Armed Citizens' Legal Defense Network, Inc.

Lessons from the Case of Kyle Rittenhouse - Part 1

by Dr. Art Joslin, J.D.

Kyle Rittenhouse. A name that many Americans, and most in the self-defense world will recognize, has been the subject of discussions, blog posts, articles, news, and videos around the country and around the world. On August 25, 2020, during a Kenosha, Wisconsin protest over the police shooting of Jacob Blake, Kyle Rittenhouse killed two men and wounded a third. Many in the media have called Rittenhouse a vigilante and immediately accused him of setting out to wantonly kill anyone in his path. This two-part series will attempt to parse the facts of what happened that night, and perhaps bring some clarity to a confusing situation. Opinions vary and this one is mine.

Ultimately, my opinion and the opinions of scores of writers and columnists do not matter. The final verdict (the trial is set to begin November 1st) will be determined by a group of citizens called the trier of fact, otherwise known as the jury.

Unrest and protests occurred in Kenosha over the shooting of Blake, a black man, by police. The officers were white. He was shot seven times by police as a neighbor caught much of the incident on video. Blake survived but is permanently paralyzed. Racially-charged protests ensued. Kyle Rittenhouse, then a 17-year-old, traveled from Illinois to Kenosha, in response to a call from local militia, with the goal of protecting area businesses and residences from looting and destruction during the riotous protests. It was during this riot that Rittenhouse shot and killed two men, Joseph Rosenbaum and Anthony Huber, and wounded a third, Gaige Grosskreutz. But was Rittenhouse acting as a vigilante as many have claimed? Or did he act in self defense? Many naysayers have been quick to label Rittenhouse a murderer, without fully understanding the law and without the ability to apply it properly.

In Wisconsin, as in most jurisdictions, you may use deadly force against another when you reasonably believe that other person intends to do great bodily harm, or cause the death of you or another person. However, you may use only a level of force that is proportionate to the force being used against you. For example, if someone intends or is attempting to use an object against you that could cause your death or great bodily harm, you are authorized, under law, to use any level of force, up to and including deadly force, to stop that threat. Next, you cannot provoke or incite the attack in order to claim self defense. In other words, if you are the initial aggressor, or the one who starts the fight, your claim of self defense will most likely fail. Like many jurisdictions, if you are the initial aggressor, you must make every reasonable attempt to avoid using deadly force by attempting to run, escape, avoid the attack, or prevent the attack, before resorting to using deadly force, and even announce to the other party that you are done fighting, and don't want to fight any more in order to regain your innocence.

Video retrieved from that night shows Joseph Rosenbaum chasing Rittenhouse into a used car lot in the midst of the riotous environment. Authorities say it shows Rosenbaum throwing an object (later determined to be some type of plastic bag) at Rittenhouse and an attempt was made by Rosenbaum to take Rittenhouse's rifle away from him. Rittenhouse fired his AR-15-style rifle at Rosenbaum, killing him. When someone, other than law enforcement, attempts to disarm a loaded weapon from your person, can you assume they intend to use it against you? This can be a difficult question to answer. It depends on several factors that might be in play. In law enforcement training, when a subject attempts to disarm a police officer of their weapon, deadly force is authorized. It is presumed that the subject's only reason for disarming the officer is to use that weapon against him or her. Can we make the same presumption when a civilian attempts to disarm another civilian? Perhaps, we can. However, it may come down to what you reasonably perceived, in the moment, in the totality of the circumstances, and whether you are able to articulate the reasonableness of a deadly force threat. Rittenhouse, and others in the self-defense world, contend that Rosenbaum threw the plastic bag at Rittenhouse in an attempt to distract him, with the goal of disarming him.

Following the first shooting, Rittenhouse appears to be running toward police, and away from an angry mob chasing after him, when he trips and falls in the street. The video clearly shows a mob of protesters, I counted at least eight to ten, chasing him down the street. At one point, a protester appears to kick Rittenhouse in the head when he was down on the ground. Tripping and falling to the ground, Rittenhouse was in a position of disadvantage, with what appears to be multiple attackers quickly gaining on him. Can Rittenhouse reasonably believe that he is about to be attacked by multiple people? One of them kicked him in the head; what would the others do? Taking a blow to the head, while in a position of disadvantage, with multiple people about to jump on you, can certainly cause a person to reasonably believe this attack can lead to death or great bodily harm.

At this point, Anthony Huber appears to stumble over Rittenhouse as he hits Rittenhouse with the end of a skateboard. He is shot as he grabs the barrel of Rittenhouse's gun. A skateboard is a large, solid wood object, with four hardened wheels, and is not intended to be used as a deadly weapon. However, using any object as a weapon that can cause death or great

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bodily harm is considered deadly force. Was it reasonable for Rittenhouse to believe he would be struck again or that the ensuing mob would overpower him with each rioter taking turns raining blows down on him? Rittenhouse has at least four attackers within lunging distance of him and his rifle. Almost immediately, Gaige Grosskreutz approaches within about two feet from Rittenhouse with what appears to be a handgun. Rittenhouse shoots Grosskreutz wounding him in the arm.

