

## LEGAL ISSUES RELATING TO THE USE OF DEADLY FORCE

By Michael P. Anthony

(With updated 2010 legislation, *D.C. v. Heller* & *McDonald v. Chicago* notes)

(Version 14.0 - July, 2010)

### **(2010 “Constitutional Carry” and other Arizona legislation)**

(2010 Firearms in National Parks)

(2009 “Defensive Display” justification)

(2009 Guns in Bars with CCW permit)

(2009 Guns in Workplace parking lots)

(2009 “Domestic Violence” expanded)

(2009: *Nordyke v. County of Alameda*, 9<sup>th</sup> Circuit applies *Heller* to states)

(2008: ***District of Columbia v. Heller* - Second Amendment Right of Self-Defense**)

(2008: Law authorizes restoration of felon’s right to CCW permit & possess firearms)

(2008: CCW training valid for 5 years)

(2008: CCW renewal within 5 years of expiration of CCW permit)

(2007: CCW Renewal Training Eliminated)

(2006: Justification Burden of Proof on Government Restored)

(2006: Castle Doctrine)

(2006: Justification Attorney’s Fees in Civil Cases)

(2006: CCW Permit Recognition for Other States)

(2006: Privacy of CCW Records Clarified)

(2006: Nonliability for Civil Damages Sustained in Criminal Act - Unconstitutional?)

(2006: Storage/Transporting Firearms in Arizona clarified)

Course curriculum for fulfilling the requirements  
of A.R.S. § 13-3112  
and corresponding DPS requirements

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## I. OVERVIEW OF CRIMINAL AND CIVIL LAWS PERTAINING TO FIREARMS AND THE USE OF DEADLY FORCE

### A. Introduction - A.R.S. § 13-3112: Concealed Weapon Permit

A.R.S. § 13-3112, as amended effective July 29, 2010 (referred to here as the "CCW Law"), requires an applicant for a concealed-weapon permit to

1. undergo a criminal background investigation

and

2. have ever completed a CCW course approved by the Department of Public Safety ("DPS"),

or

2. have ever demonstrated competence with a firearm by any of several, statutory means,

and

3. provide "adequate documentation" of training,

and

4. sign an application form attesting that the applicant "has been furnished a copy of chapters 4 and 31 of this title and that the applicant is knowledgeable about the provisions contained in those chapters."

This text is intended to help understand the legal issues relating to carrying a firearm and the use of deadly force in Arizona.

This text cannot teach all the criminal and civil laws that affect carrying and using a firearm in Arizona, and neither this text nor an instructor can give

legal advice about any specific case. This text reviews the laws that the CCW Law requires be understood, plus some additional, related laws.

First, the text examines the differences between criminal and civil law. These differing procedures provide very different rights, risks and liabilities in criminal and civil cases. Next, the text examines criminal laws relating to firearms. Then, the text reviews civil laws relating to firearms. Next, and most important, this text discusses the circumstances under which a person is justified in using a firearm or other deadly physical force against another person, and offers common situations which a person might face in order to develop judgmental shooting skills. Finally, the text looks briefly at additional laws affecting a person's right to carry a firearm, and reviews the legal principles that must be incorporated into judgmental shooting. Keep in mind that the criminal and civil laws are constantly changing. To stay abreast of the most recent, significant changes, go to the DPS CCW web site, <http://www.azdps.gov/ccw/>, and download the latest version of this legal text.

## B. Overview and comparison of criminal and civil law

The state can prosecute, fine, imprison, and, in the most serious cases, execute those who violate **criminal laws**. Violations of **criminal law** also may be violations of **civil law**, and the victim and/or the victim's family might sue the violator to recover money or obtain a court order against the violator. It is possible to violate a **civil law** without violating any **criminal law** and vice versa. If only a **civil law** is violated, the victim/injured party and others related to that person might still sue the violator to recover money or obtain a court order against the violator. This text explores the criminal and civil laws that apply to carrying, displaying and using a firearm. Anyone carrying a firearm, concealed or openly, must obey these laws, and must combine these laws with other considerations, such as tactics, safety, environmental considerations, type of firearm, personal abilities with a firearm, personal moral and religious values, etc. The combining of the law with these other considerations is called judgmental shooting.

