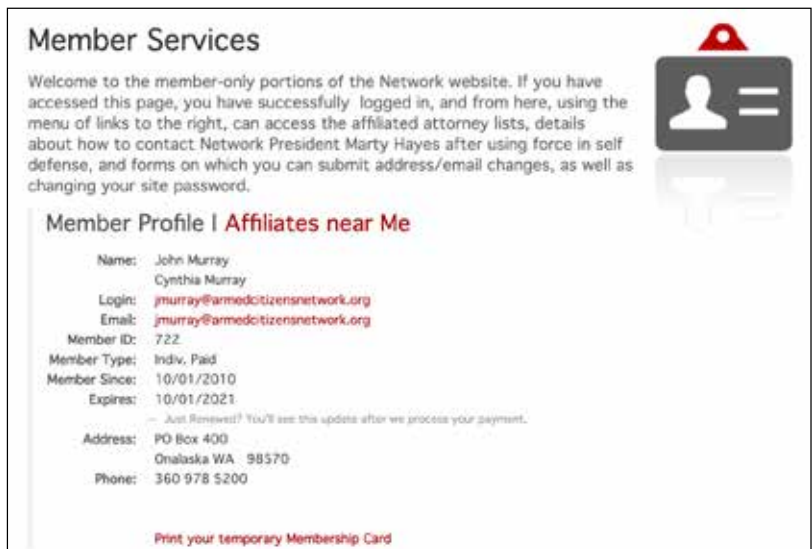
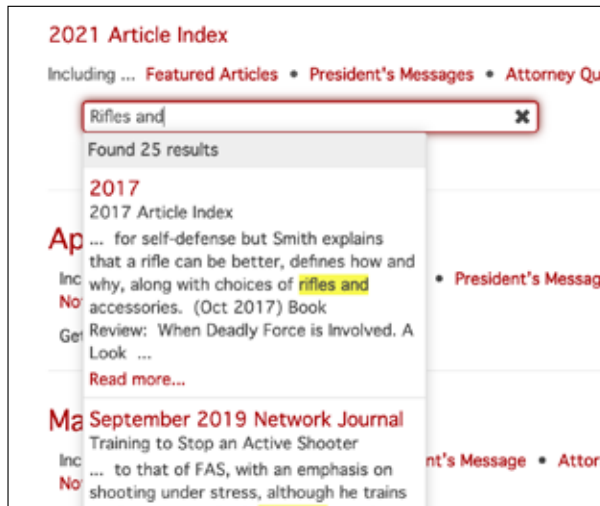
In addition, we've added a link that will allow you to print your own temporary membership card while you wait to receive the printed plastic wallet card we'll be sending to you via mail.

Also note the Affiliates link; it will list Network affiliates near you based on your ZIP code.

You may be curious how we are accomplishing this. We maintain a private Member/Affiliate database, to which only ACLD Network staff have access. When you call, fill in a form, enroll or renew your membership, we update this database. We are now pushing select information back up to the website so that you, our members, can check on your current membership status with us. Please note that we update this a couple of times a day, so if you were to

renew your membership on Friday evening, you won't see your membership's expiration date update until we process your payment on Monday.

Please also be aware that we do NOT store your financial information, either at our office, or on the website. Every time a transaction is processed, we securely forward that to our payment processor, and never retain that information.



May 2021



Editor's Notebook

Is This Doomsday?

by Gila Hayes

Remember when spring warming suggested impending hot days with beach trips or light-hearted splashing in the city water park, the simple task of tending flowers in a planter on the sidewalk and other life-affirming pleasures?

Now, with the cold of winter receding, I caught myself thinking that the smaller or briefer protests during winter's dark and cold will blossom with renewed vigor during summer's warmth and long days.

I was raised with the belief that Biblical prophecies predicting the end of the world, preceded by persecution, destruction and torture would soon be our reality, so as an adult I actively control my tendency toward fearfully anticipating apocalyptic breakdown. To that end, I've recently been reading about psychological health during periods of social unrest.

