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Deadly Force in Defense of Others

An Interview with James D. “Mitch” Vilos

Interview by Gila Hayes

Scarcely a week goes by without a caller asking if the Network will pay their legal expenses if they use a gun to defend someone else. “We will if your actions are legal,” we respond. “Of course, my shooting would be legal,” comes the indignant retort. “I would only use my gun if I thought someone was about to be killed!” Unfortunately, life is rarely that simple, although these calls do underscore that many harbor mistaken beliefs about use of force in defense of others. With that in mind, we began an exploration of the principles behind use of force in defense of others and found, to no great surprise, that the laws addressing defense of third persons vary considerably from one state to the next.

Fortunately, I knew exactly whom to ask for more education on the topic. Network Affiliated Attorney James D. “Mitch” Vilos and his son Evan Vilos wrote the first edition of *Self-Defense Laws of All 50 States* nearly ten years ago, releasing a new edition in 2013 and thereafter updating it as needed on their website mitchvilos.com (<https://mitchvilos.com>). Mitch Vilos agreed to speak with us about self-defense law applying to defense of others. We switch now to our Q&A format to share Vilos’ comments on this subject.



eJournal: Thank you for helping us understand how armed citizens can comply with the law and still, if the necessity exists, step in to keep another from being killed or crippled. There are some pretty big legal risks in misunderstanding state laws about self defense, so I'm looking forward to learning from you about how to stay legal. To start off, what is the right terminology?

Vilos: In our book, we just call it "Defense of a Third Person." You come upon two people who you think are in a fight and one of them has a knife and you think he is going to stab the other person, so you draw a gun and shoot the one with the knife. The question is, did you shoot the right guy? Well, different states have different rules!

Let's say the guy with the knife was simply defending himself from a much stronger robber, so you shot the good guy. In some states you are held to a strict liability standard, so you could be criminally liable. If the person being assaulted did not have justification—from our example if he is the robber he wouldn't have justification to defend himself against the person with the knife who was the innocent party—then you would not be justified, either. In other states, you are only held to the reasonable person standard—the same that you would be held to if you were being attacked by someone with a knife. You have got to know the law of the state!

eJournal: That word "reasonable" echoes throughout these state laws over and over again, but I worry that reasonableness is in the eye of the beholder. Who can really tell us what that means?

Vilos: Well, that is the problem! In the eighth chapter of our book, we write that home defense, defense against an armed robbery and defense against a mass shooting are the three fact patterns that are seldom prosecuted. Everything else gets kind of tricky. In some jurisdictions, there is a presumption of innocence and reasonableness in defending your business. In other jurisdictions, that is limited to your home; in some jurisdictions, there is the issue of how close to your home do you need to be?

For example, UT has a self-defense law that says if you are in your home and somebody breaks in or sneaks in you don't have to identify a weapon, you only need to have a reasonable belief that they are going to assault you and, omitting other facts, of course, that gives you the right to use deadly force against that person; it is a lower threshold in the home. So, then the question becomes, well, what if he is on your porch? In your drive way? "Reasonableness" is very tricky.

The only solution we have ever been able to come up with is to write this 500-page book as a reference manual so if you are traveling, you not only know if your concealed weapon permit is recognized by the state that you are traveling in but what are the specific requirements of that state's self-defense law. How is it different from your state? Most people never look that up!

eJournal: Here's another area of concern: what does the armed citizen truly know about the person they propose to use deadly force to defend? Using CT as an example, the state law requires a reasonable perception of immediate danger, then additionally piles on many, many restrictions. You have to be where you have a right to be, can't be the initial aggressor or willing participant in mutual combat, and more. In the same sentence the law states the allowances for personal defense and defense of others as identical. If we defend a stranger, how can we know they comply with all those restrictions?

Vilos: The state says that you step into the shoes of the person that's being attacked, but I don't know that there is any way that you can know if he has the right to use deadly force. A very blatant example would be a guy robbing a convenience store with a shotgun. If the clerk should draw a gun, the robber knows he does not have the right to use deadly force against the clerk; he has got to retreat, drop the gun or surrender. He cannot say, "The clerk was about to use deadly force against me, so I shot him or her."