### 1. General description of criminal laws

Criminal laws are "statutes" that have been enacted by government legislation. In Arizona, the statutes are named "Arizona Revised Statutes," and they are numbered by sections. They are abbreviated "A.R.S. § \_\_\_\_\_." Criminal laws are affected by politics, compromise, special interests, public pressure, time constraints and the committee process in the legislature. As a result, criminal laws often contain vague, ambiguous, confusing or even conflicting provisions. Politicians in the

city, county, state and federal governments, anxious to "do something" about society's problems, have created a bewildering array of confusing and sometimes conflicting criminal laws affecting the use of firearms.

A person should not assume to understand a criminal statute by merely reading it. Courts determine the meaning of criminal statutes, and they sometimes do so with bizarre results. If a criminal statute is too confusing, or if it conflicts with higher laws, such as the federal or state Constitution, the courts may decide that the statute is ineffective, partially unenforceable or wholly unenforceable. The legal principles used by the courts to interpret the meaning of criminal statutes have evolved over centuries, and scholars argue endlessly over how the laws should be interpreted. In other words, **no one should assume that he/she understands the meaning of a criminal law by simply reading a statute and attaching his/her own meaning or dictionary definitions to it.**

## II. CRIMINAL PROCEDURE COMPARED TO CIVIL PROCEDURE

Before examining specific criminal and civil laws, it is important to understand important generic differences between these laws - the differing rules under which the laws are applied. These rules are called "procedure."

### A. Rights applicable to criminal cases that are not applicable to civil cases

In criminal cases, the government prosecutes the accused, who is presumed innocent, until proven guilty "**beyond a reasonable doubt**".<sup>1</sup> In the course of the criminal investigation and trial, the accused has procedural protections guaranteed by the U.S. Constitution.

#### 1. Self-incrimination - Fifth Amendment U.S. Constitution

In the U.S., the government cannot force a person to give potentially incriminating statements. This protection extends to police questioning of a suspect and all phases of the trial.

#### 2. Double jeopardy - Fifth Amendment U.S. Constitution

Generally, the accused cannot be tried twice for the "same crime." While it is possible for each different governmental

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<sup>1</sup> Although criminal prosecutions under state law in Arizona must be proven beyond a reasonable doubt, if the accused asserts the insanity defense, the accused must prove insanity by clear and convincing evidence (A.R.S. § 13-502).



authority, e.g., federal and state, to try an accused for the same acts, those acts are different crimes under different statutes. Retrials after a mistrial or reversal on appeal do not constitute being tried twice because the first trial never became final.

3. Right to counsel - Sixth Amendment U.S. Constitution

The accused is entitled to counsel in any felony case. If the accused cannot afford to hire counsel, the court will appoint counsel for the accused. Public defenders are paid by the government to represent accused persons in criminal trials.

4. Searches and seizures - Fourth Amendment U.S. Constitution

The government is generally prohibited from searching those places in which a suspect has a reasonable expectation of privacy, unless a search warrant is first granted by a court, based upon a showing that there is probable cause to believe a crime has been committed and that the requested search is reasonably calculated to lead evidence of that crime.

5. Jury trial - Sixth Amendment (U.S. Const.) & Art. 2, § 23 (Ariz. Const.)

In a criminal case, the accused is entitled to a jury trial to determine his guilt or innocence.

B. Civil law procedure

In a civil case, a private party or the party's lawyer prosecutes the case against the defendant. The defendant is not presumed innocent. Both sides present their cases, the competing evidence is balanced, and the side with the "greater weight of evidence" or "preponderance of evidence" wins. There is a U.S. Constitution **Seventh Amendment** [Art. 2, § 23 (Ariz. Const.)] right to a jury in **civil cases at "common law,"** but the federal courts have ruled that this right applies only to civil suits of the type that could be maintained under common law at the time the Seventh Amendment was adopted (September 25, 1789), and the **Sixth Amendment** jury right does not apply to civil cases. Arizona courts, statutes and rules also have limited the types of civil cases to which a right to jury applies. Moreover, under some statutes and rules of procedure, if neither of the parties to a civil suit demands a jury trial within specified times, the right to a jury trial (when it exists) can be lost. The defendant in

