

Back to Basics: Disparity of Force

An Interview with Massad Ayoob
by Gila Hayes

eJournal: Whether you are reading a book, listening to a lecture or standing around the range discussing recent crime reports, you will quickly run into the term “disparity of force.” It is important to define the words we use and the context in which the definition is applicable. In the legal context, what is the meaning of “disparity of force?”

Ayoob: It’s an important piece of the puzzle and to understand it you must know what the whole puzzle is supposed to look like in the end. When you open a jigsaw puzzle and none of the pieces look like they will fit, the first thing you need to ask is, “What this thing is supposed to look like at the end?”

What this puzzle looks like at the end is what justifies the use of deadly force, which is that degree of force a reasonable person would consider capable of, or likely to, cause death or grave bodily harm. The only justifying circumstances are immediate, otherwise unavoidable danger of death or grave bodily harm to oneself or another innocent party one has the right to protect.

Death, of course, is obvious. Grave bodily harm is generally defined as a crippling injury, a severe injury, a permanent injury. In some states that can mean a broken bone. In one state, there is case law that said a broken tooth was serious bodily harm. But generally, grave bodily harm is crippling or horribly disfiguring injury. That is the universal standard.

I have found the best way to get this across too many people is to picture a table that is set on three legs.

The top of the table is that situation that justifies deadly force:

immediate, otherwise unavoidable deadly danger.

The three legs that hold it up – and all must be simultaneously present – are the criteria that create this circumstance. Different people use different names, but generically, most commonly are called **ability, opportunity, and jeopardy.**

Ability

Ability means the opponent has the power to kill or cripple.

Opportunity

Opportunity means they are capable of immediately employing it. There are no great obstacles between the assailant and you. The assailant can kill you very quickly with whatever they have. A guy with a knife three steps away from you certainly has opportunity. A man 100 yards away who is waving a knife and screaming that he is going to stab you is certainly threatening homicide, is threatening deadly force, he does have a deadly weapon, but within what the courts call the totality of the circumstances, he can’t immediately employ it because the opportunity is not there at that great distance therefore the three-legged table in our metaphor would not be fully supported.



Jeopardy

The third element is jeopardy, sometimes incorrectly, improperly called intent. If we teach people the other guy must have the intent to cripple, then if the student has used deadly force in self-defense, they are asked, “Did you know his intent?”

“Yes, he was going to kill me.”

“So, you are telling this jury you have the power to read minds?” That can impair credibility!

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Let’s go back to the element of **ability**, which some people call **means**. Where disparity of force is an issue, the most obvious element of **ability, or means**, is a deadly weapon, per se: *a gun, a knife, a club – something of that nature*.

The presumably unarmed attacker has ability if within the totality of circumstances his force to yours is so superior, is so likely to result in you being killed or crippled, that it becomes the equivalent of a deadly weapon. The certainty of damage therefore warrants your resort to a per se weapon – *in this case your defensive firearm – to stop the attack*.

Disparity of force can take any number of forms: the most obvious is force of numbers, a gang of assailants or just two. It could be, again obviously, a much larger, stronger person, interestingly not necessarily a younger person. While often you will find that with a younger attacker and an older victim, disparity of force exists, it is not the age that’s doing it; it is the common disabilities that come with age.

Let’s say we have a 130-pound anorexic junkie and the person he’s attacking is in their mid-70s and has had heart surgery. When I use this example in classes, my students say, “Oh, well, that’s not disparity of force!” The guy with the history of heart problems could be a more vulnerable victim, but in this case, the man I’ve just described is Arnold Schwarzenegger.

Arnold Schwarzenegger at 75 having recovered from his heart surgery, is going to be a very formidable opponent for the 130-pound junkie and shooting the junkie because he was afraid of being beaten in a fist fight would be a tough sell to a jury.

Disparity of force could be the handicapped attacked by the able-bodied, *even if the handicap has taken place during the assault*. Let’s say that you are attacked by a person of similar size and apparent abilities, but she starts the fight with a kick that breaks your kneecap. It is going to be all you can do to stay on your feet, let alone launch punches with body weight behind them, effectively block and evade, or throw a kick.