In the totality of the circumstances, would Rittenhouse's actions stack up to the elements of self defense?

The five elements of self defense, that have been identified by Attorney Andrew Branca in his book, *Law of Self Defense* (https://lawofselfdefense.com/shop-losd/), are Imminence, Innocence, Proportionality, Avoidance, and Reasonableness.

These elements of self defense can be found, for the State of Wisconsin, in WI Stat §939.48 (2014), Self-defense and defense of others.

It states, in part:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably (Reasonableness) believes to be an unlawful interference with his or her person by such other person (Avoidance, or no statutory duty to retreat. See *State v Wenger*). The actor may intentionally use only such force or threat thereof as the actor reasonably (Reasonableness) believes is necessary (Proportionality) to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably (Reasonableness) believes that such force is necessary to prevent imminent (Imminence) death or great bodily harm to himself or herself.

Imminence can be defined as where in time does the threat fall? Imminent means it is happening right now; it isn't happening five minutes from now, and two minutes ago is too late. The threat must be happening right now, in the instant, and requires your immediate action.

Innocence is defined as who started the fight. You can't start a fight, escalate it to the point the other party draws a weapon, and then innocently use deadly force claiming they drew first. It doesn't work that way. Regaining innocence, in many jurisdictions, means you must announce to the adverse party your intention to stop fighting. Furthermore, some additional action would be appropriate such as a retreat, running away, or moving to a position of safety. If, after regaining your innocence, your adversary pursues you, they may be considered the initial aggressor and you may use the appropriate level of force allowed under law.

Proportionality simply means you can use only that level of force necessary to stop the force being used against you. Someone grabs your purse; you can generally grab it back. However, if force that can cause death or great bodily harm is used against you, you may use deadly force to stop that threat. I want to insert a note here: in the WI statute, the term "unlawful interference" is used. Please don't take this out of context. An unlawful interference could be unwanted touching. However, this would not be a deadly force threat. Read the next sentence of the statute. "The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference." So perhaps using only enough force as to remove the hand of the person touching you would be warranted.

Avoidance is the duty to retreat. In a few jurisdictions, you must make an attempt to retreat to a position of safety before deadly force is allowed. Michigan, my home state, is more of a hybrid duty-to-retreat state. In other words, a person does not have to retreat as long as they meet certain elements of the law. However, Michigan has a jury instruction that allows the jury to use the fact an actor did not retreat, when they could have (or should have), in their verdict decision, if they determine the actor was culpable at some level. Typically, no duty to retreat hinges on two primary factors; the actor is not in the commission of a crime and is in a place they have the legal right to occupy.

Throughout this writing, I've used the term reasonableness. Reasonableness is simply looking at all elements, in the totality of the circumstances, and applying the standard of the average person, in the same set of circumstances, with similar general knowledge and life experiences, to the facts at hand. Each element must be present; reasonableness is the umbrella that covers the other four. Keep in mind, in a true case of self defense, you (your defense team) must prove all five elements to acquit; the government must disprove only one to convict.

As you open this online journal, the Rittenhouse trial should be at its inception. The trial is scheduled to start November 1st (whether or not the trial goes as planned, I will report back in the next issue). The burden of proof is beyond a reasonable doubt; this burden falls on the prosecutor. He must disprove self defense by that standard. However, the defense has the burden of production and must produce some type of evidence at some level above zero to show self defense. The old standard was the defense must prove self defense by a preponderance of the evidence. This is no longer the case as the last holdout state, Ohio changed its statute. This went away in all 50 states March 19, 2019. You may still see preponderance of the evidence used but most likely in a self-defense immunity hearing. If immunity is not granted, then the case can go to trial. If immunity is granted, case over. A recent Louisiana appellate case cited preponderance of the evidence but it was a non-homicide case and it appears the defendant was the initial aggressor.

A New Voice: Introducing Art Joslin, J.D.

This month's journal marks a turning point for Armed Citizens' Legal Defense Network and its online members' journal. Our lead article, the first in a two-part series exploring the lessons we can learn from Kyle Rittenhouse's trial, is researched and written by our newest Network team member, Art Joslin, J.D. This is just the beginning! As the newest member of the Network team, Art brings with him many talents honed through a lifetime of experience across fields as diverse as his recent completion of his law degree from Thomas Cooley Law School at Western Michigan University, musician, pipefitter, firefighter, law enforcement officer, martial artist, self-defense instructor and security professional.