a civil case has no protection against searches and seizures and no protection against giving evidence that will hurt his case. Indeed, under Arizona civil procedure, the defendant is **required** to reveal all known evidence that has a bearing on the case, even if the evidence hurts the defendant's case and helps the other side. If the defendant refuses to answer questions, the court (or the jury) can presume the answers would have hurt the defendant's case. The defendant must provide his own counsel, and if he cannot afford to hire a lawyer, the government will not provide one for him. If the defendant loses, he will likely be responsible for court costs and might be required to pay the other side's attorneys' fees and costs. If the defendant injures more than one person, each injured person might be able to sue the defendant at different times in different courts. The defendant can be asked and required to produce documents and other evidence, and cannot refuse so long as the request is reasonably calculated to lead to the discovery of evidence bearing upon the lawsuit.

C. Overview of differences between civil and criminal law

CRIMINAL PROCEDURE

CIVIL PROCEDURE

Enforced by Government

Enforced by individuals (mostly)

Right to Counsel

No right to counsel unless you can pay

Right to Jury Trial

Limited Jury Trial Rights

Right Against Self-Incrimination

Silence Can Be Used Against Defendant; Defendant Is Required to Disclose All Relevant Information

Right Against Unreasonable Searches and Seizures

Defendant Must Disclose All Relevant Information, Documents, Evidence, Witnesses, Etc.

Proof of Guilt Required "Beyond A Reasonable Doubt"

Proof by "Preponderance of the Evidence" or "Greater Weight of the Evidence"

Penalties Include Fines, Imprisonment, and Death

Penalties Limited to Money (Primarily) (Most Insurance Policies Do Not Cover Intentional Shootings)

D. Summary of differences between civil and criminal law

Criminal laws are enforced by government; the accused is entitled to counsel for serious charges carrying one year or more penalty; the accused has the right to a jury trial; the accused has the Fifth Amendment right against self-incrimination; the accused is protected against unreasonable searches and seizures; the accused must be proven guilty beyond a reasonable doubt; if convicted, punishment is by probation, imprisonment, parole, fines and/or restitution, or execution.

Civil laws are enforced mostly by lawsuits from private persons (plaintiffs), usually with the aid of private lawyers; there is no right to counsel (defendant must hire own counsel); there is no Fifth Amendment right (silence can be used against you); incriminating evidence can be requested or subpoenaed without any showing of probable cause; proof of liability is by preponderance of evidence; right to a jury trial has restrictions; "damages" in the form of monetary judgments are awarded to successful plaintiffs; liability (homeowner's) insurance usually will not cover intentional shootings and may exclude negligent firearms injuries.

E. Nonliability for Civil Damages Sustained in Criminal Act Unconstitutional?

1. Arizona has a special statute, A.R.S. § 12-712, that bars a criminal from recovering for damages sustained by the criminal as a result of the negligence or gross negligence of any person while the criminal is committing, attempting to commit, or fleeing the scene of a felony criminal act, or from a victim as a result of the negligence or gross negligence of the victim while the criminal is committing or attempting to commit a misdemeanor criminal act against the victim or the victim's property. The Court of Appeals held the **misdemeanor** portion of the statute to be unconstitutional. Arizona Constitution, article XVIII, sec. 5. *Sonoran Desert Investigations, Inc. v. Miller*, 213 Ariz. 274, 141 P.3d 754 (App. Div. 2, 2006), Review Denied.

F. Convicted criminal is restricted from denying crime in victim's civil suit.

A.R.S. § 13-807 prohibits a criminal convicted in a criminal proceeding from subsequently denying in any civil proceeding brought by the victim against the criminal the essential allegations of the criminal offense of which the criminal was convicted, including convictions resulting from no contest pleas. However, the criminal may raise

“affirmative defenses” in the civil proceeding. See *Williams v. Baugh*, 214 Ariz. 471, 154 P.3d 373 (App. Div. 2, 2007).

### III. CRIMINAL LAWS CONCERNING USE OF DEADLY FORCE AND FIREARMS (Title 13, Arizona Revised Statutes)

To understand the legal risks of carrying and using a firearm, one must understand certain criminal laws of particular importance to anyone carrying a firearm (note how the use of a firearm can satisfy particular “elements” of criminal offenses).

