

## Use of Force in Defense of Pets

### An Interview with Attorneys Mike and Alex Ooley

Interview by Gila Hayes

*When armed citizens strive to understand circumstances under which use of deadly force against another human is appropriate, a frequent question is whether you can use your gun to defend a beloved dog, cat, or horse. Advising that “defense of life,” means defense of human life is not always welcome, but it is how our criminal justice system works.*

*As a topic that arises frequently, we explored the bigger question of animals and use of deadly force from several angles with Network affiliated attorneys Mike and Alex Ooley, a father-and-son team of attorneys from southern Indiana. They also teach firearms and use of force law classes at the O2 Gun Group (<https://forgeoffreedom.com/the-forge-of-freedom-instructors/>), regularly exposing them to use of force questions. Let's switch to interview format to preserve the tone of an interesting conversation we enjoyed last spring while visiting Indianapolis for the NRA Annual Meeting.*

**eJournal:** Thank you for stopping by, Alex and Mike. Today, I'd like to learn about the law's view of defending domestic animals and on the other side of the coin, defending against animals. As I was writing out my questions, I laughed when I realized that we could have the world's shortest interview if I asked, “Is it okay to use deadly force to defend your domestic pets?” and you would say...

**Alex Ooley:** “No.”

**Mike Ooley:** Generally, no. There might be a small exception in the state of Texas from what I understand, but I'm not a Texas attorney, so you're on your own there, but generally the answer is “No” with respect to deadly force to defend a pet. I will tell you that topic is one on which we encounter the greatest resistance in terms of self-defense notions because pets are part of most people's families.

Our interviewees, [L-R] Alex and Mike Ooley flanked by their co instructors at O2 Gun Group, Ryan and Doris Ooley with the canine family members.



**Alex Ooley:** Especially when we're talking about dogs. Sometimes I think people like their dogs better than their spouse or significant other.

**eJournal:** In my experience, horse fanciers are also quick to ask about defending their animals.

**Mike Ooley:** I don't recall horse owners being as devoted as people are to their dogs.

**Alex Ooley:** ...unless it is show horses.

**eJournal:** Let's move on to how the law views harming an animal. I've often heard animal-lovers assert that animal abuse is a felony, and then make the leap of logic that they can use deadly force against someone committing a felony in their presence. Where does that idea fail?

**Mike Ooley:** It is important to understand that our benchmark, our standard with respect to the use of deadly force is whether we're facing imminent threat of death or great bodily harm to us or another innocent person. We have to understand that a pet is never going to be a person; under the law, a pet is never

going to be valued above a person. Now, with respect to your question about preventing a forcible felony. In Indiana, where we are right now, you can use deadly force to stop a forcible felony. A forcible felony is a felony that involves the threat of force or the use of force in the commission of a felony AGAINST ANOTHER PERSON. That's the key.

**eJournal:** Too often a lay-person reads black-letter law and thinks they have found a loophole, usually by failing to consider the entire situation. In this example, I failed to acknowledge the modifier “forcible.”

**Alex Ooley:** The commission of just a simple felony in Indiana  
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and, I think, in most states, is distinguished from the forcible felony that Mike was talking about. As he said, a forcible felony has as an element, the risk of serious bodily injury to another person, not just some theft or some offense against property.

**eJournal:** While researching our topic, I was amazed by a 50-page treatise in *The George Washington Law Review* about defense of pets. The writers made a concerted effort to change the word “pet” into “companion animal.” I suspect they’d like to categorize all pets as essential service animals. After all, who is going to speak out against extra consideration given a dog that makes life better for disabled veterans or for someone who suffers from seizures, for example? Does the law allow use of force to defend service animals beyond what’s allowed for pets?

**Mike Ooley:** Here’s the bottom line, currently and for a long time to come: the law is never going to value a pet or even a service animal over a human being no matter how despicable the human being may be.

**Alex Ooley:** Killing a police dog in the commission of a criminal act may elevate the status of the crime, so there are some things that elevate the status of the animal but never to the level of a human.

**Mike Ooley:** In my estimation, the law is no different objectively whether a pet or a service animal, but I suspect there is a lot more prosecutorial discretion whether a police officer would be charged for defending their police-trained K9.

**Alex Ooley:** We were talking about situations where it’s clearly defense of the animal itself, but there may be circumstances where the person is attacking your animals but also presents a threat to you. If you can articulate that not only was the person a threat to your animal but also a threat to you, then deadly force might be justified.

**eJournal:** Suppose you saw somebody getting ready to gut your dog with a knife or do some great harm to your dog and it is clear the person is going to act. If you went out to prevent that, as most of us would do, saying perhaps, “Hey, buddy! What are you doing? That’s my dog, let me get ahold of him.” I’m uneasy approaching an unknown person who’s armed. I need to determine if the threat has shifted from my dog to me.

**Alex Ooley:** You might be looking for a verbal threat, but it could be overt acts, too. It may be the person stepping towards you, brandishing a knife, or pulling out a gun. There are lots of acts that could present a threat and objectively create a necessity for deadly force. It may be verbal; it may be other acts.

**eJournal:** Of course, we want to do all we can to stop the escalation before it goes that far. If you see your dog being injured, what would you do?

**Mike Ooley:** Personally, I wouldn’t stand by and let that happen. We have pets. This is one reason I’m a real advocate for intermediate force like pepper spray. We gun folks sometimes overlook avoidance, awareness and all these intermediate steps. We overlook the potential of less lethal force like pepper spray in an instance like that.