Another element of disparity of force is the position of disadvantage. Maybe my student is 6’2” 220 pounds and a body builder, but they are seat belted into their car and in the road rage incident the attacker is punching them through the open window. That seat belt is going to act like an accomplice that is pinning your arms and holding you in place. You will not be able to get body weight behind a counterpunch, you certainly will not be able to kick, and you would be virtually unable to slip or evade a punch. That was the classic element in the George

Zimmerman/Trayvon Martin trial when the evidence showed that Zimmerman had, in fact, been down on his back, with a taller man smashing his head into the pavement.

Another element in disparity of force could be that the opponent has a known or obviously recognizable high-level skill in unarmed combat. You know he is a black belt. You know he was trained to kill with his hands in Special Forces and now he has turned bad. Maybe you have no idea who he is, but you just saw him kick a 6'2" 220-pound guy through a plate glass window while you were close enough to know that the guy, you're dealing with is not an average Joe.

It has become an issue in so many cases! In just the past 12 months we have seen two very high-profile, nationally televised murder trials in which disparity of force was an issue. *Wisconsin v Kyle Rittenhouse* and *Florida v Curtis Reeves* which was wrongly called the popcorn shooting in the theater. In both cases, the argument was made by opposing counsel that it's never self-defense to shoot an unarmed man.

Now, these are attorneys. These are practicing attorneys. These are veteran criminal attorneys who work in the criminal justice system and have for many, many years. It is entirely possible that they actually do not understand disparity of force.

Network president Marty Hayes and I have both been expert witnesses, Marty for 30-some years and me for 40-some. We each interact with a great number of attorneys. When we are not down to business, and we are having dinner or a drink with them after the trial, we like to pick their brains.

The question both of us often ask is, "How much deadly force training did you get in law school?" The average runs no more than three hours. Several of them have said, "I don't remember any." About the only time we get anybody who got more than three hours in three years, it is somebody who was assigned a moot court case and the defendant happened to be claiming self-defense.

Testifying as expert witnesses in what happened to be a strange court case, Marty Hayes and I did this trial in Tucson, Arizona that you wrote up at https://armedcitizensnetwork.org/images/stories/Hickey_Booklet.pdf.

It's one of those trials that ended in a hung jury. We found out later that there was an attorney that was on the jury as a juror who had told the other jurors, "*I am a lawyer. I know all about this. There is no such thing as disparity of force. You can never shoot an unarmed person.*" He said this about a man who was violently attacked by three people, all of them larger than he, and was about to lose consciousness when he opened fire and righteously defended himself. He ultimately won his freedom, but it was a long ordeal.

Basically, the jury pool – the jury pool being the general public – has been taught the same thing. They think that if you shoot an unarmed man, it can't possibly be self-defense. It is an unfair advantage; it's got to be criminal somehow. We really need to educate the public on that!

I write a series in American Handgunner magazine called Ayoob Files which describes some such cases. In fact, there is a disparity of force element case in the current issue. (<https://americanhandgunner.com/our-experts/ayooob-files-going-for-a-gun-the-jarrett-jones-case/>)

For several decades I have written the *Self-Defense and the Law* column for *Combat Handguns* magazine. Somebody needs to put this stuff in Reader's Digest so the general public – not just the people who read gun magazines – can grasp it! This is a classic example of people not knowing what they don't know. It is woven into the warp and woof of American law in all 50 states.

You should be able to get a disparity of force instruction if your attorney is smart enough to ask the judge for it. If this is something that eludes attorneys, where do you think that leaves the average citizen?

Remember that all 19,500 Network members are not only law-abiding armed American citizens; each one is a member of the jury pool. There is an excellent chance that any Network member might be summoned for jury duty tomorrow and face a case like this. It is absolutely critical for them to know these elements, because there is

a very good chance that the defense attorneys are going to be so clueless that they don't bring it up. You can be damned sure plaintiff's counsel in a civil case and the prosecutor in a criminal case are not going to bring it up.

eJournal: What are the chances of getting a disparity of force jury instruction?

Ayoob: You have a good chance if you have properly argued, if your attorney has quoted caselaw, if there already is a recommended jury instruction on disparity of force, within your state jury instructions.

eJournal: Is that common in most states?