Well, if you go into the store and you see someone pointing a shotgun at the clerk, you should know that person is not justified in using deadly force against the clerk. But what if the clerk is not behind the counter? What if both the clerk and the robber are dressed similarly? What if one of them has a knife and one of them has a gun?

You might just kill the clerk and save the robber. In the states that you are held to the knowledge of the person that you're defending, you would be criminally and civilly liable for shooting the clerk instead of the robber. Maybe there is just no way for you to know who's who if the clerk is not behind the counter and they are both dressed in a similar fashion.

I tell you, if you are defending a third person, it makes it very, very dangerous if you don't know what that state's law is regarding defense of third persons. Once you step away from the three types of incidents that are not typically prosecuted, you are taking a chance by using deadly force against anyone, so you really need to mind your Ps and Qs before you use deadly force.

eJournal: What are some of the other restrictions present in one state that might not be common knowledge for someone from another state?

Vilos: In some states, Oklahoma is a good example, they name the third parties that you can defend, and if they are not one of those people, technically and theoretically, they could hold you responsible. In one case that we wrote about, the guy defended his brother and a brother is not one of the persons listed in the state statute as one of the third parties that you can defend with justification. They held the man that defended his brother guilty of manslaughter or murder. There are a lot of hidden legal traps hidden in the law of self-defense and you don't want to be the test case.

eJournal: Is there any flexibility in laws that specify only particular relations whom you may defend? Is there any "wiggle room?"

Vilos: The wiggle room would be in the common law.

eJournal: Is that what we also hear called case law?

Vilos: Yes, I don't know how the common citizen even knows what the case law is! That is one of the things we tried to do with our book, for jurisdictions like Washington D.C. where they have no self-defense statute, it is all case law, so how do you even know, without reading our book, what the rules are for self defense?

eJournal: So, if we study both, but the case law disagrees with the statutory law, which one is in effect?

Vilos: Whatever the courts use. For example, in our book we have a warning under California, not to rely on their self-defense law which looks like it was written back in the 1800s. What the judges have created as jury instructions is what really applies when you're charged with a crime, when self defense really is a legitimate defense.

eJournal: Where do you find the jury instructions applicable to one state or another?

Vilos: Sometimes, they are located on a website, like California's. Incidentally, they are subject to change although the self-defense laws don't change as readily as, for example, the concealed carry laws or other gun laws. That has been the benefit of our book and then when they do change, we update the book on our website. We ask citizens and gun owners in different states to let us know about legislation they hear of that has passed or if there are new jury instructions sometimes we get notice from attorneys in other states.

Sometimes those jury instructions are in law books or form books that are housed in some library at some state's university; it is just hard to know where to look for them. We did the work so readers could know if their state has self-defense jury instructions that conflict with their state's actual statute. It was a lot of work!

I have to laugh, because we thought writing this book was going to be easy, we thought we'd just read each state's self-defense laws and reduce them to plain English at about an eighth-grade level. We found out that states like California have a statute that even they don't use, so we had to research all the jury instructions for all of the states.

eJournal: In the interest of learning from the mistakes of others, I think we are all interested in how normally law-abiding people run afoul of the law. As a defense attorney what are some of the mistakes you would warn us against?

Vilos: We discuss what we call "Thumbs-Down Factors" in chapter seven of our book. The more of those thumbs-down factors you have in your incident, the more likely you are to be arrested, prosecuted or convicted. For example, if somebody assaults you without a weapon, you draw a weapon, you shoot him in the back multiple times and you are drunk, or if it was a drug deal gone bad, each one is a thumbs-down factor and they compound!

eJournal: Well, several of those factors won't come into play in a Network member's situation, however, we do need to deal with the reasonableness standard if a court is going to understand using a gun to stop an unarmed assailant from killing a third person, for example. We have to justify our own conclusions—we were defending a woman, we were defending a smaller person against a really huge man. But will the law find our prejudices reasonable?

Vilos: Well, reasonable people can have different opinions. If it is arguable that you did in fact act in lawful self defense—depending on just how the facts come out and if you were defending an innocent person—we want to encourage people to defend innocent persons. We don't want it to be like New York City in 1964 where 38 neighbors watched while Kitty Genovese was knifed and left to die. No one got involved! No one even called the police! Do we want that kind of society?

eJournal: It is interesting you should mention public policy. It was a theme I encountered in the research I did for this interview. A report on various states' laws about defense of third persons suggested that in developing the various laws, legislators acknowledged that people should care enough to step up and fight to protect innocent people from harm.