Keep in mind, although we’ve been saying, “You can’t do this; you can’t do that!” throughout this interview, you CAN still use reasonable force to protect property. A pet is property. We can’t use deadly force to protect property, but we can use reasonable force.

**eJournal:** We need a range of force options. You don’t go out to confront someone with your gun in your hand. You go out ready to intervene verbally or deter with an appropriate level of force if the desired response is not forthcoming.

**Mike Ooley:** Here’s another reason I am an advocate for pepper spray. I think folks with pets need to have a plan about what they’re going to do if somebody else’s pet attacks their dog.

**eJournal:** That’s a much more common way our pets get injured or killed.

**Mike Ooley:** Oh, yes, I think that’s a lot more common. If you’re walking your dog, make sure you have a plan as to what to do if another dog comes up and attacks your dog. I’m an advocate for pepper spray. It is effective against dogs, so that’s my number one suggestion. If you have a walking stick, you might use that since obviously you don’t want to put your hands and arms down in the middle of a dog fight.

You need to have a plan for your particular situation. I don’t mean to sound like I’m not an advocate for firearms, but using a firearm to shoot a dog is incredibly difficult to do when that dog is moving around under foot. It raises a lot of safety concerns. You may shoot yourself, somebody else or your own dog. Have a plan to use reasonable force. If that’s pepper spray, carry it where it where you can get it and practice with it. You can get inert cans or be very careful in practice.

**Alex Ooley:** Get the right type of pepper spray. While pepper gel might be effective against a person, would be very difficult to use effectively against an animal that’s moving erratically. A spray or a stream would be better for an animal.

**eJournal:** For that situation, I think a fogger unit would be a beautiful thing, and by the way, beyond just having it in hand and not at the bottom of your bag or pack, be prepared for the possibility of cross-contamination.

**Mike Ooley:** I would say it is very likely you are going to get at least some cross-contamination.

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**eJournal:** Do you teach pepper spray classes in which students can experience pepper spray exposure in a controlled environment?

**Mike Ooley:** Believe it or not, people don't seem to take an interest in training with pepper spray. They think they can buy it and they're good to go. I've been exposed to CS in the military and that is certainly an eye-opener. Actually, I should say it is an eye-closer.

**Alex Ooley:** I would encourage practice on a paper plate that's attached to a tree or something because people don't think about wind or distance, and they overestimate how simple it is to use. It's a lot like the fire extinguisher: you hope you never need it, but it's good to have and you should know how to use it. There are all sorts of things that can go bad. If you have carried a can for a while you may want to replace it and relegate the old one to the practice pile. Practice even just getting it out of your pocket. A lot of people don't realize how difficult in a life and death situation or even just in a stressful situation how difficult it would be to get the pepper spray out of a pocket or purse or where they keep it.

**eJournal:** That is a good point, and I'd add that some cans have tiny lockout tabs that are hard to disengage as I once found to my chagrin during in-service training. If your pepper spray can has a lock, you need to habituate using that safety.

You mentioned using a walking stick on a dog fighting with your dog or we might be fortunate to have a clear shot on the dog that attacked. I wonder about the ramifications of harming someone else's property – in this example, their expensive purebred dog – to avoid death or injury to one's own dog, which is also property.

**Alex Ooley:** To be clear, we are not talking about self defense, but if we use any degree of force against someone else's dog and harm that animal, we have to articulate why the degree of force used was reasonable and that it was also necessary.

**Mike Ooley:** It's really not self-defense. It's a justification under the law and it's a matter of choosing the lesser of two harms. We either had to kill the dog that was the aggressor, or our dog was going to be killed. That was the choice we had.

**Alex Ooley:** Remember, too, when talking about defense of property, whether you're using reasonable force or deadly force, part of that analysis is whether it's proportional. You have to be able to articulate why your actions were reasonable and part of that articulation is proportionality. Think about the concept of an eye for an eye. You can never take the life of a human for a dog's life. They're never, ever on the same plane so it's not proportional, but if you're protecting your animal from another animal that's a different analysis. It is a different context.

The context matters. If you use deadly force in public, that's different than if it's in my front yard out in the middle of nowhere. In public, you could also be potentially liable for something like criminal recklessness or reckless endangerment of other human lives.

**eJournal:** I'd like to move away from domesticated animals. Have you had cases or followed cases where the defensive force was used against a wild animal?

**Alex Ooley:** I have had some animal cruelty cases, but luckily in Southern Indiana we don't have many wild animals that would present a threat, unlike out west where you may have mountain lions or bears.

**Mike Ooley:** My wife Doris and I were talking about this when we were in Florida recently with respect to alligators and Millie, our German Shepherd. You have to understand that in some parts of the country, wild animals – particularly the ones that are a threat to human beings – are protected by federal laws. A lot of time, there may be no eyewitness testimony because this may be out in the wilderness, so avoid it if you can and be very careful about using deadly force against wild animals, particularly those that are protected by federal wildlife laws.

**Alex Ooley:** This is another example where intermediate degrees of force can be useful. I love to hike with my dog. If I'm out West where I may be in danger of wild animals, I typically carry bear spray. It is very effective against bears but also other wild animals, like mountain lions. It might be more effective than a firearm because a handgun is not particularly effective against a large animal. If you can utilize bear spray against wild animals, that would be a good intermediate option to have.

