

Use of Force

Introduction: The Basic Issue

In the United States, it is illegal to harm another person intentionally.

That is the law at its most basic level. The names given to crimes involving such harm range from battery to murder, but the general idea is simple: If you poke someone in the eye, you can safely assume that you're breaking a law.

However, there are circumstances that may justify your action, or at least mitigate the punishment. These vary, but the relevant consideration to this discussion is common sense: self-defense.

If you poke someone's eye to prevent him from poking you, are you still committing a crime?

Well, not really, but it's more complicated than that. A killing is a killing; an eye-poking is an eye-poking; a stabbing is a stabbing, and so forth. If the evidence supports that you did such a thing, and you're prosecuted for it, and you don't deny it, then it's a crime. You can, however, make the case that you were *legally justified* in your actions, and if you can prove that, then you're clear. But while establishing that you did the eye-poking is the prosecution's problem, establishing justification is yours—your burden of proof.

That's the basic issue—legally justifiable use of force—and though this is a gross oversimplification, it gets at the core of the matter. It also introduces the goal of this website: to provide basic, accurate information about how US law today addresses the justifiable use of force for self-defense purposes.

We will walk you through the “ground rules,” so to speak, to give you some idea of this complex and messy issue. It's so complex, indeed, that there aren't any straight, easy answers, and it's particularly important to understand that we can't give you personalized legal advice. For that, you must consult a good lawyer.

Although the general principles are fairly clear, the law itself, its interpretation and application in *individual* cases, and its numerous state-by-state variations are not at all simple or straightforward. Therefore, we emphasize that all practical summaries, including this one, come at the cost of some legal precision. Our focus is on giving you information that you can use, not making you a lawyer.

Fortunately, it's not hard to grasp the simple fundamentals that will hold true across the country and throughout the tangled judicial system. Our ultimate goal is not only to educate, but to provide you with a working knowledge of issues that can and may affect you. Hopefully they never will. But one day, they may.

Lethal vs. Non-Lethal

One important consideration before we enter the bulk of this information is understanding the difference between lethal force (that which a reasonable person would assume to cause death or grave harm) and anything less (non-lethal force).

Much of the literature, instruction, and legal prosecution that addresses these issues concerns lethal force. The reason is simple: Homicide, no matter what the circumstances, is a big deal. Giving someone a broken jaw in a bar brawl is much less serious for everyone involved.

Legally, a line is sometimes drawn between lethal and non-lethal force, and sometimes not. However, we have chosen here to view situations involving force as generally homogenous, for two reasons: first, for simplicity, and second, because the basic precepts the law uses to establish justification for using force apply to using virtually all degrees of force. If a situation justifies kicking someone, generally speaking, you can use the same guidelines to decide whether you're justified in shooting someone else. As a result, although many of the statements and examples given here will be focused on lethal force situations, you can feel free to apply their general principles across the board.

Step One—The Central Ideas: Ability, Opportunity, Jeopardy, and Preclusion

The use of lethal force that can end in homicide is justified in the situation of immediate, otherwise unavoidable danger of death or grave bodily harm to the innocent. — Massad Ayoob

That statement by Mr. Ayoob, one of the premier authorities on these matters, is a succinct summary of the basic elements of any justifiable use of force in self-defense. Essentially, it is very simple: In order to determine justifiability, the courts want to know that you *had to do what you did*. Since “had to” is a pretty subjective judgment, it is legally defined, usually in the following way:

Ability

Your attacker must have the ability—the physical, practical ability—to cause you harm. Common sense applies here, as does context. A gun gives your attacker ability (lethal ability, in fact); a knife gives ability as well. Indeed, most weapons qualify, all the way down to glass bottles, baseball bats, and screwdrivers. While the latter are not *designed* as weapons, if they are applied as such, they can certainly kill you just as dead.

Other “ability” considerations include disparity in size or physical power between you and your attacker—a very large man versus a very small man, a strong man versus a cripple, a trained fighter versus a bookworm, a man versus a woman, all can apply. And don’t forget disparity in numbers—four men attacking one can very easily kill or cripple, unless that one is a Hollywood action hero.

Most of the above are valid lethal force scenarios, but non-lethal force uses the same standard. Just about anyone can punch you and break your nose, or break your arm, or bruise your stomach.

