

Transcript: When Can You Use Lethal Force?

0:00 • Don West I'm Don West, National Trial Counsel for CCW Safe, and I'm here with Andrew Branca, proprietor, chief author, lecturer and expert extraordinaire with Law of Self Defense. Thanks, Andrew, for joining me here today.

Andrew Branca Pleasure to be here.

0:15 • Don West What I'd like to talk about a little, as soon as you explain a little bit more about yourself so the viewers know where you're coming from, because we're going to talk about legal and maybe even some tactical issues that enter into decision-making along the use-of-force spectrum.

0:30 • Andrew Branca Sure. So, I'm an attorney who specializes exclusively in use-of-force law. I have for more than 25 years. At my law practice, Law of Self Defense, our slogan is: "You carry a gun so you're hard to kill. Know the law so you're hard to convict." And we don't mean by learning legal tricks; we mean by learning what the law actually is. And of course, all these legal frameworks do have tactical implications as well. In fact, one of the things I always like to remind people of, though I don't consider myself a tactical expert but a legal expert in use of force, is that your number one priority has to be not the legal fight, but the physical fight.

1:07 • Andrew Branca You must win the physical fight. If you don't do that, all the legal stuff becomes less pressing. Now, you don't want to win the physical fight and then end up spending the rest of your life in prison, which is where the legal stuff comes into play. But you do have to obviously win the tactical situation, and hopefully do that in a way that's consistent with what the law allows.

1:28 • Don West You know, I'm sure you've seen this comment. I know I get these comments from time to time: "I'd rather be judged by 12 than carried by 6."

Andrew Branca Yes.

Don West And I know it's typically a flip comment, and where it's coming from, but there's in some ways a lot of wisdom there: you have to win that physical fight first before you face the legal challenge. So, when somebody says, "I'd rather be judged by 12 than carried by 6," we always want them not to be carried by 6. We want them to survive the attack on their life. But we also don't want them to be judged by 12, because we want them to understand the rules and the parameters and legal boundaries, so that when they respond to a self-defense scenario, when they're confronted by someone, they act not only tactically appropriately and effectively, but they also act legally, so that they aren't facing an effective prosecutor down the road.

2:30 • Andrew Branca Sure. And of course, it's not a binary choice. It's not either/or. Most of us are responsible adult citizens who prepare to defend ourselves and our families from criminal predators. We take self-defense courses. We learn how to use a gun effectively. And what we're doing when we do those things is we're reducing our risk of losing that physical fight, increasing the chance that we'll win the physical fight. Well, you have to do the same things, if you're a responsible adult, to prepare for the legal fight. You want to learn what you need to do to reduce your risk of losing that legal fight. And you can do both. There are tactical decisions that you can make that not only work effectively in winning that physical fight but also make it much less likely that you'll lose the legal fight that follows.

3:20 • Don West A lot of the questions I get seem to focus on: at what point in time can I go for the gun? At what point in time do I communicate to the attacker that I have a gun? When do I draw it? When do I display it? When do I point it? When do I fire it, on this use-of-force continuum? And I'd like to talk with you about that scenario. Maybe what we'll do is pick a fact pattern that everybody would be familiar with and relate to, that's sort of constant, and then we can talk about how that would unfold and the decision-making process along the way.

3:55 • Don West What came to mind, and I know it's something that you use in your teaching, is: picture yourself in a parking lot, and you see someone approaching you, and you have some decisions to make. So, let's sort of peel that apart a little bit and talk about what you're going to do, what you're going to be thinking, and at what point you're going to be legally able to use lethal force to defend yourself.

4:25 • Andrew Branca So the whole question of when am I allowed to present the gun, what am I allowed to do, this, that or the other thing in self-defense, is really premised on a notion of ambiguity. Where people like us, good-guy cases of self-defense, tend to get into trouble from a legal perspective is not on the extreme ends of the use-of-force continuum. When there's zero threat, obviously, we're just going about our day; we don't do anything. When someone steps around the corner and has a raised machete and is about to strike us with it, well, that's not a complicated legal analysis. You just defend yourself against that obvious and apparent threat.

5:00 • Andrew Branca It's in between those two extremes, in what I call the zone of ambiguity, where we're facing something that's scary, that's genuinely frightening us, but we're not sure what's going on. It's unclear whether or not they're a threat. It's not that 100% threat level; it's something less than that. We're feeling an emotional, intellectual need to defend ourselves, but we're not exactly sure what's going on. That's where people tend to make poor decisions, decisions that create both tactical and legal jeopardy for them.

5:30 • Andrew Branca And that's the parking-lot scenario you describe, where you might be walking through a dark parking lot or parking garage and you realize there's someone 20 or 30 feet behind you. You don't know them. There's something scary about them. They're frightening you, but they haven't done anything explicit yet that's threatening. So, you can't just turn around and shoot that person; they're not threatening you with a weapon, for example. Well, what can you do to better secure your safety in that kind of scenario? I think the real key, when you're in that zone of ambiguity and you're uncertain what to do, is to strip away the ambiguity.

6:06 • Andrew Branca A great way to do that is to give that person verbal commands. Verbal commands are not force. You don't create any legal liability for yourself by simply yelling at somebody to stay back. Yell at them to stay back. Now, if they just happen to be an innocent, normal person who's going about their own business and finds themselves 30 feet behind you, and you turn around and you're screaming at that person to stay back, well, a normal person is going to say, "Holy cow, that's a crazy person over there. I'm not going anywhere near them." If they don't do that, if they continue to close on you when you're screaming at them to stay back, is that behavior consistent with them being a threat? Absolutely it is.