#### A. Ch. 11: Murders, negligent homicide and manslaughter

Killing someone with a firearm, without legal justification, violates criminal law and may result in imprisonment or even execution. Depending on the circumstances, the criminal violation may be negligent homicide, manslaughter, second degree murder or first degree murder. A.R.S. §§ 13-1101 - 1105.

##### 1. Negligent homicide (with or without firearm), A.R.S. § 13-1102

- a. Criminal negligence, which
- b. results in death of another person

[Example #1: A drunk discharges a firearm in the city without intending to hit anyone, but accidentally kills another.]

[Example #2: A person shoots his gun in the desert, without checking downrange. Two people are camping or hiking downrange, and the shooter does not see them. One shot hits and kills one of the campers or hikers.]

##### 2. Manslaughter (with or without firearm), A.R.S. § 13-1103

- a. Recklessly causing the death of another person;

[Example: A shopper enters a convenience store and sees an armed man, holding a gun to the clerk's head. The shopper correctly surmises that a robbery is in progress. The shopper pulls his gun and shoots ten times at the robber, but misses him. Unfortunately, one or more of the shopper's shots kills another customer in the store.]

or

- a. Adequate provocation by the victim,

- b. resulting in heat of passion or sudden fight, and
- c. commit second degree murder;

[Example: Husband comes home from work to find his wife and her lover in bed together. Husband flies into a rage and immediately shoots his wife and her lover.]

or

- a. Intentionally aiding another to commit suicide;

[Example: Gun owner gives a gun to a friend who asks to borrow it to commit suicide.]

or

- a. Coerced with deadly force that a reasonable person could not resist into
- b. committing second degree murder, *i.e.* intentional killing without premeditation/ planning.

[Example: A madman grabs gun owner's child, threatens the child with death, and demands that gun owner shoot another person or madman will kill the child.]

or

- a. Knowingly or recklessly causing the death of an unborn child by physically injuring the mother under circumstances that would be murder if the mother had died.

3. Second degree murder (with or without firearm), A.R.S. § 13-1104

- a. **Intentionally** causes death of another (without additional elements for first degree murder) (use of firearm is evidence of "intent" to cause death);

[Example: Gun owner is walking in the mall, when a stranger bumps into gun owner. Gun owner pulls a gun, says "thanks for making my day" and intentionally shoots and kills the stranger.]

or

- a. Conduct which person **knows will cause death or serious bodily injury**, which
- b. Causes death of another person.

Use of a firearm in killing is evidence that a person knew that his/her conduct would cause death or serious bodily injury.

[Example: "Gangbanger" is walking in the mall, when one of his friends dares him to shoot toward a crowd of shoppers. Gangbanger pulls his gun and fires a shot toward the crowd, not intending to shoot or kill anyone in particular, but kills a person in the crowd.]

- 4. First degree murder (with or without firearm), A.R.S. § 13-1105
  - a. **Premeditation** (planning to kill),
  - b. conduct which person **intends or knows will cause death**, and
  - c. causes death of another person;

[Example: "Businessman" normally does not carry a gun. Businessman learns that his cheating business partner, with whom Businessman has been arguing for years, is going to be alone at a desolate location, so Businessman decides to "even the score." Businessman takes his gun, goes to the desolate location, waits for his partner to arrive, and shoots and kills his partner.]

or

- a. Kills someone while committing certain other crimes.

[Example #1: Mr. Lonesome meets an attractive, young woman and follows her home. Lonesome tries to talk his way into the woman's house, but she refuses to let him in. Lonesome pushes her inside and threatens to kill her if

she does not have sex with him, and he rapes her. After raping her, Lonesome panics, and shoots and kills her.]

[Example #2: Mr. Broke needs money, so he decides to hold up a convenience store. He enters the store, puts a gun to the clerk's head, and demands all the money in the cash register. As the clerk opens the cash register, he reaches for a gun under the counter, and Mr. Broke shoots the clerk before the clerk can shoot Mr. Broke.]

B. Ch. 12: Endangerment, threatening, assault, shooting at structures and attempted crimes

Wounding someone with a firearm, without legal justification, violates a criminal law for which the shooter can be imprisoned or fined. The criminal violation would be attempted murder, aggravated assault, assault or some other offense. A.R.S. §§ 13-1001, 1101, 1104-1105, 1201-1204, 2904.