Vilos: Yes, we certainly should encourage that. Look at what is going on with police shootings: officers are prosecuted and sued after coming upon the scene of a person who is reported as having a firearm and the person points that apparent firearm at the police officer. It turns out the person had a toy or a BB gun. The police officer acts in a split second because he has always been taught that

action beats reaction and he knows that he has a split second to make a decision about whether or not to shoot. He is going to resolve all issues in favor of his own safety. This then becomes jelled in the minds of potential jurors in a case where an armed citizen was defending him- or herself.

We ought to be able to resolve issues in favor of our own safety! The risk of dying should lie with the person who was acting unlawfully not with the innocent police officer or the innocent civilian. We need to weigh this better. Prosecutors need to be involved in this, too, and they need to cut these prosecutions off. If it appears to them that there had to be a split-second decision, the risk of dying should be on the unlawful aggressor. You should have fewer and fewer prosecutions; you should have fewer and fewer civil law suits. But that does not seem to be the way it is going.

eJournal: No one, police or private citizen, is gifted with omniscience when forced to make a life or death decision in, as you say, a split second. Will the trier of fact deem the decision reasonable? On today's topic, we're considering killing without having seen the initial attack—a decision that's made with limited information.

Vilos: Think about it: If you come upon a fight and both people are armed, most states have a law that in mutual combat, both are guilty. Whoever lives through it gets convicted of murder. Neither has the right to self defense. So, you come along and end up shooting somebody; that's a no-win situation.

eJournal: If an armed citizen stumbles upon a confusing and complex fight and makes the wrong decision and shoots the one appearing to be winning, is he going to prison?

Vilos: Well, it depends on what the state case law says—it is usually case law—about what his actions make him ultimately responsible for. If he is held to the standard of knowing exactly what the person he is defending knew, with no reasonable way of really accomplishing that because he came upon the scene later on, it is more likely that he is going to be convicted. There is some injustice built right into that statute. That is a minority view, however. Most states simply require you to act reasonably, which is hard to define, but at least you get to act like a reasonable person and if you do, you are not guilty.

In a minority of the states, you are supposed to divine what the person you are defending actually knew. There is no way to do that! If you are convicted, sometimes the judges take into account that the law itself is somewhat unjust and if you are a law-abiding citizen and you have a clean criminal record, that is going to weigh in your favor during the sentencing. The bench is the failsafe, hopefully, in some of those cases. You see that occasionally: the judge says, "Hey, the law is strict. I have to impose a sentence, but if I have discretion I am going to make the sentence light because the law itself is probably overly strict."

eJournal: At the risk of going off-topic here, does that make you a friend or a foe of strict sentencing guidelines?

Vilos: Well, it makes us a foe of those because they are overly broad generally and they do entrap people who are acting in self defense like that woman in Florida who shot into the wall to warn her abusive husband to stay away from her. They sentenced her to 20 years for aggravated assault. Finally, that case was overturned and I think she may have gotten a pardon or something. A pardon is always a possibility, too.

A lot of criminal defense attorneys underutilize pardons. I am using the pardon more and more as the laws become crazier and crazier, especially in the domestic violence arena. In our state, there are some really crazy applications of the domestic violence misdemeanor that could disarm you for life. Sometimes a pardon is the only avenue to reverse the injustice. I find that a pardon is a last-ditch attempt to make a wrong right. The good thing about a pardon, at least in Utah, it is not just a one-time shot. If they don't grant you a pardon this year, you can come back in maybe five years and ask again and maybe they will grant it then.

eJournal: I never thought much about pardons and hadn't considered that the defense attorney would seek that mitigation instead of the defendant or their family or a high-profile person making a last-ditch try for justice. I'd not considered that an attorney could use it to keep fighting for his or her client.

Vilos: It has gotten to the point now days where it is so easy to be arrested as a gun owner just because you are a good enough citizen to carry a firearm for defense the way our Founding Fathers intended.

eJournal: Invoking good citizenship, using deadly force on behalf of others to stop a mass shooter before dozens are killed would seem about the best example imaginable. You mentioned mass shootings in passing as one of the few defensive gun uses that would not end in arrest, prosecution and punishment. Could you talk a little about the differences between defense of perhaps only one stranger compared to stopping a shooter intent on killing as many as he can before he is stopped?