Art's newly minted Juris Doctor degree is only his most recent involvement in post-graduate schooling. He holds three degrees in music with a master's degree from the University of Michigan in Ann Arbor, and a doctorate from the University of Illinois. He is currently immersed in preparation to take the bar exam and add the title "Esquire" to his Ph.D. and J.D.

Even without his legal training, Art would bring a wide range of applicable experience to his new role at the Network, having worked as security and close protection specialist in the security and legal services industry. He is skilled in verbal judo, firearms handling, close protection, executive protection, armed security work, and has been a bar bouncer. His experience includes working crowd control, venue security, and working across the force continuum has nurtured his strong ability to rapidly de-escalate situations. He has provided executive protection, armed and unarmed, for high and medium risk talent escort, and done high risk armed escort and driver for the jewelry trade. He is a level four instructor in Commando Krav Maga (CKM) with 35 years' experience and training in Hapkido and Brazilian Jui Jitsu.

Art is a graduate of the prestigious Force Science Institute certification, is a TASER International Instructor, and holds a number of firearms instructor certifications. During his studies at Cooley Law School, Art worked as research law clerk, bailiff and court officer at the 4th Circuit court in Jackson County, MI. He particularly enjoys legal research, a talent he will bring to his columns and articles in our online journal. He also enjoys recreational activities with his sons, time spent with his German Shepherds, and sharing his musical talents singing the national anthem during opening ceremonies for various public events and providing other musical entertainment.

In addition to contributing educational content in our monthly journal, watch for an expansion into video blogging on our website, a project in which Network President Marty Hayes and John Murray, our IT Director are enthusiastically partnering. We look forward to drawing on Art's experience and training in a number of other Network efforts, as well. While we await his Spring of 2022 move to the Network's headquarters where he will be available to assist Network members more directly, we hope our members will enjoy his video and journal contributions.

President's Message

by Marty Hayes, J.D.

Let's talk about the Alec Baldwin incident, okay? As I write this, five days have passed, and new details of the incident are coming out every day. With that said, my commentary this month will be based upon what I have read up until now. If new details emerge that would substantively change my thoughts here, I will let you know next month.

The Incident

It appears that on a movie set, actors were portraying gunslingers in a good old-fashioned shoot 'em up western. And in this particular incident, the fatal scene was apparently a scene where Baldwin was being filmed shooting directly towards the camera. But, for some unknown (at this time) reason, at least one if not more live rounds were in the gun instead of blanks. How could this have happened?

I have heard reports which indicate that on breaks between filming sequences, one or more actors and/or movie personnel would hold shooting contests, using live ammunition in the guns that were being used as props. Then, supposedly the live ammo was unloaded from the guns and then blanks were used in the cylinders for the movie scenes.

Because movie actors are not typically experts in firearms and gun safety, the actors rely upon professional "gun handlers" to make sure that the proper type of cartridge (blanks) are loaded into the guns when filming. But to complicate matters, there are typically scenes where live ammo is used for filming bullet impacts into backstops, the ground, rocks, etc. So, the gun handlers need to be on their toes at all times. Rumor has it that there were some conflicts among the directors, gun handlers and perhaps other personnel but I am not sure exactly what these conflicts amounted to. There are also indications that prior to the incident in question, there had been accidental or inadvertent discharges on the set. In other words, overall, it appears to have been an unsafe environment, one which was begging for a tragic mishap to occur.

Who Is to Blame?

I have been following this on social media (I do not get broadcast TV) and most people place the blame solely upon the shoulders of Mr. Baldwin. Of course, most of my social media contacts are gun people, and are shouting about the Four Rules of Gun Safety. I am not going to argue that Baldwin does not shoulder blame for this occurrence, but as a professional firearms instructor with over 30 years of experiencing setting up mini scenarios where people point "guns" at others, I can absolutely understand how it occurred.

In the early '80s, when I was a rookie police officer in the academy learning the skills and tactics necessary to do the job, we almost had a fatality in training. We were practicing felony car stops. At that time, the safety protocols were such that an instructor would check your service revolver to make sure it was not loaded, and you would remove all your ammo from your belt. After that, the cadets pointed their guns at the other students and instructors throughout the scenarios.

It worked, as long as there was no breakdown of these safety protocols, but in one incident, an on-duty officer stopped by to watch the new cadets, and in his marked patrol car, was a loaded Remington 870. In the cars that had been sanitized it was fair game and pretty much part of the training that the passenger officer would grab the shotgun and use that superior weapon for his weapon as cover, and the driver would have his revolver out and be giving commands over the patrol car loudspeaker.

Well, unbeknownst to the instructors leading the scenarios, the on-duty officer stopped by to observe the cadets and his car was worked into rotation. Then, on one scene, a cadet grabbed the shotgun, racked the slide and was about to take up slack on the trigger, when his brain told him he had just put a round into the chamber. He had been an experienced bird hunter and had felt the status of the gun based on his experience. Without that experience, we would have had a dead officer.