Pointing a firearm at a person, without justification, violates a criminal law for which the gunman can be imprisoned or fined. The criminal violation would be attempted murder, aggravated assault, assault, threatening or intimidating, endangerment, felony disorderly conduct<sup>2</sup> or some other offense. A.R.S. §§ 13-1201 - 1204, 13-1001, 13-1104 - 1105, 2904(A)(6).

Shooting at certain structures, without justification, violates a criminal law that was created, effective July, 1996. A.R.S. § 13-1211.

1. Endangerment, A.R.S. § 13-1201

- a. Reckless conduct which
- b. substantially risks imminent death (class 6 felony) or physical injury (class 1 misdemeanor) to another person.

Conduct which might be lawful (like joking and pointing your finger at someone) becomes endangerment if you use a firearm.

[Example: Birthdayboy celebrates his birthday by making the

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<sup>2</sup> *State v. Garcia*, (1CA-CR 07-0314, 7/24/08) held that a conviction of disorderly conduct arising from recklessly displaying a gun is classified as a felony under A.R.S. § 13-702(G), even if the defendant did not intentionally or knowingly display the gun.

rounds of his favorite bars.<sup>3</sup> He decides to impress one of his buddies with his new gun, so he pulls it from concealment and points it at his buddy, without intending to scare him.]

2. **Threatening and Intimidating, A.R.S. § 13-1202**

- a. **Threat or intimidation by word or conduct,**
- b. **To cause physical injury to another person, or serious damage to another's property; or to cause serious public inconvenience, e.g., evacuation of building; or to cause injury to another person or another person's property in order to promote the interests of a gang or to induce another person to participate in a gang.**

While simple words of dissatisfaction or even anger are usually not a crime, those words, coupled with a firearm, can easily constitute illegal threatening.

[Example: Mr. Sixgun is walking in the mall, when a sleazy looking youth who appears to be a gang member starts taunting Mr. Sixgun with a string of profanity. Sixgun pulls his gun and tells the youth "Go ahead, make my day." The young punk is not frightened, but he turns and walks away.]

3. **Assault, A.R.S. § 13-1203**

- a. **Intentionally, knowingly or recklessly,**
- b. **Causes any physical injury to another person.**

[Example: Mr. Short Temper gets into an argument with a stranger and punches the stranger, causing his nose to bleed.]

**or**

- a. **Intentionally,**
- b. **Places another person in reasonable apprehension of imminent physical injury.**

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<sup>3</sup> As discussed later, effective September 30, 2009, it is legal to take a firearm into a bar in an emergency or with a CCW permit, if you do not consume alcohol and the bar is not posted to prohibit firearms. A.R.S. §§ 4-101.24, 4-229, 4-244.30, 4-246, 11-441, 13-3102, 13-3112 & 38-1102.



[Example #1: Ms. Shopper is walking in the mall, when a sleazy looking youth who appears to be a gang member starts taunting her with a string of profanity. Shopper pulls her gun and tells him "Go ahead, make my day." The youth starts crying, and begs Shopper not to kill him.]

or

- a. Knowingly,
- b. Touching,
- c. With intent to injure, insult or provoke.

4. **Aggravated Assault, A.R.S. § 13-1204**

- a. **Commit a simple assault,**

**and**

- b. Cause serious bodily injury, or
- c. **Use a deadly weapon,**<sup>4</sup> or
- d. Cause substantial disfigurement, loss or impairment of bodily organ, or fracture of body part, or
- e. Commit the assault after entering home of another with intent to assault, or
- f. Commit by adult (over 18) upon child (15 or under), or
- g. Commit an assault in violation of protective order, or
- h. Upon a peace officer, teacher, medical personnel, firefighters, prosecutor, etc., or
- i. Knowingly takes or attempts to exercise control over a police officer's firearm, weapon or implement used to restrain or injure (except handcuffs), or
- j. By a prisoner upon confinement officer, or
- k. Various other circumstances listed in statute.

