Transcript: Make the Aggressor Work for the Fight

0:00 · Don West I'm Don West, National Trial Counsel for CCW Safe, and I'm here with Andrew Branca of LawOfSelfDefense.com, a nationally recognized expert in use-of-force law. You know, Andrew, we know that you can avoid being convicted if you don't get prosecuted. You can avoid being prosecuted if you don't get arrested. And you can avoid getting arrested if you don't kill anybody, even if it would otherwise be legal. So, I've heard you talk about making the other guy work hard at… you say it better than I do. When you talk about making the other person work hard before you use force in self-defense, what are you talking about?

0:52 · Andrew Branca Sure. So, one of the things that's really important for people to keep in mind is, the moment you get engaged in that confrontation, you've just incurred two risks you were not incurring a moment before: a greater-than-zero risk of losing that physical fight, and a greater-than-zero risk of losing the legal fight. We learn self-defense, we get a gun, we get a concealed carry permit, we carry pepper spray. We do all those things to reduce the risk of losing the physical fight to as close to zero as we can possibly make it. But the risk is never zero. You could always lose that physical fight. It just might not be your day.

1:33 · Andrew Branca Well, the same is true for the legal fight. You can take my classes, read my books, do all kinds of stuff to reduce your risk of losing the legal fight as close to zero as possible, but it's never actually zero. There's always a greater-than-zero risk that you could be convicted for that use of force. And what I urge people to do is think to themselves: if I've used force, if I've taken another human life, I'm charged with murder, I go to trial, I get convicted, and I'm sentenced to 20 years in prison, under what circumstances would I be able to look in the mirror on the last day of that 20-year sentence and say, "You know what, it was the right thing to do. Pressing that trigger was the right thing to do, and if I had to do it again, I would do it again"?

2:18 · Andrew Branca Because there are circumstances in which it's worth that cost, right? It's better to be alive in prison than dead. If your wife or your children were at risk of dying or being maimed, that would be worth it. But the truth is, if you think about it, I think you'll realize there's a very short list of things that are worth going to jail for much of the rest of your life for. And unless the circumstances fit one of that very short list of items, it's probably not a circumstance in which you want to risk having to shoot another person.

2:55 · Andrew Branca To put it another way, I urge people to choose their tactics and make their decisions in such a way that if they're ever compelled to use deadly defensive force against another person, they made that other person earn that. They made that other person work for that. They did everything in their power for that not to happen, and that other person made it impossible, made it their only last resort to have to use that deadly defensive force. Unless you've done that, I think it would be very difficult to spend 20 years in jail and feel like that was the reasonable and appropriate place to be.

3:33 · Don West So the idea of avoiding any conflict that you can avoid makes the risk zero at that point.

Andrew Branca Yeah. The only way for the risk to be zero is to not be in the fight.

3:48 · Don West Let's talk a little bit about some of the things you can do as a practical matter. I know it kind of blends into tactics, but what are some of the things that you can do if you are being approached by someone and you're a little worried, they're doing something scary? We've talked about that before, in the hypothetical parking lot situation. You're there at your car, maybe fumbling with stuff, and all of a sudden, you see somebody off in the distance, headed your direction, and you're concerned. You don't see something that makes you genuinely fearful, but you're a little worried about what's about to unfold.

4:23 · Andrew Branca Well, there's lots of things you can do, but they're all geared, again, towards making that other person work for it if there's going to be a fight. So, for example, everyone's familiar with the phrase "stand your ground." Some states are stand-your-ground states; some states impose a legal duty to retreat before you can use force in self-defense. In fact, only a small minority, only about 13 states, impose a legal duty to retreat before you can use force in self-defense. But folks, if you can safely retreat from a fight rather than get in that fight, and you don't do that, you're a fool. And I don't care if you're in a duty-to-retreat state or a stand-your-ground state. It makes no difference.

5:00 · Andrew Branca Your job is to make it hard for that other person to compel you to use force against them, if you can, consistent with safety. Again, the priority is winning the physical fight, so I'm not saying to increase your jeopardy. But if you can, consistent with safety for yourself and other people you have a duty to protect, avoid that fight by retreating. Please take advantage of that opportunity. If you're facing a prospective threat in a parking lot and you can take two steps, consistent with safety, and place a vehicle between you and that scary character, please do that. It's effortless. It's completely safe. It costs you nothing. And it's making that other person work hard to compel you to have to use force against them. That's the circumstance you want to put yourself in.

5:48 · Don West So not only are you, in that context, stripping away the ambiguity that we talked about on other occasions, you're making the person go through all of those necessary steps to get at you, basically, at which point, if they insist on you responding, then you're prepared to do that.

Andrew Branca Absolutely right.

6:14 · Don West Let's talk a little bit about avoidance in that sense. I'm the one who came up with this for myself, because it helps me explain certain factual scenarios and legal analysis: this notion of the avoidance mindset, or the stand-your-ground mindset. You've touched on it in a way. The stand-your-ground mindset, in a stand-your-ground state, essentially would be: "I have the legal right not to retreat, to stand my ground and confront any force that's used in whatever legal way I can. I have no obligation to retreat, so I won't." As opposed to the avoidance mindset, which may be legally required in those 13 states. But at the same time, what you're saying, I take it, is it makes the most sense, if there's any way to avoid that lethal confrontation, to take advantage of that, because then you're not injured and you're not arrested.