In short, common sense is a more or less effective guide on this point. The important question is simply whether, as far as you know, the attacker has the ability to harm you—kill or maim you, if you respond with lethal force, or lesser degrees of danger for equivalently lesser uses of force.

Opportunity

Although opportunity can be viewed as a subset of ability, it is an equally important criterion. Basically, while your attacker may very well have the *ability* to cause you harm, it means nothing unless he also has the *opportunity* to do so—right here and right now. After all, there are probably countless criminals in the world who “could” kill you and might do so, given the chance; but they aren’t standing in front of you at this moment, so they don’t have that opportunity.

The biggest consideration here is range or proximity. Although a man with a gun is considered dangerous at any reasonable distance, a man with a knife standing 300 feet away is not, simply because he cannot stab you from that far away. Yet there is another factor, as well. If he were standing mere yards away, he *still* probably couldn’t reach you with his knife, but because it would *only take him moments* to approach you and change that, he would still be considered dangerous. A common police standard is to assume that a knife-wielding assailant is capable of covering 21 feet and striking with the blade in 1.5 seconds. Mull on that time span.

Some other considerations may apply when it comes to Opportunity. For instance, is a knife-wielding assailant behind a locked door a threat? Probably not. Therefore, if you were to shoot him through the door, that would not be justifiable. On the other hand, if he started—successfully—breaking the door down, then he would promptly become dangerous again. Again, use common sense.

Jeopardy

The most subjective factor of the AOJP analysis is the jeopardy requirement, sometimes called “imminent jeopardy.” This criterion requires that, in your specific situation, a “reasonable and prudent” person would have believed himself to be in immediate danger.

In other words, jeopardy is what distinguishes between a *potentially* dangerous situation and one that is actually dangerous. Hundreds of times every day, you walk by people who *could* punch or stab or shoot you. The reason you aren’t “defending” yourself against them is because you have no reason to think that they are actually about to attack you. (Why would they?)

On the other hand, if someone screams a threat and points a gun at you, any sane person would expect that behavior to indicate an intent to cause you harm.

It’s important to recognize that you cannot *actually know* this person’s intent; you are not a mind reader. All you can judge is his outward appearance and demeanor, which, in that case, are consistent with harmful intent. If it

turns out that he was joking, or lying, or the gun was fake, or he wouldn't actually have pulled the trigger, nothing changes, because you could not have known those things.

The other important qualifier to remember is that the jeopardy must be *immediate*. A general threat to your well-being in the distant future is meaningless, but "I'm gonna kill you right now!" is meaningful.

Finally, it's essential to understand that the "immediate jeopardy" condition can go away at the drop of a hat. On the one hand, if you are attacked, beaten, and left lying in an alley, you are *not* justified in shooting your attacker in the back as he walks away, because he will have ceased to be a threat. On the other hand, if he turns around and comes back for more, then the immediate jeopardy resumes. Jeopardy can cease suddenly and unexpectedly if your attacker surrenders or clearly ceases to be a threat (if you knock him unconscious, for instance, or he tries to run), and continuing to use force in such situations can change your action from legal self-defense to illegal battery in moments.

Preclusion

Preclusion is not so much an individual consideration as it is an all-encompassing lens through which to view your actions. More complex than the others, it is nevertheless just as important. It is the idea that, whatever the situation, you are expected to use force *only as a last resort*—that is, only when the circumstances *preclude* all other options.

In other words, even when the ability, opportunity, and jeopardy criteria are satisfied, and knowing that you must clearly do *something* to protect yourself, the use of force, particularly lethal force, may only be that "something" if you have no other safe options.

The word "safe" is key there, because at no time does the law ever require you to choose an action that endangers yourself. If you can run away or retreat, you should, but if doing so would put you in harm's way, you are not required to do so.

Preclusion is the factor that is missing in most self-defense arguments, and thus the reason most fail. You must remember that you bear the burden of proof; until you prove otherwise, the law merely sees two equal citizens in a dispute. You can say, "He tried to hit me," but then the police and the courts will ask, "Why didn't you _____?" You must have no options to offer to fill in that blank—there must have been no other courses of action you could have taken to maintain your safety except the use of force. Otherwise, you're just fighting because you want to, and that's a crime.