Use of a firearm in any dispute can be evidence of intent to cause physical injury to another person, and the likelihood of causing such an injury, accidentally or intentionally, is increased when a firearm is used to settle the dispute. Moreover, the intent, combined with the firearm may create an aggravated assault.

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<sup>4</sup> A pellet gun has been held to be a "firearm" and a "deadly weapon" under A.R.S. §§ 13-105.13, 13-105.17 & 13-1204. *State v. Cordova*, 198 Ariz. 242, 8 P.3d 1156, review denied (App. Div. 2, 2000).

Displaying a firearm during a dispute or to an unsuspecting person may cause that person to reasonably apprehend imminent physical injury. Moreover, reasonable apprehension of injury, combined with the display of a firearm may create an aggravated assault or felony disorderly conduct.

Simply touching someone while displaying a firearm might be used as evidence of an intent to injure, insult or provoke. Moreover, the touching, combined with the firearm, may create an aggravated assault. Having a concealed weapon permit does not bestow any additional right to use a firearm and does not provide protection from an assault charge. A person carrying a gun who gets into an argument or confrontation should keep the gun concealed and refrain from displaying or using it, except under circumstances where "defensive display" or the threat or use of deadly force is legally justified.

[Example #1: John Gunowner gets into an argument with a street beggar, decides to teach him a lesson, and slaps him beside the head with his gun. Simple assault + deadly weapon = aggravated assault and about 5 years in the state prison.]

[Example #2: John Gunowner is in a heated argument that turns into shoving and punching. To make a point, John pulls back his coat, revealing his gun. John puts his hand on his gun and tell the other person that he had better buzz off or John will end the argument right now. Simple assault + deadly weapon = aggravated assault.] – But see "defensive display" justification discussion.

## 5. Shooting at Structures, A.R.S. § 13-1211

- a. A person who knowingly shoots a gun at a residential structure (movable, permanent or temporary structure [any building, vehicle, railroad car or place with sides and a floor that is separately "securable"] adapted for "both human residence or lodging.") commits a class 2 felony.
- b. A person who knowingly shoots a gun at a nonresidential structure ("building, vehicle, railroad car or place with sides and a floor that is separately securable") "used for lodging, business or transportation" commits a class 3 felony.

[Example #1: A person who knowingly shoots at a house, mobile home, camper's tent (if it has a floor), or other structure

designed or adapted for human habitation likely violates subsection A of A.R.S. § 13-1211.]

[Example #2: A person who knowingly shoots at an automobile or nonresidential structure used for "lodging, business or transportation" violates subsection B of A.R.S. § 13-1211.]

[Example #3: A person who shoots at a motel or hotel might be charged under either subsection A or B -- who knows?]

6. **Unlawful Discharge, A.R.S. § 13-3107 ("Shannon's Law")**

- a. Effective in July 18, 2000, a person who, "with criminal negligence," discharges a firearm within or into the limits of any municipality can be charged with a class 6 felony (.5 - 1.5 years & \$150,000 max. fine). A.R.S. § 13-3107.A. "Criminal negligence" means "that a person fails to perceive a substantial and unjustifiable risk" that the firearm discharge is within or into the city or town limits. "The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." A.R.S. § 13-1105.9(d). Obviously, if a person intentionally and knowingly fires a gun within or into the city or town limits, that person has violated this law. However, Shannon's Law does not require that a person know that he/she is in or near the limits of a city or town. The big question is how this law, which was passed as "Shannon's Law" to penalize "random gunfire," treats people who accidentally discharge a firearm within or into the city or town limits.

If the "dangerous nature" of the firearm discharge is charged by the prosecutor, it is a class 6 felony charge. If "dangerous nature" is not charged, it may be a class 1 misdemeanor. A.R.S. §§ 13-3107.B & 13-702.G. The wording of the statute (A.R.S. § 13-3107), when combined with the cross-referenced statute (A.R.S. § 13-702.G), leads to the logical conclusion that discharge of a firearm within or into the city or town limits in violation of "Shannon's Law" can only be a felony. However, the prosecutors who pushed for this wording insist that prosecutors have discretion to charge as a misdemeanor under the statute by omitting the "dangerous nature" from the charge. Curiously, "Shannon's Law" was intended to punish "random gunfire" with a felony,

but “random gunfire” is not mentioned in the law.