If a fatality had occurred, would it have been the cadet's fault? I respectfully suggest not. Would the police department have been ultimately responsible for the death? I believe they would, as it was their overall responsibility to ensure a safe training environment.

That was 40 years ago. How about 25 years ago? I was running the Firearms Academy of Seattle, and we were teaching an advanced-level course for armed citizens. By that time, we were issuing all participants either "code eagle" paint marking guns, or inert dummy guns. At one time in the proceedings, one of our instructors had shown up to observe, and eventually he was asked to step in as a role-player. He agreed, and upon starting the exercise he yelled "Stop!" and confessed that he still had a loaded gun on. Yikes!

Who would have been responsible if the scenario had evolved into a fatal shooting? Being the owner and director of the academy then, I would have accepted that responsibility. Since then, we increased our safety protocols, to include frisking

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each student and instructor, and even "wanding" with a metal detector just to make sure. So yes, I do understand how Alec Baldwin shot two people on the movie set, killing one.

In addition to Baldwin, who may or may not be prosecuted, there are others who share culpability. Whoever had the ultimate responsibility for making sure the guns were loaded with blanks and not live ammunition certainly shares the blame. Additionally, the production company also shares the responsibility to use reasonable methods and take reasonable steps to ensure a safe production environment. Clearly this was a huge failure, especially given the reports of off time plinking with live ammo. I cannot imagine mixing live ammo and blanks on a movie set; it is a sure recipe for disaster.

I also assign some blame onto the shooting victims themselves. They allowed operable firearms to be fired in their direction, with the only safety protocol being someone else having supposedly checked the condition of the gun. I would never allow that, would you? I suspect there will be some real soul searching and major changes made by the directors and cinematographers before that is allowed again. Or maybe not. Profit is the driving factor when making movies, and I understand that if the costs of production exceed the revenue realized, movies would not be made.

In the grander scheme of things (the big picture if you will–pun intended) the movie industry needs to re-think how they use firearms in making movies. If I were chief honcho at the Screen Actors Guild, I would be consulting several firearms professionals to work on how the movie making industry could incorporate fool-proof firearms safety protocols to make sure this never happens again.

And lastly, who else is to blame? Well, if you are one of these folks that just loves a shoot 'em up bang-bang movie, maybe you (and I) share just a sliver of blame for rewarding the movie industry with our dollars. After all, no dollars, no movies.

Attorney Question of the Month

As our Network President Marty Hayes indicated in his September column, we often turn to our Affiliated Attorneys for a broader understanding of how various principles of law are applied across the nation. Looking more deeply into one of the issues the Washington Office of Insurance Commissioner originally raised but later dropped, we asked our affiliated attorneys to share their knowledge and experience with innocent clients who plead guilty when given an attractive plea offer. We asked--

Why might an innocent person choose to plead guilty to a crime they did not commit? Have you seen this occur first-hand?

So many attorneys wrote in to share their thoughts that this discussion has run in the September and October journals and is completed here. If you missed the previous commentaries, please return to https://armedcitizensnetwork.org/september-2021-attorney-question and https://armedcitizensnetwork.org/october-2021-attorney-question to get caught up.

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No person should ever plea guilty, and no court should ever accept a plea of guilty if a person is truly not guilty of the crime. A plea is a sworn statement in court. Making a false statement can subject a person to additional criminal charges including perjury and contempt.

During a plea colloquy the accused will be asked if they are making their plea knowingly, voluntarily and be required to articulate each element of the crime, and their conduct which makes them guilty of said crime. If the accused cannot make truthful statements about their guilt associated with a crime, then they are making a false statement which could subject them to additional charges.

So why do so many people enter into pleas? Many persons have a justification or technical defense which may result in an acquittal. Despite knowing they have a meritorious defense, an accused person may choose to plead guilty for fear that their defense, while meritorious, may not carry the day at trial, and result in disastrous consequences if convicted. Under those circumstances an accused person can truthfully plead guilty to a crime, disregarding their defense.

If an accused is in a circumstance where they truly cannot admit their guilt to the elements of a crime, but nonetheless want to enter into a plea, they may be permitted to enter a nolo contendere (no contest) plea. This type of plea allows the accused to enter the plea, but avoid having to formally admit their guilt. Such a plea can only be entered if agreed to by the court and prosecutor.

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Why might an innocent person choose to plead guilty to a crime they did not commit? Have you seen this occur first-hand? One of the most persistent myths about the criminal "justice" system is that only guilty people plead guilty. In fact, given the coercive tools available to prosecutors, a rational choice for an innocent person might be to plead guilty to a lesser charge to avoid the risk of going to trial. But, if defendants have a right to trial by jury, why would they plead guilty? There are several factors.