**Mike Ooley:** If faced with it, it may be a necessity that you have to potentially kill the animal. If you have to, you have to! People in parts of the country where that's more likely than it is here in Southern Indiana need to think about that.

**eJournal:** If bear spray motivates an animal to go in the other direction, that's a win with the bonus that you don't have to explain to Fish & Game why you injured or killed the State's black bear or wildcat and being told you will never get a hunting license again.

Several years ago, I saw a cougar walk past my office window at sunrise. It was so unusual that for an instant, my brain wouldn't accept what my eyes saw. I had a shotgun, but fortunately neither dog nor people were outside. Had circumstances been different, I might have needed to explain decisions made in mere seconds. I am aware of at least one trial at which an expert witness provided gunshot wound analysis when the State tried to punish a man who shot a charging cougar.

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**Mike Ooley:** If there was ever a topic on which jury nullification might raise its head, it would be in respect to defense of a pet. A little while before this interview, Alex did a podcast about jury nullification at <https://podcasters.spotify.com/pod/show/forgeoffreedom/episodes/Episode-10--The-Forge-of-Freedom--What-is-Jury-Nullification-e209itd> . It is a very interesting concept.

**Alex Ooley:** If you used unlawful force against an animal, there could be enough jurors in the jury pool that are sympathetic to animals that might acquit you because they sympathize with you defending your own pet.

**eJournal:** That topic is a huge hot potato...

**Mike Ooley:** ...and we are going off topic.

**eJournal:** Gentlemen, in these interviews, I always wonder if I asked the right questions. What do you wish I had asked that I didn't even consider?

**Alex Ooley:** What if someone came towards you and they had a large, aggressive dog on a leash? What if that leashed dog was aggressive towards you or towards your pet?

**Mike Ooley:** That's a good question. We talked about it in advance, and we didn't come to a resolution.

**Alex Ooley:** It's difficult because it's going to depend on the context. If that dog is on a leash and the owner is instructing the dog to be aggressive towards you, I think you may have justification to use deadly force against the owner not just the dog.

**eJournal:** Is the dog the weapon at that point?

**Mike Ooley:** The dog is the tool, yes, but you are starting down a very slippery slope, so this is more of an academic discussion. I think there are circumstances where you would be justified in using deadly force because of the tool is being used against you by a human perpetrator.

**Alex Ooley:** If you can articulate that the animal presented a threat of death or grave bodily harm towards you, and that

person controlled or was directing that animal, I think you have justification to use force in that situation.

**Mike Ooley:** At the same time, I think it's possible, depending on circumstances, that you could go to prison for the rest of your life for shooting the person that controlled the dog.

**Alex Ooley:** It depends on the situation. Was it avoidable? Did you have an obligation to avoid it? There are lots of circumstances.

**eJournal:** Here's a circumstance that comes up a lot – were there previous disputes or threats between the people involved?

**Alex Ooley:** Were you innocent, or did you instigate the confrontation, then the person retaliated against you? Those things change the dynamics significantly.

**eJournal:** We've had member-involved cases that started over dogs pooping on neighbors' lawns, and that was a factor in the aggressor's supposed reasons for persecuting the shooter in a non-member trial we analyzed in the first three months of [2019's journals](#). If I could say one thing to dog owners, I'd say don't let your pets run free and poop on the neighbor's lawn.

There just are not any easy, one-size-fits-all answers. Alex, Mike, I appreciate the way both of you offered answers that dog-lovers do not always want to hear, and how you went far beyond simple "Don't do it" responses, but with the sensitivity of pet owners and outdoors enthusiasts. You shared a lot of "we're right there with you," be that Alex's love of hiking with his dog or Mike explanation about figuring out what would be the right thing to do if an alligator went after the family German Shepherd during their visit to Florida. Thank you for sharing those real-life concerns and how you've prepared to face situations that might arise when you're out with our dogs.

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*Get to know Alex and Mike Ooley along with Doris Ooley and learn about their classes at <https://forgeoffreedom.com/the-forge-of-freedom-instructors/> . Details about the Ooley Law Firm are found at <https://ooleylaw.com/about/> .*



## President's Message

by Marty Hayes, J.D.

This is an important President's Message, as it explains new procedures regarding the emergency telephone number that we provide to all Network members for use in the event of a self-defense incident.

After 15 years of being tethered to the emergency cell phone (meaning that I have had to stay within cell service) we have figured out a way to break those chains, or loosen them at least a little.

I enjoy seeing the fulfillment of my concept for post-self-defense assistance come to fruition when a member has a true self-defense related legal emergency. With growth of our membership numbers, though, it is becoming increasingly common to get phone calls from members who just want to chat. Sometimes the call comes from a member who wants to renew or check the status of their membership. Sometimes fumbling fingers or other inadvertent actions are to blame when a member dials the emergency number. I've even had calls from members' toddlers who were too young to talk! Those examples identify only a few of the reasons members call the emergency line when they have not been involved in an act of self defense.

In response to these problems regarding the emergency phone number, we have implemented a technological solution. When you call the emergency number now, you will first hear a very brief message advising that if the call is NOT an emergency, we ask that you hang up and dial the office telephone number 888-508-3404. If you have been involved in a self-defense incident, we direct you to stay on the emergency line, which forwards the call to Network principals' personal telephones. Primarily, our COO Gila Hayes has volunteered to answer any calls if I am unavailable. In that rare circumstance that neither Gila nor I were available to answer immediately, we ask the member to please leave your name and call-back number and we will get back to you as quickly as humanly possible. That's unlikely because the new tech solution allows us to add another Network leader to the ring group if circumstances dictate. I doubt that will ever become necessary, but it is good to have fallback provisions we can implement if the unexpected occurs.