“Shannon’s Law” does not apply if the firearm is discharged (1) with “justification” (see “Justification” section later in this text), (2) at a legal shooting range (A.R.S. § 13-3107.D.2), (3) in an approved hunting area, (4) for the control of nuisance wildlife by permit, (5) with a permit from the chief of police of the city or town, (6) by an animal control officer, (7) using blanks, (8) more than one mile from any “occupied structure” (A.R.S. § 13-3101 - building, vehicle, watercraft, aircraft, etc., used for lodging, business, transportation, recreation or storage, including dwelling house, whether occupied, unoccupied or vacant), or (9) in self defense or defense of another from animal attack if reasonably and immediately necessary. A.R.S. § 13-3107.C.

7. Attempted Crimes, A.R.S. § 13-1001 + §§ 13-1104 - 1105

- a. A person intentionally engages in conduct which would constitute a specified crime if the circumstances were as such person believes them to be; or

[Example: Casanova decides that he will end his love affair by killing his lover and makes plans accordingly. Casanova pulls his gun, pulls the trigger, but the gun fails to fire ("misfires"). Casanova has committed attempted first degree murder.]

- b. A person intentionally does or omits to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of a specified crime; or

[Example #1: Bill Businessman decides to kill his cheating partner by ambushing him outside his favorite bar. Bill gets his gun, drives to the bar, and waits for hours, but Bill’s cheating partner never shows up. Bill has committed attempted first degree murder.]

[Example #2: Bob Robber decides to pickup some needed money the easy way by robbing someone who is withdrawing money from an ATM. Bob stops an ATM customer, points his gun at the customer and suddenly decides to pull the trigger. Bob’s gun misfires, and Bob falls to his knees, begging the customer to forgive him. Bob has committed attempted first degree murder and attempted robbery.]

[Example #3: Again, Bob Robber decides to pickup some needed money the easy way by robbing and killing someone who is withdrawing money from an ATM. Bob tells his buddy of his plan to rob and kill an ATM customer. Bob stops an ATM customer, points his gun at the customer, but changes his mind. Bob falls to his knees, begging forgiveness. Again, Bob has committed attempted first degree murder and attempted robbery.]

- c. A person tries to help another person to commit murder under circumstances that makes the first person an accomplice if the murder had been committed or attempted by the other person, but the murder is not committed or attempted by the other person.

[Example: Jim Disgruntled tells Cindy Listener of his plan to kill his boss. He asks Cindy if he can borrow her gun to commit the crime. Cindy loans him her gun, but Jim does not kill his boss. Cindy has committed attempted first degree murder.]

In simple terms, whenever someone uses or threatens to use a firearm against another person, without legal justification, he is violating a criminal law, and the state can prosecute him. If his conduct is legally justified, he is not violating a criminal law, but he might have to go through a trial to establish that his conduct was justified. If someone uses a firearm against another person, the final decision whether he was justified will be made by other people, such as police, prosecutors, judges and juries. There are no guarantees that others will agree that use of a firearm was justified. The critical thing to understand is when use of a firearm probably is legally justified and when it probably is not legally justified. A.R.S. §§ 13-401 - 413. Judgmental shooting includes deciding when a firearm should not be used, even though use of a firearm might be legally justified.

C. Ch. 15: Criminal trespass and burglary

- 1. **Criminal trespass** A.R.S. §§ 13-1501 - 13-1505
  - a. **Criminal trespass in the third, second and first degrees, A.R.S. §§ 13-1502, 1503 & 1504**
    - 1) **Entering or remaining on or in land, building, residence or yard,**

which

- 2) Is posted prohibiting entry, e.g., posted no entry with a firearm, or
- 2) After a person having lawful control over real property asks a gunowner to leave or asks the gunowner to check his gun, GUNOWNER MUST CHECK HIS GUN OR LEAVE!

2. **Burglary**, A.R.S. §§ 13-1505 - 13-1508

- a. Entering or remaining unlawfully in a fenced yard, a structure or a residence,
- b. With intent to commit any theft or any felony therein.