Does the Preclusion standard mean that an ultimatum like "give me your money or I'll hurt you" requires you to, well, give him your money? Unless you honestly believe that he may hurt you anyway, yes. The law values "life and limb" above property. Or you can refuse, but you may not respond with a fist. He's giving you a choice, which, by definition, means that you still have options other than force.

The point is simply that you must exercise self-restraint to the greatest extent possible. One vital aspect of this requirement concerns the *appropriateness* or *degree* of the force you employ, or how well suited your response is to the threat itself. If a man punches you, you probably cannot justifiably shoot him, because that's a lethal response to a non-lethal attack. If a three-year-old punches you, you probably cannot do anything at all. If, on the other hand, a 300-pound boxer punches you, you may be justified in responding with deadly force, because his fists can be deadly as well.

Always remember:

1. The threat must be current, immediate, and unavoidable.
2. Your level of force must be appropriate to the threat.
3. Your use of force must stop when the threat ceases.

If at any point you smudge the first, exceed the second, or forget the third, you are running the risk of a criminal indictment—and if the results are glaring (e.g., you killed him), it's nearly certain.

Knock your attacker over—then keep stomping on him while he's down and not moving? Bad. Pull a knife and slash—and keep slashing when your assailant pulls away? Uh-oh; now you're not only breaking the rules, you're

leaving “defensive wounds,” a signature of cuts and marks which forensics experts will use to prove that *he* was an unwilling victim.

Step Two—Unjustified Force: Misconceptions and Exceptions

With a basic understanding of the precepts of Ability, Opportunity, Jeopardy, and Preclusion (or AOJP), and additional research on your part, you can begin to judge most situations accurately. However, there are a few common areas of confusion that bear clarifying.

Verbal Threats

In and of themselves, verbal threats are fairly meaningless. (They may constitute a crime under harassment laws, or something similar, but that’s not relevant here). However, they *do* matter when they denote or imply serious “jeopardy.”

In other words, suppose somebody sends you a threatening email. Are you justified in driving to his house and beating him up? Probably not. Every aspect of AOJP is missing, most of all the third: If someone actually wanted to hurt you, would he send you an email about it? It’s pretty unlikely that you (or any “reasonable and prudent” person) would consider this an immediate threat, even if it is sincere.

On the other hand, suppose a young man bearing gang tattoos and carrying a metal pipe approaches you in a parking lot at night, appearing to be under the influence of drugs, swinging the pipe, and yelling that he’ll bash your brains in. Now, not only are the conditions of Ability and Opportunity fulfilled, the threat itself (of imminent physical harm) is also credible. Context, context, context is all! A meek gray-haired grandmother saying the same thing in a book store probably won’t invoke fear in your heart, and rightly so.

Anything expressed verbally or in another non-physical fashion that does not denote or imply immediate physical jeopardy is *not* legal justification for the use of force. Insults are not. Generic shouting is not.

Lawful Force

One case in which you are not justified in using force, whether or not you follow the rules of AOJP, is when the situation you’re responding to is a lawful one. The most obvious possibility is a lawful police action.

If, in the rightful execution of his duties, a law enforcement officer grabs you, throws you to the ground, and handcuffs you, shouldn’t that justify your hitting him back? No. If he were just some guy on the street it would, but the fact is, a cop is legally allowed to do what he’s doing—it’s necessary to do his job. If you respond with force, it is not justified and you would be breaking the law.

There are exceptions to this, depending on certain technicalities and issues concerning *degree* of force—basically, whether the officer himself was acting legally—but they’re nothing to stake your life and liberty on. Check your state legislation for exact details.

Required Retreat

One commonly misunderstood facet of justified self-defense is so-called “required retreat” laws, which a number of states have enacted.

The idea here is to encourage you to retreat (in other words, run away), if it’s at all possible. “Required retreat” is meant to discourage force in situations where you *can* use force but do *not have* to do so. If you’re driving in your car and someone starts yelling at you from the sidewalk, should you drive away, or run him over? Gee

In short, “required retreat” is largely just a clarification of AOJP, specifically of the Preclusion condition. If you have any other options, including retreat, use them before you use force; however, you needn’t use them if doing so would put you in danger. “Required retreat” laws do not change this fundamental right.