Ayoob: Yes, you will have either disparity of force or some description which, without using those terms, encompasses it. You will almost certainly have some case law. If you don't have it in your state, have your attorney check at the higher levels, at the findings of the appellate courts. If you're in Washington state, for example, a state supreme court decision, from an East Coast state, doesn't bind a Washington judge, but it can always be offered as persuasive argument for such an instruction.

Another persuasive element is a classic text, *Warren on Homicide*, that's not widely known amongst laypersons. Lawyers who try a lot of homicide cases consider *Warren on Homicide to be the Bible of homicide law*.

Warren on Homicide makes it abundantly clear what disparity of force can be and why it should be considered an element of the ability factor.

eJournal: At the Network, we work hard to avoid members having to go to trial, but as in the Tucson case you mentioned, the overwhelming prejudice goes against an armed person who needed to shoot an unarmed person. That case was doomed to need a trial to resolve concerns about why the armed citizen resorted to deadly force against three unarmed attackers. That somewhat pessimistic observation brings me to several questions.

First, how can armed citizens explain the reality of physical attack to prosecutors or district attorneys in hopes of derailing them from filing charges, or if it goes to trial how can one have provided clear statements starting with initial interviews with law enforcement that explain the necessity of shooting someone who was not carrying a gun?

Ayoob: Let's assume, first, that we have an honest prosecutor doing his job, and not one of the unfortunately increasing numbers of prosecutors whom certain billionaires with agendas have funded with giant amounts of money to get them elected and to push the agendas of those particular billionaires. If a prosecutor is looking to make an example of someone for gun control, we may not be able to dissuade them, but in my opinion, the vast majority of prosecutors are honest. If your defense attorney calls the prosecutor and says, "Look, my client and I would like to come in and sit down and talk with you and your investigator. Of course, we will both record the whole thing." That is so unusual that you're going to get a double take, and the curiosity it creates is so strong that you will get a response of, "Yes, come on in." If they say "No," that tells you that they have already made up their mind and there is going to be a show trial.

It will be a surprise when you go in and you sit down and say, "Here is what we've got," because so many criminal defense lawyers who spend their careers defending guilty men find one of their best strategies is "hide the ball" to save your best game for trial. Because that is the usual thing guilty men's lawyers defending guilty men do, when a lawyer that is respected by honest prosecutors comes in and says, "Mr. Prosecutor, here's what we have. Here's what we've done. We have no ball to hide. This is going to be our defense and nothing that the state puts forward is going to change that." Very often what we hear is, "Thank you for bringing that to our attention. We had not seen that side of it." Often the matter is resolved there, and the case is dropped.

It's not been too long ago that the Network had a very similar situation in Colorado. Doing exactly that saved a Network member the months and sometimes years that it takes to await trial. Our members need to understand that this is not a one-hour episode of *Perry Mason*.

In April I had a case involving a shooting that took place in 2016. The officer was cleared by his department. He was cleared by his state's department of law enforcement. He was cleared by the prosecutor's investigation and was cleared by a grand jury. Then in 2019, he was indicted by what I consider to be a self-styled social justice warrior from the Department of Justice in a federal case. If convicted, he was looking at 20 years "hard," based on the federal sentencing guidelines.

The indictment came down in 2019. The officer, of course, had to leave law enforcement. The trial did not take place until March-April of 2022. We won the case. The officer has since been reinstated but he had literally a half decade with the Sword of Damocles hanging over his head. It is virtually unknown to the public how many of these cases we win if, at the beginning, we can get in and let the other side realize the shooting was justifiable.

You have some idea what my caseload is. I have gone into a courtroom I think twice this year to testify at trial and fortunately, we won both of those.

eJournal: Are you able to get dismissals, too?

Ayoob: We regularly get dismissals or plea bargain offers. Sometimes the prosecutor's office needs a plea bargain to save face, and that is as far as they will go. We have had two in the last few months where the attorneys and I were convinced we were most likely going to win at trial. When I say most likely, virtually everybody in the business pegs it at about 10% that the most ironclad defense can fail. There is going to be some surprise witness, a believable liar on the other side, or maybe one time out of 10 a juror with an agenda sneak(s) onto the jury, where even the best defense might end up with a conviction.