### Good 2A News

Amazingly, a trial judge in Massachusetts, Associate Justice John F. Coffey, ruled in the case *Commonwealth v. Dean F. Donnell*, that Donnell being a New Hampshire resident with a

valid New Hampshire Concealed Carry License was lawful to carry a concealed handgun in Massachusetts without a Massachusetts permit. Read the ruling at <https://www.docdroid.net/524o4XV/opinion-coffey-comm-v-donnell-pdf>.

In my opinion, this ruling is extremely important, because if it is tested and upheld by an appellate court the prospects look good. Favorable rulings for this and other appeals making their way to the United States Supreme Court would allow for national reciprocity, something I have long held should be constitutional without a national law.

Right now, the Donnell ruling has no value to anyone except to Mr. Donnell, at least until it is appealed and ruled upon by an appellate court. It will be riveting to watch how it progresses in the appellate process.

### Interesting Videos on Self-Defense "Insurance"

In my May column, I mentioned an Arizona attorney, Marc J. Victor, who has been taking many of self-defense insurance companies to task by reviewing the contracts they enter into with their customers. Mr. Victor runs a separate program called "Attorneys on Retainer" which he offers nationwide. It is apparently worthwhile for him to compare and contrast his program with the other self-defense companies. If you have some spare time, I recommend watching his You Tube programs.

[CCW Safe Self-Defense Policy Review](#)

[The Truth About The USCCA Self-Defense Liability Policy](#)

[Firearms Legal Protection \(FLP\) Self-Defense Policy Review](#)

[US LawShield Self-Defense Policy Review](#)

I don't believe it is in the Network's best interest to attempt to compare and contrast our program with the others. First, there is no way I could guarantee the accuracy of their contractual language, and more importantly, I could not guarantee any explanation of what that language means. If someone else wants to do so, at least I will point out someone else's opinion about the programs. When I came across these videos, I contacted the Attorneys for Freedom law firm, and asked to talk to Mr. Victor about the Network's membership program to address the possibility that he might want to review what we do. We don't have one of these multi-page insurance contracts (as you well know being a member yourself) but instead rely upon our website and other promotional material to form the "offer" side of the contract with our members. If a person signs up and pays, then a legally binding contract is formed. You can get a full understanding of our program by viewing my video [Setting the Record Straight](#).

That's enough for this month, see you next month.



## Attorney Question of the Month

In this column, we turn to our affiliated attorneys for commentary on legal concerns. Because our affiliated attorneys are located in states all across the nation, their input is valuable and always interesting because laws and practices vary from state to state. This month, our Network President Marty Hayes presented a question about pretrial immunity hearings and an immunity hearing's effect, if any, on claiming self defense at trial, if the presiding judge at the hearing denies immunity. We asked our affiliated attorneys the following questions:

***Does the legal process in your state regarding self-defense defenses allow for a pretrial hearing, such as Florida's Stand Your Ground law, to argue for dismissal? If so, please explain how the hearing process works in your state.***

***If a judge denies the request for dismissal of the charges at a pretrial hearing, does this stop the defense from arguing self defense at trial?***

Our affiliated attorneys' responses follow.

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Kansas is a self defense friendly state. Among the protections under Kansas law is the ability to have a "self-defense immunity hearing."

The immunity hearing is held sometime before trial. At the hearing a judge will decide whether you're immune from prosecution because you acted in lawful self defense.

The burden of proof is on the prosecutor to prove that you were not justified in using self defense. To prevail against an immunity claim, the state must prove that an ordinarily prudent and cautious person could believe that (1) a reasonable person would not believe such force was necessary under the circumstances or (2) the defendant did not believe such force was necessary to protect themselves.

If the court denies the motion, we can still argue self defense at trial.

The only disadvantage to this hearing is that, if it fails, the prosecutor has essentially seen our entire case, and had an

opportunity to cross-examine witnesses. Thus, they're able to prepare for trial, and further investigate the matter, knowing exactly what our defense will be.

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In Arizona, there exists no similar mechanism to allow a court to rule in advance of trial on a justification defense. Courts regularly rule in advance of trial on issues surrounding admissibility and suppression. A court could rule that probable cause didn't exist, but part of raising an affirmative defense is admitting to the act, and thus the probable cause for arrest and continued prosecution is established.

At trial, at the close of the state's case, a Rule 20 directed verdict motion could be made that no reasonable jury could conclude that justification wasn't established and the court could dismiss the case at that point, but from a practical perspective the case would almost always be decided by the trier of fact.

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In New York, the first place to challenge the issue would be in the grand jury, then a motion to dismiss after indictment in the trial court.

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In Georgia, a person who validly uses self defense is immune from prosecution. So, if he claims immunity, he is entitled to a hearing before trial to determine if he is immune (much like Florida).

The burden is on the defendant to prove by a preponderance of the evidence that he validly used self defense. If immunity is denied, he can still claim self defense at trial, where the burden is on the state to disprove beyond a reasonable doubt that he validly used self defense.