“Castle Doctrine”

The so-called “castle doctrine” is another type of law enacted in many states, which essentially provides a partial exception to the rule of Preclusion.

If you are in your home, it says, you are not expected to retreat from it. If a burglar breaks down the front door, you need not climb out a window or dart out the back door. Doing so may very well be the *smart* thing, for your safety, but *legally*, you're not required to flee your own home. This comes from the ancient notion that your "house is your castle," and you should not be expected to cooperate in being chased out of it. So if you feel legitimately threatened within your home and have no other options except to run, appropriate force is justified. Check your state laws to see whether this applies to you.

Defense of Property

You are generally permitted to use *minimal* force to remove a trespasser from your property (someone on your property who has no lawful claim to it, whom you have *asked to leave* and who has refused), but you may not cause him serious harm unless he is violent, in which case the usual AOJP rules apply.

You cannot shoot someone for stealing your car. You cannot shoot someone for stealing your wallet. You cannot shoot someone for wandering over your property line. In the eyes of the law, life has priority over possessions—even a criminal's life. You may defend your *own* safety with the use of force, but not your stuff.

Defense of Others

But how about defending your family, friends, or a stranger? You are generally permitted to use the same amount of force, under the same rules, in defense of another person as you would in self defense. However, while this is technically the case, unless the third party is a close friend or family member, doing so can be a very risky proposition simply because you do not always know the whole story. For instance, if you turn a corner and see one man hitting another, he may be defending himself from an earlier attack; he may be a plainclothes police officer; or he may be protecting someone else altogether. AOJP applies, but it's more difficult to judge because appearances can deceive. You may not know everything. Be wary.

"Fighting"

Engaging in a fight, or consensual combat—in other words, a brawl where all parties willingly (even if implicitly) agree to be involved—strips all participants of any justification for the use of force. You all may be prosecuted, or none of you may be; check your state laws. Unless serious injury results, even if you *can* be charged, the chances are that the DA's office (District Attorney) won't bother; they'll just look at it as a brawl.

Remember, though, that a fight can turn into a case of one-sided battery within moments. Is your opponent starting to lose and trying to withdraw? Better stop hitting him, because he has withdrawn his consent to fight. What if you're having a fistfight, and one of you breaks a chair over the other's head, or pulls a knife? Odds are that's illegal, too, because both parties didn't "consent" to a knife- or chair-fight. Fighting is dangerous legal ground.

Step Three—Civil Law

Martin Cooper explains self defense as a four-part challenge, where only a victory on all four constitutes a true win:

1. *You must be able to perform*
2. *You must defeat your opponent*
3. *You must be cleared of all criminal charges*
4. *You must be cleared of all civil charges*

Civil law is a world apart from criminal law, and just as complicated. Why is it relevant here? Because it is vital to realize that even after surviving the confrontation and winning the criminal case (or avoiding prosecution altogether), you may still face a civil lawsuit, and should expect to.

The good news is that the tenets of civil prosecution generally parallel those of criminal law in matters of self defense. If you were wholly justified in your actions, you should have a sound defense against your attacker suing you, and indeed, may have a case to sue *him*.

However, the standards and the burden of proof are different in a civil court, so the issue is more complex. Although a criminal charge must be proven beyond a “reasonable doubt,” a civil charge must only be proven by a “preponderance” of the evidence—in other words, the criminal charge needs to be a very strong case, whereas the civil one simply needs to be stronger than yours. It’s entirely possible to come out clean in the criminal case, yet still have to pay fines in civil court, if your actions merely *seemed* inappropriate, yet couldn’t be proven so beyond a reasonable doubt. And in the litigation-happy US, if you’re brought up on a criminal charge involving use of force, you might as well assume that you’ll be sued as well. This is yet another reason to use as much restraint as safely possible.