First, prosecutors can stack charges with impunity. It is rare for us to handle a criminal matter where our client is not overcharged. So, even if our client is guilty of something, he or she is almost certainly not guilty of everything they have been charged with. This overcharging or stacking of charges is a bargaining technique that creates risk for a defendant at trial.

Second, defendants are often concerned with something commonly referred to as the "trial penalty." The trial penalty is a term that refers to the differential between what a prosecutor will offer you if you take a plea bargain and what your punishment will be if you exercise your right to a trial and you lose. Often, the sentence if you are found guilty at trial would be worse than if you plead guilty. The possibility of suffering a trial penalty is often enough to convince someone to plead guilty, especially when coupled with the fact that many defendants are represented by public defense counsel who are often overworked and underpaid. The trial penalty is one of a whole suite of tools available to prosecutors to induce people to waive their right to a trial and plead guilty.

We should also mention that many states allow Alford pleas, which is a guilty plea where a defendant in a criminal case does not admit to the criminal act and asserts innocence. A defendant may use an Alford plea because the evidence is too strong to take a chance at trial, where taking the chance of a trial

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could end with tougher penalties than when pleading guilty, i.e. the trial penalty discussed previously. My understanding is that courts will treat this type of plea differently than the standard guilty plea because of the specific way the defending party will make the plea. We practice in Indiana, which is one of the few states that does not allow an Alford plea.

Third, lots of people end up in jail, awaiting trial. Sometimes they do not even have bail available to them. Even if they do have bail, it is often set at an amount that they just can not realistically afford, so they are going to be stuck in jail waiting for their trial. It is a very difficult and unpleasant place to be, so many people will plead guilty just to get out of jail rather than waiting weeks or months for trial. This has been especially problematic during the pandemic, when many court systems delayed trials for many months.

Fourth, and we mentioned this earlier, most people who go through our system are represented by government-funded lawyers, and the government persistently under-funds those lawyers. Essentially, they carry more cases than they should. They do not have the time to give a fully zealous representation in each of their cases. Sometimes you do not even meet your lawyer until the day of your trial and that is not how a zealous defense is put together.

Fifth, there is the problem of over-criminalization. There are so many crimes that it is hard to keep track of all of them. In fact, it is impossible to know everything that is a crime. This is especially concerning because many things that are against the law are not obviously wrong. There is a distinction in the law between actions that are *malum in se* (inherently wrong) like murder and actions that are *malum prohibitum* (wrong because they are prohibited), like carrying a firearm without a license. This over-criminalization, coupled with the vast resources of prosecutors to bring to bear on individuals, creates a situation that is antithetical to a free society.

Finally, prosecutors often threaten family members, especially in the federal system. So, if they want you to take a plea, and you are not interested, the prosecutor says something like, "Well, you know what? This is a white-collar business case, and your son participated in this business for a while, didn't he? Maybe we should take a close look at him. Let's look at his income taxes, look if he ever hired an undocumented worker, we'll just look at every single facet of his life. How do you think your son would do in prison?" As shocking as it may seem, that happens all the time. It is routine for prosecutors to threaten family members in the way that I just described, especially in the federal system.

As you can see, there are several tools that prosecutors can wield to get someone to plead guilty, even if the person is innocent. I have not addressed every tool, like mandatory minimums, but taken together, you can see that these tools add up to a very coercive dynamic. The plea bargain, as it is practiced by prosecutors, has become a tool that helps pervert justice by penalizing people who seek a jury trial.

A few years ago, Lucian Dervan and others conducted a deception study, where they accused students of engaging in academic misconduct. The accused students were offered two alternatives. If they were willing to plead guilty, they would lose their compensation for participating in the study, which was akin to a plea in return for probation in the criminal justice system. If they did not plead guilty, they would proceed to a trial before an administrative review board, which was meant to represent a criminal trial. In that context, if the student lost, a differential was created by saying that they would lose their compensation, their advisor would be informed, and they would have to attend an ethics course.

The study showed that approximately 89% of the participants who were guilty of the misconduct accepted the plea deal and pleaded guilty. The study also showed that 56% of the innocent individuals also accepted the plea deal and pleaded guilty. 56% of the innocent individuals felt like the rational decision for them was to falsely plead guilty to something they had not done in the context of academic misconduct. That is very concerning, and it casts a lot of doubt on the accuracy of the plea-bargaining system, especially with the coercive tools available to prosecutors.

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The answer is, unequivocally, and tragically, yes. I have seen it hundreds of times as both a judge and an attorney. It is, like a lot of things in life, simply a matter of choosing the lesser of two evils.