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Pennsylvania law provides for a preliminary hearing. It is a standard hearing in all Pennsylvania state criminal cases that did not commence by indictment – there is nothing about it that is unique to a self-defense case. In fact, practically, the defense almost never presents testimony at a preliminary hearing and it is nearly impossible to establish self defense at a preliminary hearing, so most such cases have to go to trial.

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In Michigan, once the claim of self defense is made, the burden shifts to the prosecutor to prove that it is not self defense, and that it is not justified.

We do have a preliminary exam where you can argue self defense. The standard for binding the case over for trial is very low, this is the probable cause or more-likely-than-not standard. Some judges follow the law. Others would bind-over a ham sandwich if the prosecutor asked him to.

If the judge fails to throw out the case for self defense, you can still assert it at trial, and the burden is still on the prosecutor to prove it is not justified or self defense.

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*Thank you, affiliated attorneys, for sharing your experience and knowledge. Members, please return next month when we have a new question for our affiliated attorneys.*

## ***Educating His Fellow Lawyers***

The name of our final commentator on this month's question, Steven Howard, caught my attention as I was skimming the *The Champion*, the monthly journal of the National Association of Criminal Defense Lawyers. Imagine my surprise when I turned the page to find illustrative photographs and diagrams of 12 gauge shotgun wads and shot cups. In an article entitled *Shotgun Wads: What They Are, What They Do, How Far They Fly, and What They Can Reveal About What Happened*, Attorney Howard described re-investigating a scene where a law enforcement officer was killed when struck in the head by 00 buckshot. His expert analysis of the location of shotgun wads found at the scene showed that the suspect was firing into the air, not toward the officers. The facts, Howard observes, indicate that the officer was killed by a fellow officer.

A study of ejected shell casings established where the suspect was standing; shot cups at the scene supported the Howard's belief that the suspect had fired Remington #8 birdshot into the air, as did the location of the shot shell wads. To support his conclusions, Howard writes, he went to the range and test-fired a large number of 12-ga. shotgun shells to evaluate how far the wad can travel. He used several shotguns to account for different barrel lengths and other variables, but found that barrel length had little influence on where the wad lost momentum and fell to the ground. He found that wads could travel as far as several hundred feet after leaving the barrel. "In the suspect's case," he writes, "all the wads were found within less than 10 yards, and one was within 10 feet, of the spot where the police admitted the suspect had been standing."

Howard relates that the police and prosecutor initially refused to accept that a fellow police officer fired the 00 Buckshot that resulted in the death, but investigators "ultimately realized it was the truth." He closes with the axiom that "People lie. Evidence doesn't."

The full article, for our affiliated attorneys who are NACDL members, is at <https://www.nacdl.org/Article/Aug2023-Shot-gunWads> and for members and attorneys alike, Mr. Howard's website is <http://gunsandammoexpert.com/index.html> .



## News from our Affiliates

### Jason Falconer

In early August, I had the privilege of visiting with Jason Falconer, our Network affiliated instructor from Waite Park, MN, who agreed to share his knowledge and experience with me and our fellow Network members. Falconer's background includes policing, competitive shooting, several decades of experience as a firearms instructor, and he operates Tactical Advantage, a training resource, indoor shooting range and retail shop. In short, he's a busy man who still finds time to recommend Network membership to a substantial number of folks per year, who tell us that they heard about the Network at Tactical Advantage.

I asked Falconer how he got started and it was interesting to follow his progression from his days as a beginning shooter up through a critical incident in which his decisive actions saved many from harm. We switch now to interview format, so readers can enjoy meeting Jason Falconer through our conversation. This interview is also available as streaming video. For [video](#), click the image to the right.



**eJournal:** How did you get started?

**Falconer:** I started out in competitive shooting and wanted to learn more about firearms, but I really didn't have anybody to go to. I had a few people that introduced me but that was learn as you go. I took some basic NRA classes locally and I took the classes several times because that was the only thing we had around here.

The group I was taking the classes from was looking for more instructors and one thing led to another. I joined that group to help instruct people and became an instructor through the basic NRA Personal Protection Inside the Home class

**eJournal:** How did you get into policing?

**Falconer:** I was in the corporate world, working for a utility company and advancing in the company to the point where I would be in a managerial role, but I would have to live in different places every 3-5 years. That didn't interest me. I had taken some criminal justice classes in college, so I went through a career transition program at Alexandria Technical

College and I've been a licensed police officer since 2001. I'm getting towards the end of my law enforcement career now, but that's how I got started.

**eJournal:** It was fortunate that you did. Many will recognize your name because five years ago you were awarded the Congressional Badge of Bravery after you stopped the Crossroads Mall knife attack. What happened?

**Falconer:** You know, that was just me being at the right place, some would say, at the right time. I was off duty at the time, shopping for my son's birthday present when I was approached by an individual. I didn't know what was happening; at that time, I didn't know that there had been an attack in the mall.

After hearing a series of noises, I went out into the mall to investigate and there was a mass of people that were running. At the back of the crowd was an individual in a security uniform. He approached and asked me if I was a Muslim. I stated, "No," and based on his demeanor, I stepped back. That was when I noticed that he had knives in his hands. When I told him I was an off-duty police officer and wanted to stop to talk

to him, he took off running. I did get compliance out of him, but then he turned towards me and I ended up shooting and killing him. That's when I found out about what had happened throughout the rest of the mall. He had stabbed 10 other people. That incident led to our Congressional delegates giving me that award.