Step Four—Applying it All

Now that you’ve got a sound—though basic—understanding of the relevant laws, how can you apply it? Well, you must use your judgment, as always. No two situations are the same. However, here are some guidelines that you may find useful:

- Prepare by researching the self-defense laws in your state. If you carry a knife, gun, or another weapon, look into those laws, as well. Understand that if you use a weapon in a violent confrontation, even if it is technically legal to do so, prosecutors may be looking at you for *mens rea*, or “guilty mind.” If you are carrying a ten-inch fighting knife useful for nothing but combat, law enforcement will wonder if you *wanted* to stab someone. State of mind is a big deal; it may influence a decision to prosecute, and if you are charged, will certainly come out in your trial when the DA portrays you as someone who was ready and willing to fight.
- If you’re going to carry a weapon—a gun, a knife, or whatever—first *get trained in its use*. Not only do you need to know how to use it, for your own safety and the safety of those around you, but you also need to know the legal ramifications of its use. If you carry a gun, there are good (albeit expensive) on-site tactics and handling courses you can take that will also address legal issues. There is also an excellent seminar expressly devoted to the legal angle, Massad Ayoob’s [Judicious Use of Deadly Force](#). Specific training and further information can be found as well concerning knives and non-lethal tools like pepper spray, though as in all research, make sure your source is credible. When in doubt, the laws themselves (ideally through the eyes of your lawyer) are the surest source.
- Do what you can to avoid potential altercations altogether. Stay away from places where your safety is not assured (parking lots, alleys, or streets at night in the wrong part of town, and certain bars and other establishments where you don’t feel in control). Stay in groups of people whom you can count on to be on your side (friends or acquaintances if possible). Do not appear weak or vulnerable, and do not behave in ways that make attacking you easy.
- If a dangerous situation threatens, do what you can to defuse it. Don’t rush to “skip ahead” and start preparing for a fight as soon as someone speaks to you aggressively; be prepared, but be optimistic. Act cordially, apologize, move away; buy your antagonist another beer; give up the seat—be polite, but act with confidence. In short, pursue all available avenues of speech or interaction that do not lead to violence. Do this even if it seems futile; at the very least, you will establish for any witnesses that you did not want this fight. If necessary, state *loudly* that you don’t want to fight, that you want to leave; you are creating witnesses who might otherwise see nothing, or miss the initial confrontation and only see you hitting the other guy. If the situation appears to be deteriorating, continue your peacemaking efforts, but also ensure that you are positioned to escape if necessary, and are not vulnerable to a surprise attack. Make a mental note of the things that indicate danger to you so that later you can relay them to the police.
- If violence seems imminent, leave. If necessary, run. After escaping the immediate danger, head toward safety—a well-lighted public area, a police station, an emergency room (where police can often be found). If leaving a bar, restaurant, or other venue, do not return anytime soon.
- If you are unable to avoid or escape a violent encounter, and you are either certain that you are about to be attacked or have already been attacked, respond immediately and without hesitation with the amount of force necessary (and no more). This does not mean to start fighting; your assailant’s actions may be

designed to harm you, but yours should be designed only to restore your safety. If a small amount of force opens a window of escape, take it—don't forget that you can run just because force has already been used.

- Once the immediate danger is over, stop the use of force. If your assailant used a weapon, secure it, if it is safe to do so. Move at once to a place of safety. Do *not* stay in the area even if your assailant is incapacitated (or dead). If possible, do take note of any potential witnesses. If you have a weapon, put it away (do *not* ditch it). Do not tamper with the crime scene.
- As soon as safely possible, call the police. Describe the immediate situation, give your own location and the location of the altercation, and request medical assistance for yourself and your assailant, if needed. Try to give only the necessary information. (“I need an ambulance” is good; “I done killed some hombre and I liked it!” is not so good.)
- When the police arrive, identify yourself. If you used a weapon and still have it on you, tell them so in non-threatening manner. Do not be alarmed if they handcuff you. Cooperate but tell the police only those facts that are necessary for them to know immediately (e.g., point out injuries, witnesses, etc.). To be safe, say nothing more at all; you are under a great deal of stress and the adrenaline is pumping, which may lead you to say things you do not mean. Explain this to the police and tell them that you will not make a statement or answer questions until your attorney is present. ([Here](#) is an outstanding and compelling run-down of the reasons why not to talk to the police, whether innocent or guilty, presented by an attorney and an active-duty officer.) Do not apologize or verbally express remorse for what happened; remember, your actions were justified.
- When the paramedics arrive, seek treatment whether you are aware of any injuries or not. You may be wounded and not realize it, and shock is a danger regardless.
- If you have a criminal attorney, call him/her as soon as possible. If he can meet you at the scene, have him do so; give him the details and have him relay them to the police.