The anger and hurt voiced on social media that these days so pains me that I rarely visit Facebook, MeWe never really got its hooks into me, and I guess I was just too old to figure out Instagram when it was the hot, new thing. Still, when conversation or email from a friend, colleague or Network family member expresses their despair, hurt and sense of victimization, be that due to government restrictions, pandemic isolation, family problems, changes at work or the absence of safe social outlets (to name only a few), I wish I could give the gift of internal resilience, focus their attention on building self-worth and help them stop blaming other people and institutions for their woes.

A few days ago, my husband commented that he finds it ironic that only one or two generations ago, our grandparents were more concerned about whether they had food for their children than much else. I had to agree and thought further that I don't remember hearing my elders complaining that a neighbor, co-worker, member or leader of their church, or local law enforcement disrespected their needs and wishes. They had more basic worries like food, warmth and shelter. These days, with plenty to eat, have we become obsessed about whether we are receiving the respect and consideration we think we're owed?

Transfer the personal obsession about respect and equal treatment onto a bigger stage, and we have a population ripe for manipulation by demagogues and influencers preaching how one group or another has been victimized. Few will argue that we see this played out in riots and politics, but may I suggest that we're also falling prey individually to believing we've been disrespected and oppressed, too? Our society – and we as its individual components – have become insanely petty and self absorbed. We're becoming psychologically unbalanced.

This was echoed in a *Psychology Today* column I read that asked whether preppers were obsessed with doomsday pre-

dictions. The columnist wondered why people are so cynical, when "research shows that people are intuitively cooperative."

She explored negative beliefs about others, writing, "The overall component is a general pessimistic view of a post-apocalyptic world – mostly that the doomsday is imminent, the resources will be limited, and that humans will be uncooperative. The three subcomponents are–

- 1) Negative beliefs about human nature and the availability of resources,
- 2) beliefs about competition for survival, and
- 3) beliefs in the need to be prepared.

"Each of these beliefs reflect a variety of personality traits (e.g., low agreeableness and high neuroticism) and beliefs (e.g., political ideology and conspiracy beliefs."

The column suggested that "major political events" contribute to pessimism, which comes as no surprise or as a friend would exclaim, "Duh!" There's no doubt our community is suffering from the blows of the 2020 election, so I have to ask, does that loss guarantee irreversible suffering and defeat, or will personalities emerge that persevere and even thrive? Can we find happiness and joy even in hardship? What attitudes and influences must we avoid at all costs and what personal philosophies should we embrace?

It would be silly to suggest a simple cure for factors as complex as personality, emotional make up, and individual resilience or lack thereof. Nonetheless, rather than encourage beliefs that we're being victimized, I think we have to feed and nurture beliefs that encourage emotional and physical self-sufficiency.

I think that requires turning off videos from political commentators and accepting real news only from select, reliable and unbiased sources. Listening to, reading and wallowing in extreme, negative opinions hurts our resilience by feeding core fears and beliefs about insufficient resources, and gut-level fear that other people will steal our share. Feeding those beliefs makes us angry and fast to lash out, suspicious and snappish. If you think anxiety makes it hard to live with your family, just wait until that viewpoint slips out via facial expression or an under-your-breath epithet uttered during a tense stand off in a parking lot or on a city street.

For our own good, we have got to stop nurturing our anger and outrage and instead cultivate our internal strength, self-worth, and cooperative problem-solving skills.

How? Myself, I get inspiration from reading biographies. We should seek direction from stories of recovery and renewal. A great starting place by one of our own is [Warnings Unheaded](#) and the [interview](#) with its author Andy Brown in our November 2016 journal. Likewise, I've been inspired by the spirit of the late Louis Zamperini, whose story is told in [Unbroken: A World War II Story of Survival, Resilience, and Redemption](#). Those are only two diverse examples of the self sufficiency we can emulate as we seek internal fortitude to weather the ills that buffet all of us. Members, what inspires you? Share with me at editor@armedcitizensnetwork.org.

May 2021

About the Network's Online Journal

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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.

To submit letters and comments about content in the eJournal, please contact editor Gila Hayes by e-mail sent to 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

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Please write to us at info@armedcitizensnetwork.org or PO Box 400, Onalaska, WA 98570 or call us at 360-978-5200.