Vilos: We are horrified that mass shootings occur! It is so terrible that most people would never imagine doing anything like that! If you were defending against something that horrible, generally speaking, you are probably not going to be prosecuted as long as you don't close your eyes and pull out a Glock 18 (a full-auto pistol). If you are just trying to survive along with all the other intended victims, that is just not going to be prosecuted as readily. People will look at that person as a hero.

Look at that church shooting in Texas. The armed citizen across the street hears the shooting, comes out, sees the guy getting ready to leave and shoots him before he gets in his car. You know, we warn people not to shoot at fleeing felons. I don't know if he was actually a fleeing felon or still shooting at people, let's suppose that armed citizen shot at a fleeing felon, yet everyone is considering him a hero not a bad guy because it was a mass shooting.

The guy he shot was leaving with his firearms after having shot up a church. What was to keep him from going to another church and shooting more people, or going to a shopping mall where there were a lot more people? I think the armed citizen who shot him was clearly justified in using deadly force with an AR-15.

eJournal: Of course, that occurred in Texas, not in Delaware or Maryland. The state's gun rights climate influences arrests and prosecutions, too.

Vilos: True. Here's something that might interest you. Utah teachers have been armed since 1997 as an exception to the Gun Free School Zone Act. Any school employee that has a concealed weapon permit can carry a concealed weapon into a school zone. There is an exception to the federal act if the state allows it and our state does. We have not had one fatality, we have not had one student injured as the result of the Utah legislature's policy of arming school employees who have concealed weapons permits.

Everywhere else in the country, on average, the number of fatalities in Gun Free School Zones have tripled per decade. In the past 21 years, Utah has had a very good result compared to the rest of the nation when it comes to the decision whether or not to have armed school workers. It has been very successful here. It is ironic that the activists out of Florida where those kids were essentially victims of a gun free zone are showing up here in Utah telling us what we need to do. We have already done it! We did it in 1997.

eJournal: Echoing an earlier theme, is it good public policy to have adults who have been vetted through the concealed carry licensing procedure able to wield deadly force in defense of students and other teachers? If we answer that question by saying, “Yes, it works,” then we have to ask, why wouldn’t that philosophy apply under other circumstances? In your state, arming teachers is a successful and accepted example of what Utah society is happy to let armed citizens undertake in defense of the innocent in a specific situation—at school. The bigger question is, does society want one person stepping in to defend another person from intended harm?

Vilos: I am telling people in the legislature that we need to change the dialog from trying to divine who is going to be the next mass shooter because that doesn’t work. Move away from gun bans and worrying about mentally ill persons—only a small percentage of mentally ill persons “go postal.” You are trampling on civil rights!

The only issue we should be deciding is how do we harden the target? We should change the rhetoric from trying to prevent shootings through mental health or anti-bullying or gun bans and gun free zones. None of that has worked. The issue is how can we protect the innocent by hardening the potential target? If the target is a school, how can we make a school more defensible and how can we make the innocents there less vulnerable to attack? That should be the only issue any legislature should be considering. In Utah, we have hardened the schools by allowing school employees with concealed permits to carry handguns.

Now that everyone has demonized guns, people call the police if they even see someone walking around with a gun on their hip. What a waste of police resources! Why not just go to Constitutional Carry where anyone can carry a gun without a permit? That’s hardening the target. Now you have more people carrying concealed with and without permits. If somebody tries to attempt a mass shooting, the likelihood is they are going to be stopped a lot quicker in a state like Vermont or Utah where CCW is prevalent, than in a state like Connecticut or Maryland where there are fewer people with concealed permits. Hardening the target should be the goal of every political body.

eJournal: As our time is running short, let me ask in closing, what aspects of defense of others do you find most often trip up well-meaning armed citizens?

Vilos: The most common mistake is the use of a weapon against an assailant that has no weapon.

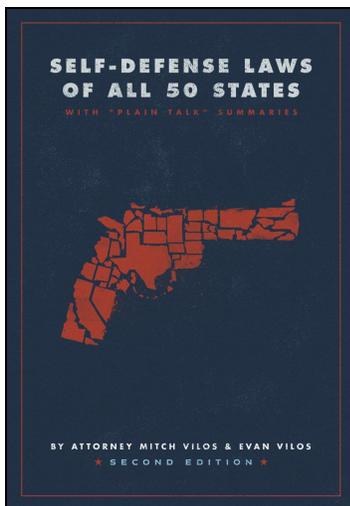
eJournal: How does the legal defense approach that problem?