Obviously, this step requires that you already have an attorney, and you should; if you have any kind of high-risk lifestyle, you should consider keeping an attorney on retainer, which will facilitate bringing him to the police station at 1:00 in the morning. At the least, you should know a good attorney you can call—which means getting recommendations from within the legal field, not looking through the phone book. And the one you pick should be someone not only versed in criminal law and self-defense cases, but someone who is able and ready to defend an innocent person—a matter that is a world apart from defending a guilty one.

The [Second Amendment Foundation](#) keeps a referral list of lawyers who specialize in firearms cases.

Continue to politely but firmly decline to answer police questions until your attorney is present. Do not speak to the media under any circumstances.

Step Five—State Laws

We have given you the general principles that determine the justifiable use of lethal force, but to know exactly how they're applied in your state—which at the very least may have exceptions, additional clauses, or different wordings—you'll need to research its specific statutes. There are a few ways to go about this:

The Web

Information on about everything can be found online, and state law is no exception. There are two routes to this.

The easiest method is to find the *criminal jury instructions* for your state. These can often be located online, either all together or divided by subject; you'll want the section on murder or assault, nearby which should be comments on justifications, including self-defense. This is the material that is read to the jury in a trial involving such issues, and as such is generally both very accurate to the law, and quite clear for the layman. In a direct sense, this is more or less how you'll be judged, should you end up in court. Not every state makes these easily available online, though diligent research (via LexisNexis or Google) should turn it up most of the time.

The harder, but more comprehensive method, is to find the actual text of your state's *criminal statutes*. Cornell University Law School's Legal Information Institute maintains [a web page](#) that lists links to the statutes for 49 of the 50 states. This resource makes it easy to find the appropriate legal texts for your own state, and you can dig through it to the appropriate sections on justifications. Unfortunately, most of these statute archives are not particularly easy to use; you may have trouble nailing down the specific sections you're looking for.

A good resource for researching weapon possession, so-called "carry" laws, and other pertinent legal matters is [HandgunLaw.us](#). You can pull up the page for your state and read detailed breakdowns of exactly what items you may carry in your state and how they may be carried.

In addition, [Google](#) (or your favorite search engine) may yield other unofficial Web pages (rather like this one) that give relevant discussions or information. Beware of biased or inaccurate material, though; lots of inaccurate material is available on this subject. Use common sense and what you've learned here to test for accuracy. Finally, any Internet pundit who doesn't provide his sources is to be doubted.

The State Attorney General's Office

The office of the Attorney General for your state is the guiding force for all state legal matters. A quick search online should yield its Web site, which should include contact information; give them a call and staff attorneys should be able to answer your questions.

The advantage of taking this route is that you're going straight to the source; other than District Attorneys, perhaps, there probably isn't anyone who's more "in the know" about your state's laws than the Attorney General. The disadvantage, however, is that you may find yourself talking to a low-level clerk or public relations officer who isn't really much better informed than you are. As always, be wary, and if you suspect you're getting inaccurate information, ask to speak with someone else.

Your Lawyer

At the end of the day, few sources are as useful as a *good* criminal defense attorney who specializes in this field of law. Even if you never have to make that 1:00 AM call asking him to come down to the police station, your attorney can still be extremely valuable as a source of information; he will surely know things about the laws in your state that you'll never find on your own.

Talk to him! It's worth the money, and if you get the information you need, you'll only have to do it once. Listen carefully, take notes, and use the information from this site to help you ask the right questions.

Sources and Contributors

Sources used in gathering the information presented here include:

- Articles by Massad Ayoob, originally published in *Shooting Industry*; most of the 10-part series is available online here: <http://www.findarticles.com/p/search?qt=Explaining+the+deadly+force+decision&t=b=art&qf=free>
- A summary by Ron Hartman, from two printed sources, online here: <http://tkdtutor.com/07Defense/Laws.htm>
- Personal remarks made by Marc MacYoung
- Personal remarks made by Alain Burrese, Douglas Patt, Toma Rosenzweig, Martin Cooper, MG, and other members of the [Animal list](#) email listserv
- An online portal for legal texts created by the Legal Information Institute at Cornell Law School, here: <http://www.law.cornell.edu/statutes.html>

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