The individual who has been under this ordeal, realizes they are paying \$500 an hour to their attorney—and many cost more; there are many attorneys that charge \$1000 an hour—and this is going to be hundreds of hours, they see themselves as bankrupting their family, and, in desperation, they take the plea. One of those cases was a homicide and the plea was no time served and a period of probation. This man had six children, and in his mind, he simply could not take the risk of abandoning his wife to raise the children alone with only one income.

I had been looking forward to going to trial. We had an excellent defense attorney, John Colley from Tennessee, and I was looking forward to working with him again. The client made the decision to plead, and John and I can both understand why he did. I think it is a damn shame he was ever charged to begin with. Getting back to what we were talking about, a huge amount of the time we can kill these cases without the person having to go to trial. The strategy is to get the truth across to honest prosecutors.

eJournal: When disparity of force is the key, what does the expert identify then tell the attorney, "You need to make the prosecutor aware of this!" What are the elements you identify and explain so that authorities don't think the client cold-bloodedly murdered an unarmed man?

Ayoob: Explain to the prosecutor that you will be bringing in expert witnesses. I would suggest bringing in material witnesses, too. Most states have a boxing commission; bring in someone from the boxing commission to ask, "Mr. Commissioner, given the size and particularly the weights of these two people, this would have been a light heavyweight fighting a fly weight. Sir, would you ever allow that?"

"Absolutely not! It would be forbidden."

"Why?"

"Because the fly weight would be so likely to be killed or crippled."

"Thank you, Mr. Commissioner. No further questions."

When you think about it, disparity of force becomes common sense, but most people have not thought about it. A smart prosecutor who has done a lot of trials knows that jurors respond to common sense. Their common sense is what they bring to the court room so you definitely play toward the common sense that the violation of fairness

is “large” attacking “small,” not the small person in desperation using a gun so they can come home to their family on their feet instead of in a box.

eJournal: When we think of disparity of force, we tend to think about large against small, able-bodied against disabled, but there is one more element that we haven’t mentioned. In today’s world, I wonder if we have dropped one, we used to teach...

Ayoob: Male versus female...

eJournal: Yes, a male attacking a female. Has the paradigm changed so gender is no longer a factor? After all, we have women wrestlers, we have people born male who become female, and so many other variations that I wonder if that element is obsolete.

Ayoob: Not really. I should have mentioned it earlier. Male versus female generally is a disparity of force element, but not always. It is well understood that the male, on average, is larger and stronger than the female of the species. He tends to have greater upper body strength, and tends, culturally, to be disposed more toward violent sports such as tackle football, for example, things of that nature. We are a society where little boys grow up being told, “You punch that Bluto, Jr. bully right in the mouth, kid! Don’t take no crap! Be a man! Stand up, by golly!” His sister is taught, “Now, dear, no one likes a pushy little bitch.”

That said, you could have the rare exception when the male is 5’ 4” and 130 pounds and the female has just retired from WWE professional wrestling, and she is 6’ 2” and 280 and could lift him and throw him across the street.

eJournal: People have asked, “What if I am attacked by a transgender person, or someone who presents as a woman but is actually a man? What am I legally allowed to do in that kind of a situation?” I think armed citizens are struggling to balance changes in our culture against the structure of our laws and legal traditions. Their questions are not frivolous.

Ayoob: I have trained several transgender students. They, very much like the gay community, are at risk of being bashed by homophobes and transphobes. You have got to look at what side they are on! If it was a 6’ 2” 220-pound male that was transitioned, they would have to say, “Look, the whole reason I transitioned is because I have always considered myself a woman. I have always hated fighting. I never learned to fight. I have been taking hormone therapy that has greatly reduced my physical strength.”

If the 130-pound male whom we hypothesized earlier is attacked by a violent, large female, their answer would be, “I was attacked by a large, violent person who outweighed me and was trying to kill me. You can take your gender preferences, your gender phobia and your gender biases elsewhere! A big person, big enough to kill me, was attacking me and I stopped them the only way I could. I did not factor in whether they were male, female, transgender or cisgender.”

eJournal: That is very useful. You remove appearance from the decision about what to do in self-defense.