In Arizona, a defendant must show a "factual basis" for any plea, by testimony while under oath. So technically, falsely stating the facts that give legal cause for a guilty plea is in and of itself a crime—perjury. That said, we can often massage the way facts are truthfully presented to fit the statutory confines of a lesser crime to allow such a plea.

It often boils down to this: Do I plead to something (that I really feel I should not be punished for) that results in a little jail time, but no prison, which is retroactively reduced back to a misdemeanor 12 months from now and for which I've already paid

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my attorney, OR do I come up with another $100,000 (at least) and proceed to trial knowing that in even the strongest case for me there is a 20% chance of 15 years in prison? Remember always, to paraphrase Sir Winston, "we have the worst criminal justice system in the world...except for all the others."

Best advice—in our world of sheepdogs, continually train and practice to lower the chance that you'll ever have to face such a horrible choice.

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Many factors go into a person's decision to enter a plea to a charged offense. Often the government will reduce the severity of the charge or agree to other concessions, i.e., length of sentence, fines, probation, or as in Florida – even if the person is to be considered a "convicted" felon, all of these factors affect a person's decision to accept a plea deal. In Florida, the accused has the opportunity to enter a plea of "nolo contendere" – which is a plea without an admission of guilt. The court and the law recognize that occasionally entering into a plea is in a person's best interest even if they do not feel they are guilty of the crime.

Sometimes the risk of a trial, especially in serious firearm/homicide cases, is too onerous. The very real chance that the jury will find a person guilty and be sentenced to life in prison without parole post-trial is often outweighed by the certainty of a plea deal with a definite term of years.

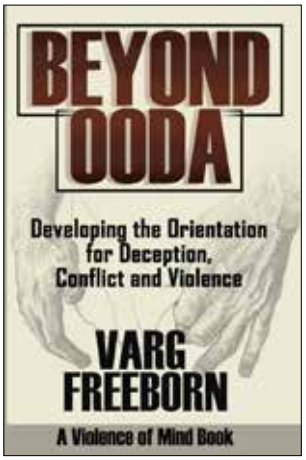
I had a personal experience where an accused took a plea to a crime when I truly believed she was innocent. No attorney can guarantee an outcome. If the jury found her guilty, it was a mandatory adjudication on a felony and prison. The guaranteed plea to a crime she didn't commit allowed her to remain at home to raise her children (she was a single mother) and not be a convicted felon.

The decision to enter a plea is a very personal choice and is unique to each case and each defendant – however, many people plea to avoid the unknown of trial – even if they are not guilty.

We extend a hearty "Thank you!" to our affiliated attorneys who contributed comments about this topic. We have a new question for discussion amongst our affiliated attorneys next month and hope you will return for their commentaries.

Book Review

Beyond OODA:
Developing the Orientation for Deception, Conflict and Violence



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Reviewed by Gila Hayes

This month I read a book about mental preparation for self defense that differed considerably from self-defense training focused on weapons and skills. *Beyond OODA* explores a single element from U.S. Air Force Col. John Boyd's Observe, Orient, Decide, Act conceptualization. "Orientation is what you bring to the fight, the source of all of the criteria that you use to make every decision," writes author Varg Freeborn. It is the basis of mindset and "control(s) how we see ourselves and the world around us, which governs every decision we make." This is a two-way street and throughout the book, Freeborn emphasizes that mindset and manipulation affect both violent criminals and their intended victims.

"Since high-stress situations, such as deadly fights, require strong and rapid decision-making, it becomes very evident that what you bring to the fight is your orientation and its inputs," he explains. "Everything else: observation, decision-making, and acting all occur during the moment. Those in-the-fight elements can be prepared for with physical fitness, conditioning, and training in skills, techniques and procedures. But what you truly bring to the fight is your orientation, and this also can be shaped and trained consciously to a high degree."

Much has been written, sometimes contentiously, about Boyd's OODA model and Freeborn views his conceptualization as an "interpretive extension" of Boyd's work. In combat, only intuitively-made decisions occur quickly enough to seize the initiative, so one's orientation must necessarily be congruent with the decisions that have to be made in a fight. He suggests, "Intuitive recognition and decision-making can become nearly autonomous within the mind, significantly speeding up the decision-act process. The intuitive mind understands the problems at hand without much conscious thought and then selects decisions from a pre-selected group of possible choices. Boyd referred to this as 'implicit guidance.'"

Freeborn explains, "In truth...your observation feeds your orientation, and your orientation drives your decision-making. That is a foundational premise. The recognition (which is observation) triggers your orientation upon which all decisions are based. This exposes a major flaw in most combat or fight training because styles, systems, methods and instructors are hell-bent on the repetition and development of physical skills while mostly ignoring the root sources of decision making in the trainee." He adds, "Simply developing physical capabilities, mental toughness and being 'ready to fight' is not preparing you to make precise, effective and efficient decisions about very specific problems under force pressure."