7:12 · Andrew Branca Right. Any way to do it consistent with your own safety and the safety of those you have a duty to protect. I mean, the stand-your-ground mindset is a mindset that's effectively saying, "I'm willing to get into physical confrontations when I don't need to." I suppose you may be free to do that under the law, but it's a very foolish life strategy. You're exposing yourself unnecessarily to violence, to a greater-than-zero risk of dying in a fight, to a greater-than-zero risk of ending up arrested, prosecuted, convicted and sentenced to decades in prison, when you don't have to. That simply makes

no sense, if you can as effectively secure your safety and the safety of those you have a duty to protect by not getting in the fight in the first place.

7:58 · Don West You know, you've talked about, in some of your written materials, the 10 common mistakes that people make in understanding self-defense law, and one of them is ego. You say don't let your ego get involved. Would you talk about that a little bit?

8:13 · Andrew Branca Yeah. Well, ego's expensive, folks. If ego gets you into a confrontation, you use force, you end up criminally charged. I mean, Don and I both know, we've both worked on a lot of different homicide cases where someone's been killed and the killer is now claiming self-defense. Those people are looking at spending easily over $100,000 before they ever get to trial, folks, in pre-trial expense, and a multiple of that when they get to trial. Even if they're acquitted, they're still out all that money. And there's no guarantee you'll be acquitted.

8:45 · Andrew Branca I tell the people on whose cases I consult: I don't care how innocent you may be in reality, if we bring you to trial and put you in front of a jury, there's a greater-than-zero chance that you will be convicted by that jury and spend much of the rest of your life in prison. Why? If you don't have to, don't let your ego put you in a cage for much of the rest of your life. Remember the core mission, folks. The core mission is to survive the fight. That's it. That's the core mission. And if that means that the other person gets to be mean to you or say nasty words, and you don't get to punish them somehow, folks, that's fine. That's not what matters. What matters is the core mission, which is securing your safety and the safety of those you have a duty to protect.

9:33 · Don West I think a lot of people have a naivete, or almost an ignorance, of how the criminal justice system actually works: the roles that the prosecutor plays, that they have an ego involved. They want to win the case. They want to advance within the office. Maybe they want to run for political office one day. And if they don't get you in their sights, then they can't do any of that on your back.

9:58 · Andrew Branca One of the most common things I hear from people who are being prosecuted is that they can't believe they're getting prosecuted for self-defense. They can't believe it, because they know in their head they're the good guy. But of course, nobody else who's evaluating their conduct after the fact can know that, because they weren't there. They're not familiar with this person. All they can do is look at the evidence and make what they think are reasonable inferences from the evidence.

10:21 · Andrew Branca And unfortunately, sometimes these decision-makers may be making unreasonable inferences from the evidence. Maybe they have some other internal motivation for pursuing this case, as you say: aspirations for higher political office.

Don West You know, in some district attorney or state attorney's offices, the individual prosecutor assigned to the case has complete control over it. In other offices, they have virtually no control; they take their marching orders from someone up the line. It may in fact be the elected official who's facing an election in a few months and wants to get in the paper. Now, I don't assume that they're being disingenuous or that they're corrupt, but at the same time, we know that if you get your name in the paper for prosecuting somebody, you're going to get a few votes along the way.

11:05 · Andrew Branca Sure. And the key message for all of the lawful defenders out there is to keep in mind that, again, once you've gone hands-on in that confrontation, all this decision-making about how the rest of your life is going to look is outside of your hands. Someone else is making those decisions.

That prosecutor is making those decisions about whether you're going to be compelled to spend much of the wealth you've acquired over a lifetime of hard work on a legal defense.

11:35 · Don West All your money. I mean, that's what it kind of boils down to. It almost doesn't matter how much money you have; it's going to cost you all of the money. What a lot of people don't understand is it can cost as much in experts and investigation and trial preparation as it does for legal fees. The lawyer fees themselves are just a drop in the bucket. And as you touched upon, it's so critically important: the individual absolutely loses control over their life once they're in the criminal justice system. And for someone to say, "Well, if I get convicted, I'll just appeal. I'll take it all the way to the Supreme Court," we know that can't happen, from a jurisdictional or procedural standpoint. And even if it did, you're going to be spending those four to six years in prison waiting for it to happen.

12:20 · Andrew Branca Another very common misconception is that so many people seem to think that the appeal is like a do-over of the trial, and it couldn't be more the opposite. When you go to trial, you're presumed innocent until you're proven guilty beyond a reasonable doubt. If you're convicted, you've been proven guilty beyond a reasonable doubt. All the presumptions on appeal are against you; they're no longer in your favor. It's a much higher uphill battle to win on that appeal than it was to try to win at trial, and you've already lost at trial. Going to appeal is not a winning strategy. It's what you do as a desperate last resort.

13:01 · Don West Terrific advice, as always, Andrew. Thank you. I encourage everyone to take a look at LawOfSelfDefense.com. Take a look at the material that Andrew offers for free. Buy his book, buy the videos, participate in a live class. We are so happy to have you as a partner. Thank you again.

Andrew Branca Thanks for having me. We'll talk again soon, I hope.

Don West Thanks, everybody. I'm Don West, National Trial Counsel for CCW Safe.