**eJournal:** Congratulations on the award and I laud the skill and decisiveness you showed. News reporting

about that incident demonstrated why armed citizens should consistently carry weapons for self defense. Your experience emphasized the importance of having worked through – *in advance* – what actions we might take if we were confronted with a threat to life. Thank you for the lessons we learned from what you did. Armed citizens have to address both mental conditioning and weapon training. Both are needed to survive what I see as the new normal in our communities these days.

Tactical Advantage is located about an hour away from the epicenter of the Minneapolis riots. How has civil unrest influenced your defensive shooting classes? Was there a shift in student demographics – age, gender, economic strata – over the past few years?

**Falconer:** There was. A lot of people that weren't interested in guns realized that really, you're on your own. As a law enforce-

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ment officer, I know we can't be everywhere at every given time. Most of what we do is react to a call. Somebody calls for help and most of the time it's over by the time we're responding. People need to be able to take care of themselves.

At Tactical Advantage, our emphasis is on avoidance and situational awareness to keep out of trouble, but if it gets to the point where you may be involved in a fight, where you have to use force or deadly force, you're prepared for not only the physical part – the firearm skills – but also prepared for what to do in the aftermath. I've gone to a lot of schools through 20-plus years of training and really, there are very few that talk about what to do afterwards. That's where [Jim Fleming's book \*Aftermath\*](#) came into play. He wrote about the things you need to think about.

You know, people often think, "It'll never happen to me," but if they look at my incident or the civil unrest that we had, they realize, "Yeah, it could happen." It could easily happen. Our students shifted to both the younger generation and even to some of the older generation. People thought, "You know what? I think I need to at least explore this avenue to see if I can do it. What are my legal rights?" We are living in a different time.

**eJournal:** Yes, we are. I find myself using terms like, "the new normal." How do you mentor folks who haven't previously thought about self defense? How do you guide them?

**Falconer:** In our permit to carry class we emphasize situational awareness, the physiological and then psychological aspects, the use of deadly force and then the aftermath. We try to separate our class base. If you haven't had any shooting experience, our permit class probably isn't for you. We cover the fundamentals, but we have a separate class for teaching people how to shoot. I think a lot of people get shorted when they take permit classes, unfortunately, because instructors try to teach somebody to shoot and put all the material that they can in a four-hour time block. That's not realistic.

Even in our *Intro to Handguns* class that averages three hours, sometimes students need to come back for more training. We've also had people who did the permit class then realized, "This isn't for me. I can't take that legal responsibility. I don't want to have to react to that situation." They struggle with the moral and ethical part or with knowing that they possibly could be arrested. That's a game changer for some. It's good that they went through the thought process. The other extreme, "I'll deal with it when it happens," is the wrong attitude.

**eJournal:** You're planting seeds. Someone who's not ready to make the decision after a class or two, may remember what you taught them if their circumstances change. You don't know when what you taught will germinate and grow. You don't know

the people whose lives you've touched, even outside of formal classes. Tactical Advantage sells guns, too, doesn't it?

**Falconer:** We have an indoor range and a retail component, but we're not a hunting store. We're more oriented toward self-defense tactical, and we do business with law enforcement agencies, as well, whether through product sales or training.

We've had a training company since 2003 but we were a mobile company. It got harder and harder to find places to have adequate training. We would travel and when we showed up, the place wasn't a range; it was just a pile of dirt. We started vetting ranges, but we needed a place that we can train at any time. Especially when it comes to low light, a lot of the ranges have conditional use permits and have to shut down an hour before sunset. Now, at Tactical Advantage, we can control the lighting and do night training anytime we want.

We opened Tactical Advantage in 2013. It was a big commitment, but I wasn't getting any younger so it was a good transition out of law enforcement. Our big emphasis is still training and getting people the best knowledge and the best skills. It doesn't have to be for defensive situations. We run a pretty well-attended shooting league here that's just for fun.

**eJournal:** Did the range you built reflect the needs you saw while traveling to teach?

**Falconer:** Yes, we have it set up so we can shoot into the walls if we need to for a wider range of training. From competitive shooting and from the tactical side of things, we knew that just shooting straight ahead wasn't going to work. We can move around portable targets that have the same ballistic backstop as our main backstop so you can shoot at different angles to give realistic moving, for example. We have strobes for when we have law enforcement in so that they can use their sights or their red dot in low light and see what it looks like. We try to make it as realistic as possible.

We do as much decision-based simulation training as we can. I think training was a big component in how my incident played out. As an officer, any time I had a chance to partake in simulation and decision-based training, I took it. My daughter is entering law enforcement and I tell her the same thing: Take advantage of training opportunities to build skills and train thought processes when you have an elevated heart rate. Training is the time to experience that, so it doesn't come up for the first time in real life.

**eJournal:** Do you offer decision-making drills in classes for private citizens, not just police?

**Falconer:** The vast majority of what we do is for the private

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sector now. It is unfortunate for law enforcement that there's not as much funding as you'd want. A lot of my own training was on my own dime. You can't just rely on what your department gives you.

I look at my incident. My hit rate was 60%. That is above the law enforcement average which is probably in the high 20s, but I look at that as a failure so I strive to be better. If you don't put the training time in, you can imagine the outcome. Even if you qualify two or four times a year, that isn't training. I'm fortunate because the department I'm at doesn't call it qualifications. We train, and then we validate that by qualifications. At our department and at Tactical Advantage, we require 80% or higher when it comes to qualifications. We do that to push people to be better.