Applying Boyd's concept of orientation to the necessary mental aspects of survival, Freeborn teaches that unpredictability is "both the greatest deterrent and a key component to fighting success." He warns that introducing unpredictability is successful only by intuiting the assailant's mindset, intentions and goals. Valuable chapters toward the end of the book detail how both criminal and defender can create uncertainty or misdirect the other's perceptions.

Adaptability is also critical to success. "It's not always the physically fastest who wins in combat; it's often the one who adapts and demonstrates mental agility in the situation more thoroughly." Boyd stated. "Adaptability implies variety and rapidity. Without variety and rapidity, one can neither be unpredictable nor cope with changing and unforeseen circumstances," Freeborn quotes. That is not to suggest that speed is unimportant, he continues, "Adaptability without agility leaves us in a reactionary mode, which is not where you want to be in a fight or any other strategic situation. Adaptability gives us variety, while agility gives us rapidity, and that combination is how we shift initiative and apply pressure rather than simply responding to pressure." Of course, you may need to reorient if the enemy does the same.

Freeborn's emphasis on the mental aspect of survival is not intended to eclipse the need for physical skills, he stresses, only to alert practitioners to the broader necessities for prevailing. "You need the skills, techniques and procedures to win, the willingness and confidence (orientation) to perform them, and the ability to analyze and synthesize new information to modify as necessary (adaptability and agility), to perform at an efficient level when faced with an attack," he writes.

For our demographic, the gap between real-life experience with violence and our training is necessarily of concern. Freeborn discusses well-designed force on force training as a source of experience and opportunities for "the retrospective understanding of the experience." Mental synthesis occurs only while solving unpredictable problems, he stresses. Without unpredictability, instruction fails to provide the analysis and synthesis

[Continued next page]

required "to reach true creativity and thus begin to achieve adaptability." He allows his students to fail and, "get shot with simulated ammunition a lot. They often know they would have died if the bullets were real, and it's critical to the process that they know this, he urges.

Criminals, he observes, "are put through violent and life-threatening events without any formal prior preparation. This creates a strong feedback loop...that drives a robust analysis and synthesis system within our decision-making process." He later addresses initiation rites and their role in willingness to do violence. Without those experiences, the law abiding citizen who trains to prevent being victimized is at a serious deficit, he writes.

Beyond OODA is a complex study that is impossible to synopsize fully in a book review. I was particularly interested in Freeborn's analysis of erroneous perceptions created by one's background that corrupt the decision-making process. He compares his early life experiences as a child raised in poverty and violence to the reactions needed to survive an attack by a predator. Understanding a criminal's orientation is crucial to influencing his or her orientation, he stresses, writing, "The 'bad guys' are humans, just like you. They have fears, insecurities, attachments, values, experience, mythos and stories, archetypes and heroes...They have good days and bad days. The sooner one realizes that the enemy is just like oneself, the sooner one masters that enemy and levels that battlefield."

Having "reverse engineered" the development of his own mindset/orientation, Freeborn analyzes cultural models we use in creating our identities. Many are little more than wishful thinking! Everyone subscribes to archetypes to guide who and what they want to be, he asserts. "There's no human out there operating at normal cognitive and social levels that is not telling themselves a story about who they are and how they fit into the world around them. And when you correctly decipher what that story is, you gain access to the keys that switch their emotions and decision-making factors on and off." That wisdom works both for governing oneself, as well as prevailing over an attacker.

Self-defense preparation needs to introduce us to our own dark sides and capability for violence, Freeborn stresses. "To be truly capable of doing battle with an extremely violent, murderous enemy, you have to be just as capable and just as willing to inflict harm to them as they are to you. Yes, you choose much more selectively who you do it to, but it is the same act. It is the perceived darkness of humankind that you must not only acknowledge but harness." He warns, "The delicate balance is finding the safe line between preparing yourself to deal with such trauma while retaining your ability to be a good human and still have compassion for others." Solutions include compartmentalization, systematic preparation, and evaluating and adjusting your values before needing to use violence. Don't just prepare for the event. Prepare to re-enter life after the event. That is the true completion of an initiation process: the coming back."

Freeborn writes convincingly of the need for congruency between one's beliefs, self-defense training, the law, and on the topic of conviction, has written a very important chapter explaining the relationship between confidence, beliefs, realistic evaluation of our skills and abilities coupled with the stories we tell ourselves about who we are. Every word in this chapter is important; I hope Network members will read *Beyond OODA*, study it and absorb its many lessons.

Editor's Notebook

by Gila Hayes

The latest Varg Freeborn book, reviewed in the foregoing pages, was as thought-provoking as his first. What he has written is so important as to merit risking repetition. In *Violence of Mind* and now in *Beyond OODA*, Freeborn urges readers to search their souls to make sure the ideals they embrace when preparing for self defense are congruent with 1) their actual skills and abilities 2) legal and ethical allowances accorded to the private citizen; and 3) the abilities of the criminal predator. Without congruence, a fatal hesitation, punishment for committing crimes, or simply being overcome by a more willing and deadly opponent are all very real risks.