6:48 • Andrew Branca And it's actual evidence from which you can make a reasonable inference that they're a threat, and make decisions to use force in your own defense. But what you're doing with your

voice there is exactly what I described: you're stripping away the ambiguity and uncertainty. You're compelling that person to either stop doing what's scaring you, or to act consistent with being a threat.

7:06 • Don West Well, what if you went for the gun? What if you said, "This guy's obviously coming toward me. I don't need to yell at him. I have a gun. I'll just show it to him, and that'll stop him"?

7:18 • Andrew Branca Well, anytime you're going to be threatening somebody with a gun, which is what you're doing when you display a gun in self-defense (you're threatening to use force in self-defense, but it is a threat of force), anytime you're making a threat of force, you're raising a risk of facing criminal charges.

7:36 • Don West What if, with that threat, you don't pull it and point it at them? You just lift up your shirt, or you just get it and you hold it down here. You don't say anything to them, but you just want to be sure they see it. And then it turns out that they were looking for directions, or you dropped your cellphone and they were bringing it back to you. What have you done when you've gone to the gun before—well, obviously, you just answered my question before.

8:07 • Andrew Branca Sure. I mean, what you've potentially done is put yourself in a position where you could find yourself charged with aggravated assault with a deadly weapon, for having put someone in fear of that deadly weapon, not in response to a threat. They were otherwise innocent. They certainly didn't threaten you to the level for which you could defend yourself with the display of a weapon.

Don West Right.

8:30 • Andrew Branca So in the ideal circumstance, if you're displaying a weapon, you want to be able to articulate that you were facing a deadly force threat. And it can't be a speculative or imaginary threat. It has to be a perceived threat based on actual evidence, things you can articulate to others: why did you reasonably perceive them as a threat against which deadly defensive force would have been justified? There has to be more than that they were just scary.

8:55 • Don West Well, let's say that you didn't actually point the gun at them. You didn't even take it out of the holster and hold it up in the air, but you clearly showed it to them, or put your hand on it. Are there some places in this country where that gets you arrested and prosecuted?

9:10 • Andrew Branca There are, for sure. And there are other places in the country where it won't. The trouble is, you don't know. It becomes someone else's decision at that point. It typically becomes a prosecutor's decision on whether he wants to characterize that behavior as representing an unlawful imminent threat against another person that he wants to take to trial, on a charge like aggravated assault with a firearm. There are jurisdictions in this country where they simply won't bring charges like that unless you've actually put the muzzle on the person. There are other jurisdictions, and typically they're the gun-control-type jurisdictions, like Massachusetts, where I practiced law for 25 years, where anytime a gun is involved, they're going to bring the most serious criminal charges they possibly can. And if you think you were in the right, they're going to compel you to make that argument in the courtroom.

9:57 • Don West And you don't want to roll the dice. Why would you, when you have other tools at your disposal, the first one being your voice?

10:07 • Andrew Branca Absolutely. Your voice is a fantastic defensive tool. And I also tell people, I encourage people who want to carry guns for personal protection (I carry a gun for personal protection; I have every day of my adult life), but it's never my only defensive tool. My voice is going to be my first defensive tool. After that, I typically carry something like OC, or pepper spray, as a non-deadly means of self-defense that I can resort to before having to go to the gun, if the circumstances allow for that. You need a multi-layered tactical defensive strategy.

10:43 • Andrew Branca If all you have is the gun—and I see a lot of cases in my office where this is the case—someone gets that concealed carry permit, they put that gun on, and they think, "All right, I'm set. I've got a gun. I can protect myself against threats." But the truth is, if you look at the FBI and Department of Justice statistics, you're five times more likely to be facing a non-deadly force threat, against which a gun is not a legally appropriate response, than you are to be facing a deadly force threat. But if all you have is a gun and you perceive something scary, what too many people do is they go to the gun, even when the circumstances don't lawfully justify going to the gun, and they find themselves criminally charged.

11:21 • Don West We'll talk more about this in other segments, I hope. But obviously, when you go to the gun, you have completely changed the balance of power here. You have displayed what is potentially lethal force against someone that doesn't pose a threat, and that's the classic disproportional response. You can't use a gun to win a fistfight; we already know that. But you certainly can't use a gun, or display a gun, in order to dissuade somebody from doing something unless they are clearly a threat to you and you've been able to assess the extent of the threat.

12:00 • Andrew Branca Right. So, the framework people should keep in mind is: the gun is deadly defensive force that's appropriate only when you're facing a deadly force threat, meaning a threat reasonably likely to cause death or serious bodily injury. If you're facing something less than that, a shove, for example (someone shoves you), that's a criminal use of force. They're not allowed to do that. That's a simple battery. But it's not the degree of force against which a gun would be the appropriate response, unless there's some aggravating factor that would make that shove something likely to cause death or serious bodily injury. That can happen as well. But typically, if it's a barehanded attack, the appropriate response is going to be some non-deadly degree of defensive force, meaning not a gun, but something like pepper spray.

12:43 • Don West Responding to the level of force appropriately, stripping away the ambiguity by not going to the gun too quickly, using your voice to attempt to identify what the purpose and intent of this person is: all of that helps protect you in the legal system.

Andrew Branca Absolutely.

13:05 • Don West Thanks, Andrew. We're going to pick this up again, I hope soon. There are some other questions I have. I love picking your brain. Thank you so much for being here, and I look forward to our next segment.

Andrew Branca Thanks. Grateful.

Don West I'm Don West, National Trial Counsel for CCW Safe, and as always, thanks for watching.