Ayoob: Now, there is one other thing we have not discussed that will round out this topic. We should consider the person with what some call the “silent disease.” This is a person who is fragile, but you cannot see it when you look at them. We have one student who has had to undergo severe, major neurosurgery and has a large chunk of his skull missing on the left side of his forehead.

A blow that would make your eyes sting could kill him. In classes, we even put him on the far left of the firing line, so he is away from flying brass. Looking at him, with the scars on his forehead, he looks like a big old, beat-up bar fighter. He looks intimidating as hell. If I were him and someone were coming up to me with a fist cocked saying, “I will knock your block off,” I would have my gun out and if he continued toward me, I would pull the trigger.

Just this past year, we had a case for a man who had a disease that’s like hemophilia. The guy was a bleeder. A much larger, stronger, younger man was coming at him and yelling that he was going to break his face. He shot him. We went through a 776.032 hearing (Florida Statute 776 Chapter 032 pertaining to Stand Your Ground) and

his attorney Art Hernandez did an excellent job and got him cleared, but he had spent a significant amount of time in jail awaiting that hearing. The pandemic, of course, has made the delays much, much worse.

I teach it like this: let's say, you have a bad heart. A punch to the sternum that would knock the breath out of me, is going to kill you. If anybody is in a situation like that, if someone is trying to start a fight with them, I tell them to yell as loudly as they can, "Sir, I have a medical condition. If you hit me, I could die." Tell him and the witnesses that this is not a TV fist fight where somebody punches somebody in the nose and says, "Now I have satisfied my honor and shall walk away." This is a deadly force situation. If the man continues the attack, he has expressed an obvious willingness to cause death or grave bodily harm and we have greatly solidified the jeopardy element.

eJournal: Our Network membership demographic tends toward people of mature years. As you said earlier, with age often comes injury, illness, or other disabilities. That makes disparity of force a subject that we must understand. Talking to you has reminded me of a great interview Dr. Robert Margulies gave at <https://armedcitizensnetwork.org/december-2015-blunt-force-trauma-lethality>. When I was interviewing him, he said, "You can't afford to risk a blow to the head; you are too old." He explained how coup and contrecoup injury is more severe for an older person. That is only one element of this big, complex subject we've covered today. Can you synopsise? Is there a CliffsNotes® closing about disparity of force?

Coup & Contrecoup Injuries

In head injury, a coup injury occurs under the site of impact with an object, and a contrecoup injury occurs on the side opposite the area that was hit. Coup and contrecoup injuries are associated with cerebral contusions, a type of traumatic brain injury in which the brain is bruised. Coup and contrecoup injuries can occur individually or together.

Ayoob: I think we've about covered it. Sadly, so much deadly force law does not lend itself to CliffsNotes® because complicated issues do not come with simple answers.

eJournal: [chuckling] Maybe that is why our journal interviews tend to run so long! I certainly appreciate your patience and all the questions you've answered so we understand deadly force law better.

Network Advisory Board member Massad Ayoob is author of Deadly Force: Understanding Your Right to Self Defense which is distributed in our new member education package that's sent to all new Network members. He has additionally authored several dozen books and hundreds of articles on firearms, self defense and related topics. Of these, Massad has authored multiple editions of Gun Digest's Book of Concealed Carry and Gun Digest Book of Combat Handgunnery.

Since 1979, he has received judicial recognition as an expert witness for the courts in weapons and shooting cases, and was a fully sworn and empowered, part-time police officer for over forty years at ranks from patrolman through captain. He serves as president of the Second Amendment Foundation. Ayoob founded the Lethal Force Institute in 1981 and now teaches through Massad Ayoob Group of which he is the director. Learn more at <https://massadayoobgroup.com> or read his blog at <https://backwoodshome.com/blogs/MassadAyoob/>.

Massad Ayoob - Disparity of Force & Justifiable Use of Deadly Force - Critical MAS EP 52
<https://www.youtube.com/watch?v=P3MZRKwnOjI>