Freeborn is entirely correct about the necessity of internalizing the boundaries of our legal and ethical restraints. Providing for the safety of our families and loved ones is a responsibility we shoulder willingly. Conversely, using deadly force to interdict prowlers and burglars in the neighborhood is subject to different legal, moral and ethical constraints. What might begin as deterring theft can morph into much more and the question of use of deadly force to protect property coupled with being the one to initiate contact with the prowler is sure to become anything but simple, as we have seen in the trial of three Georgia men in the death of Ahmaud Arbery.

In *Beyond OODA,* Freeborn opines that many citizens are less knowledgeable about the laws and ethics of using deadly force in self defense than they are about what he terms the warrior mythos in which they are emotionally invested. I would retort that Network members are an exception. Our 19,250 members are a tiny fraction of the estimated 72 million Americas who a few years ago admitted to Pew researchers that they owned a gun. It's probably an even smaller fraction; researchers likely under-count armed citizens because even with the promise of anonymity, not everyone is going to tell a stranger they own guns.

I'd like to think Freeborn is wrong about those adopting the "warrior" persona without acknowledging or even knowing of the legal responsibilities and moral burdens it entails. I'm afraid, though, that he is right. I recently heard an echo of his concerns while chatting with our Advisory Board member John Farnam about the big jump in sales of firearms to first-time gun owners. John, indulging his inimitable dry humor, commented, "The majority of guns that are being bought will probably spend the next 20 years in the box that they came in. People buy them, remain conflicted, and think, 'I will just put it in this drawer until I can get to it later.' Well, later never comes and the gun never has a chance of doing anybody any good. After the person dies, their children will open the drawer and say to each other, 'Oh! Did you know Dad had this?' That is going to be the fate of a lot of the guns sold."

When John made that observation, I flinched imagining theft or misuse by an unsupervised child or incompetent adult, although that's only one of a number of concerns arising when someone obtains a tool without any instruction about its use. There's little doubt that new gun owners could benefit from mentoring, coaching and education on how one going armed should behave. New gun owners need exposure to gun safety, to the ethical concerns attached to use of force and to information about what to expect from the criminal justice system after use of force in self defense.

Goodness knows that new gun owners are unlikely to get the truth from their usual sources of information. Propagandizing is rampant–even by so-called charities! I recently ran across a disturbing example. Don Kates, blogging on T*he Volokh Conspiracy* wrote about Amnesty International's amicus brief in *New York State Rifle & Pistol Association v. Bruen* . In his post, Kates highlights Amnesty International's anti-gun bias expressed some years ago by one AI director: "We at Amnesty International are not going to condone escalation of the flow of arms to the region...You are empowering (the victims) to create an element of retaliation...It is a dangerous proposition to arm the minorities to fight back." One can only hope the USSC Justices take that amicus brief with a grain of salt when it suggests that the NY "plaintiffs have no right to be issued a license to carry a firearm for lawful self defense." (Don't miss the rest of Kates' great commentary at https://reason.com/volokh/2021/10/13/amnesty-international-brief-against-right-to-bear-arms/?fbclid=IwAR1BokDuB2T2JlEHbMQQg2eu310H-B0gpn5t5-AgfW2YLSLpeO8id6lkKrpY)

Do you know new gun owners whom you wish more closely shared your understanding about use of deadly force in defense of innocent life? Education is the key! Please order a complimentary copy of our booklet *What Every Gun Owner Needs to Know About Self Defense Law* for them by calling us at 360-978-5200 or online at https://armedcitizensnetwork.org/contact/request-a-booklet . If you know their mailing address, tell us (we'll never use it for crass marketing purposes) and we'll happily send a booklet directly to them, or better yet, let us mail you a copy to give to them so you can personally emphasize the necessity of knowing when using deadly force is justified and when it is not. It costs you nothing, but can pay big dividends in preventing the kinds of firearms misuses that spurs legislation that's obeyed only by law-abiding armed citizens. We are much better off when we keep government out of it and influence our own to behave more safely and responsibly.

We must lead by example. If you're not sure of your state's gun laws, get started with websites like https://handgunlaw.us or the one the NRA runs at https://www.nraila.org/gun-laws/state-gun-laws/ and for use-of-force law, Andrew Branca's state-specific *Law of Self Defense* online training compliments the Network's member education program very nicely to fill the deficit Freeborn identifies. Let's be the exception, members, and in addition to internalizing a clear-eyed view of when we will use force against another human being, know the laws where you are so your use-of-force options are legal, too.

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