We want responsible gun owners out there; we want people to be educated and figure it out in a non-stressed environment. That's better than having a weapon you can't use and end up having it used against you.

**eJournal:** If you were to sum up what you think armed citizens need to learn and work out in advance of getting tangled up as intended victims of violence, what would you tell us?

**Falconer:** You hope that you don't have to use deadly force, but I always prepared for that day. A lot of people realized in 2020 that they needed to be prepared. I remind people that it doesn't change. Even if tomorrow is perfect, we still want to be prepared for what may or may not happen.

You have to continue building your skills and your situational awareness. Things aren't getting better for the most part. I've got friends in the Minneapolis Police Department, and they're hand-cuffed by the elected leaders about what they can and can't do. Until the people running the cities change, you're going to get more of the same.

We're living in a different world. Like you said, this is the new normal. You need to prepare yourself for what may happen and hope that it never happens.

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*Learn more about Jason Falconer and his Tactical Advantage team, the range and store, league and classes at <https://tacticaladvantagemn.com/> .*

## **Video Review** **Disparity of Force** **Massad Ayoob with** **moderator Marty Hayes**

*Reviewed by Gila Hayes*



Last month Massad Ayoob and Marty Hayes recorded a new member-education video that teaches about disparity of force. In this video, they analyzed incidents in which armed citizens shot ostensibly unarmed assailants. While it seems that prosecutors are quick to paint shootings like these as murder or manslaughter, testimony by the defendant and expert witnesses can show why shooting was a reasonable response to an attack by someone who did not possess a firearm. When disparity of force is skillfully explained at trial, judges and juries recognize the danger the aggressor posed and acquit the defendant, Hayes explained by way of introduction. Ayoob then discusses details drawn from trials that have been in the headlines as he explains the application of the disparity principle in justifying a self-defense shooting.

Ayoob kicks the lesson off by defining the underlying terms. He states, “We’re talking about the use of deadly physical force.” The law defines deadly force as, “That degree of force that a reasonable, prudent person would consider capable of causing death or great bodily harm – great bodily harm being defined as a crippling injury, a severe injury, or a seriously disfiguring injury. Now, one is justified in using that level of force only in a situation of immediate and otherwise unavoidable danger of death or great bodily harm to oneself or an innocent party.”

Next, Ayoob identifies three key elements and why all three must be present to justify use of deadly force in self defense. They are ability, opportunity and jeopardy. Jeopardy, he states, is the assailant’s intent “manifest ... by words and or actions ... to kill or to cripple an innocent party.” Opportunity, which is nearly self explanatory, often speaks to proximity. Is the attacker close enough to inflict the deadly harm his words and actions promise? Ability is generally attributed to having a gun or knife – a weapon per se. Ayoob expands that definition, describing how an attacker who has no weapon at hand can use “his physical advantage over you” so effectively that “if this attack is allowed to continue you’re likely to be killed or crippled.”

“Physical advantage” does not apply only to larger, stronger aggressors attacking small, weak people, Ayoob continues, describing how multiple attackers, an attacker with skill in unarmed combat, a man attacking a woman, an adult attacking a child, or an attacker aggressing on someone in a disadvantaged position like knocked down on the street, all give such an advantage to the attacker that, in those circumstances, the disparity factor becomes a de facto weapon.

Defense attorneys get little to no instruction about disparity of force during their education, Ayoob warns, identifying another

reason the Network distributes this kind of educational material to our members. The risks to a vulnerable victim are, perhaps, best illustrated by the “egg-shell skull,” a legal principle that holds an assailant – who strikes with no justification – responsible for unexpected physical harm sustained by someone who, on the surface appeared as hale and hearty as the aggressor. A judge might say, “The assailant takes the victim as he finds him. You had no right to hit that man at all. His eggshell skull is not what caused his death; what caused his death was you unlawfully punching that man for no good reason. This court finds you guilty of manslaughter,” Ayoob states.

Ayoob cites high-profile court cases that illustrate how poorly the criminal justice system grasps disparity of force principles. The cases underscore the “nearly knee-jerk reflex” causing prosecutors to charge vulnerable victims who shoot their attackers. His commentary encompasses the trials of Kyle Rittenhouse and Curtis Reeves, and identifies the actions of their assailants that created the risk of death or grave bodily harm. I followed both cases, as did many members, and in listening to Ayoob, I learned several facts about Reeves’ situation that the mainstream news obscured. Ayoob concludes that in both cases, the evidence showing the actions of the aggressors proved the deadly danger they presented. Rittenhouse and Reeves were acquitted “but in each case they had to go through the tremendous ordeal of trial,” he adds.

Disparity of force is not limited to physically frail victims, illustrated by Larry Hickey’s trials on which Ayoob and Hayes both worked. After two trials ended with hung juries, a judge gave a directed verdict that acquitted the defendant. Hickey’s ordeal began when three neighbors swarmed the healthy 30-year old in his driveway. The story of their attack gives examples of multiple attackers, aggressors of greater height, an attacker with skill in martial arts, and the in-the-moment debilitating effect of starting to lose consciousness after being sucker-punched in the head. Ayoob relates how the prosecution stressed that Hickey’s shots could not be self defense because the attackers weren’t armed. In addition, during deliberations in the second trial, an attorney seated on the jury told his fellow jurors, “This is all BS. I’m a law school graduate and an attorney. There’s no such thing as disparity of force. They made it up.”