Vilos: Well, there are a lot of factors. Was the assailant bigger, stronger, had he made threats in the past, is it male vs. female? There are a lot of different factors that come into play as to whether or not shooting at somebody who is not armed will prevail ultimately. I’ll tell you something that we say right up front in our book, if you use a firearm either to threaten or use a firearm in defense against an assailant who is unarmed, whether there be one or more assailants, you are probably going to be arrested and prosecuted.

Unfortunately, it is getting more and more difficult with prosecutors who seem to just want to punish people with firearms. You not only see that issue with someone who uses a gun against someone who is unarmed but think also about the Trayvon Martin case. They were claiming that Martin was unarmed. He was beating that guy's head against a concrete sidewalk, but they claimed that he was only armed with Skittles® and iced tea! You saw where that case went!

Not only are you more likely to be arrested, prosecuted and convicted if you have used a firearm against somebody who doesn't have any deadly weapon, it also applies to threatening a person who is unarmed. That is where you get into charges like aggravated assault with a deadly weapon. Those are felonies, so that is a really serious mistake that I see all the time in courtrooms. It is one of the most common.

eJournal: Thank you for that warning, and for the other details you've outlined today. Understanding both statutory law plus case law and jury instructions is pretty complex. I hope our readers already own *Self-Defense Laws of All 50 States* (for Kindle, <https://www.amazon.com/Self-Defense-Laws-All-States-2nd-ebook/dp/B00GRXUNJ2/>) (for paper, <https://www.amazon.com/Self-Defense-Laws-All-States-2nd-ebook/dp/B00GRXUNJ2/>) for paper, <https://mitchvilos.com/products/self-defense-laws-of-all-50-states-2nd-edition>) or go get it now. Readers should also keep in mind that <https://mitchvilos.com/blogs/news/tagged/self-defense-law-updates> (<https://mitchvilos.com/blogs/news/tagged/self-defense-law-updates>) is the way this work is kept fresh and current, so don't fail to check it periodically after reading the book. There are only two updates from 2018 and one from 2017, so frankly, this area of the law isn't real fluid. We can and should know the law where you are. *Self-Defense Laws of All 50 States* makes that easier.



Vilos: We use a template that uniformly covers just about every issue that we could think of. What's the law as it relates to the use of non-deadly force? What are the laws that relate to deadly force? What are the exceptions to the law of self defense—if somebody is committing a felony, if they are the initial aggressor or the provocateur, if they were involved in combat by agreement? We cover that for every state in our book. We reduce the blackletter law to plain language, so you can read the blackletter law in the chapter and if you don't understand it, then you can go to the red type right afterwards and we explain it in plain English.

We tried to keep it as uniform as we can, but some state laws were not conducive to that, so we put in subheadings to warn of that. It is pretty well marked, you have a roadmap in our book that makes it easier to follow the logic of each state's self-defense law whether that state's self-defense law is a statute, whether it is just a compilation of cases, or whether those cases have been reduced to jury instructions. And the jury instructions are pretty good, so using California as an example, we gave the statute, but, we said, don't rely on it. Here are the jury instructions and here is how it works. We put the subheadings in to make it clear whether we were talking about exceptions to the law of self defense, or defense of a third party or civil liability as opposed to criminal responsibility.

eJournal: Well, I for one appreciate all that effort and I also thank you for the time you've spent with us today explaining how the laws vary for use of force in defense of others! I've learned a lot from your book and more from chatting with you today. Thank you for sharing your knowledge with us.

Mitch Vilos has been representing clients for over 35 years, including defending Second Amendment and firearms rights cases, personal injury cases, cases involving gunshot wounds, brain and spinal cord injuries, medical malpractice and more. Learn more about him at <https://firearmslaw.com/practice/biography/> (<https://firearmslaw.com/practice/biography/>) and enjoy reading his blog at <https://mitchvilos.com/blogs/news> (<https://mitchvilos.com/blogs/news>) where his commentaries are always interesting.

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