In the years since that trial, Ayoob has been told by a number of attorneys that in three years of law school, they never heard the phrase “disparity of force” while being taught about the many, many other facets of law. He worries that ignorance on this topic will result in a continuing stream of cases like Hickey’s, Rittenhouse’s or Reeves’ and adds toward the end of the video, “Disparity of force is an element that comes up much more than you think it would and I can’t imagine why they don’t discuss it more in law school.”

Network members can view the lecture at <https://armedcitizensnetwork.org/disparity-of-force-video> . Login is required; if you need username or password help, please [email](mailto:) or call us at 888-508-3404 during business hours.



## **Editor's Notebook**

by Gila Hayes

August was a busy month, with the nice side-benefit that the workload included tons of emails and phone visits shared with Network members. A few reminded me of reminders I need to pass along to members.

### **Sound the Alarm!**

This summer, we had several calls in which members asked for funding to pay lawyers to resolve legal matters that had absolutely no element of, nor connection to, using force in self defense. When a call starts with the words "I have a legal problem," we reflexively go to DEFCON 1, owing to our great concern that no Network family member should face the legal system alone after defending himself or herself.

When paying legal expenses from the Legal Defense Fund we also have to exercise caution to stay within the reasons for the Fund's existence. Our Legal Defense Fund exists to pay the costs of the legal defense of use of force in self defense on behalf of members. As responsible stewards of the Fund, we must not fritter it away on gun-law violations, fall out from negligent or unsafe actions with guns, or other crimes that cascade into restrictions on gun possession.

Still, we get "Help me!" phone calls from members and non-members alike. Some call immediately after a Bad Occurrence; others reach out when served with summons to show up at court to explain their actions. Over the years, when called on to assist with problems clearly not related to an act of self defense, the underlying situations have ranged from accidental discharges, car accidents, missing, stolen or left-behind guns, trespassing, revocation of concealed carry licenses after being cited for driving while intoxicated, and lesser issues that still, if left unresolved, can result in loss of gun rights. Members, we will help you if we are able, but please remember, our after hours emergency phone and our monetary assistance is for the legal defense of acts of self defense only. For example, if you have an accidental discharge, we won't be able to pay a lawyer to negotiate with your neighbor about the damage done.

### **Less Pressing Matters from the List of Things We Can't Do**

Every now and again, we're asked to extend the household member discount for a member's adult offspring who live independently, in their own homes, far distant from our mem-

ber. In one charming conversation, a gentlemen explained that Southerners consider their adult children – no matter how aged or how far they've move away from home – to still be part of their households. It was a sweet sentiment, but I had to explain that the intent of our household discount was to recognize people living under the same roof, and sharing a single USB thumb drive with our member education videos and the book "Deadly Force" by Massad Ayoob which we include in our new member packages. The cost of our educational package has quadrupled since the early days when we opened the Network and started distributing video lectures, at that time on DVD discs that cost 75 cents each to replicate. Those were the days!

Sometimes new members question the price difference between new memberships and the discount we offer our loyal renewing members. The cost to provide and mail a member education set to new members is a big part of the higher cost. Explaining that occasionally spotlights a potential member who doesn't care to educate himself or herself and is interested in the Network only as a resource to pay legal expenses after gun use. That is what investigators call "A Clue!" After we talk about the importance of education for armed citizens, if the applicant remains disinterested, we decline their membership application. What? Turning down business? Yes, because we know that the educational videos and book are essential to members understanding use of force, when it is lawful and when it is not and when it can be avoided.

### **Surviving in the Age of Inflation**

Now that the 2023 dues rate has been in effect a full four months, we continue to hear from a few Network members who find they're unable to afford the \$10 per year increase implemented in May. That is always sad. We avoided a rate increase for as long as we could – the last time dues went up was 2015! Even so, since the increase, we've talked and corresponded with members who were displeased that dues were higher than years past. We covered the reasons in March's journal ( <https://armedcitizensnetwork.org/march-2023-presidents-message> ), and since there's been no relief on the inflation front, there's no reason to rehash it.

Since I don't think any of us are seeing much relief at the gas pump, the grocery store, or when the rent comes due, I remind members that I'll send you a \$10 off renewal coupon if a new member names you as the person who encouraged them to join the Network. We want to meet your friends, family and associates, so please introduce them to us, and take advantage of this way to save a little on your next Network renewal. You'll also be doing a solid favor for someone who needs to be part of our organization, as well as increasing the Network's strength and capabilities.

## ***About the Network's Online Journal***

The *eJournal* of the Armed Citizens' Legal Defense Network, Inc. is published monthly on the Network's website at <https://armedcitizensnetwork.org/our-journal>. Content is copyrighted by the Armed Citizens' Legal Defense Network, Inc.

Do not mistake information presented in this online publication for legal advice; it is not. The Network strives to assure that information published in this journal is both accurate and useful. Reader, it is your responsibility to consult your own attorney to receive professional assurance that this information and your interpretation or understanding of it is accurate, complete and appropriate with respect to your particular situation.

In addition, material presented in our opinion columns is entirely the opinion of the bylined author and is intended to provoke thought and discussion among readers.

To submit letters and comments about content in the eJournal, please contact editor Gila Hayes by e-mail sent to [editor@armedcitizensnetwork.org](mailto:editor@armedcitizensnetwork.org).

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We welcome your questions and comments about the Network.

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