Burglary is a class 3 or class 4 felony (depending on whether the structure is a residence), unless the person committing the burglary possesses explosives or a deadly weapon, then the burglary is more serious, *i.e.*, a class 2 or class 3 felony.<sup>5</sup>

D. Ch. 29: Disorderly conduct and public educational institutions

1. Offenses against public order, A.R.S. §§ 13-2901, *et seq.*

a. **Disorderly conduct, A.R.S. § 13-2904**

- 1) **With the intent** to disturb the peace or quiet of a neighborhood, family or person, or with the knowledge that your conduct has that effect, a person does any of the following:
- 2) fights, makes unreasonable noise, refuses to obey an order to disperse, etc., or **recklessly handles, displays or discharges a deadly weapon**. A.R.S. § 13-2904.A.6

b. Public educational institutions, A.R.S. § 13-2911

- 1) Governing boards make rules for the maintenance of public order upon all public school property.
- 2) Any deadly weapon or explosive used, displayed or

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<sup>5</sup> Use or possession of a “firearm” or “deadly weapon” during the commission of a crime is an “aggravating circumstance” that can increase the sentence imposed. A.R.S. §§ 13-702 and 13-710.

possessed by a person in violation of a rule adopted by the governing board, shall be forfeited and sold, destroyed, or otherwise disposed of according to chapter 39, *i.e.*, according to A.R.S. §§ 13-4301 through 13-4315 (these statutes set forth complex rules for forfeiture of property used in a crime).

This Arizona law prohibiting firearms at school contains an exception for approved firearm safety programs<sup>6</sup> on school campuses. This Arizona law prohibiting firearms at school does not apply to private schools. Private schools can make their own rules about firearms just as any private property owner. But, see discussion later about firearms statutes applicable to public and private schools. A.R.S. § 3102.A.12 (sec. E.2.c & f of this text); federal "Gun Free School Zones Act" (sec. VII.J of this text).

E. Ch. 31: Weapons and explosives

1. Weapons and Explosives, A.R.S. §§ 13-3101, *et seq.*
  - a. A firearm is legally classified as a deadly weapon. A.R.S. §§ 13-3101.1 & 13-105.13. It does not matter whether it is loaded or unloaded or temporarily inoperable. A.R.S. §§ 13-3101.4 & 13-105.17; *State v. Young*, 192 Ariz. 303, 965 P.2d 37 (App. Div. 1, 1998).<sup>7</sup> A pellet gun, although not a firearm or deadly weapon under A.R.S. §§ 13-3101.1 & 13-3101.4, has been held to be a "firearm" and a "deadly

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<sup>6</sup> Effective August 11, 2005, school districts and charter schools are authorized by statute to offer an elective, one-semester firearms safety course. A.R.S. § 15-714.01.

<sup>7</sup> In the *State v. Young* case, a "prohibited" shotgun was found disassembled and inoperable because the firing pin was too short for the bolt. Whether the shotgun was "temporarily" disabled and still a "weapon" was an issue at trial. In order to make the shotgun work, a City of Phoenix police lab technician had to make a longer firing pin, by cutting a bolt, drilling a hole in it, and gluing a short piece of coat hanger into the hole. The Court ruled that these modifications by the police lab technician supported the conclusion that the shotgun was not "permanently inoperable" and, therefore, qualified as a firearm/deadly weapon. The Court further ruled that Mr. Young could be convicted even though he thought the shotgun was permanently inoperable "junk" and did not have the tools or knowhow to repair it.

weapon” under A.R.S. § 13-105.13 & 13-105.17. *State v. Cordova*, 198 Ariz. 242, 8 P.3d 1156, review denied (App. Div. 2, 2000).<sup>8</sup>

- b. A prohibited possessor under A.R.S. §§ 13-3101.7, 13-3111, 13-3113 or under 18 U.S.C. § 922(d) may not receive, possess, transport or ship a firearm or ammunition. The federal and state prohibited possessor laws differ slightly.

A.R.S. §§ 13-3101.7, 13-3102.4, 13-3111, 13-3113:

- 1) Person found to constitute a danger to himself or to another pursuant to court order and whose court ordered treatment has not been terminated by court order; or
- 2) Convicted felon (whose civil rights have not been restored);<sup>9</sup> or
- 3) Adjudicated delinquent for an offense that would be a felony if committed by an adult<sup>10</sup> (whose civil rights have not been restored); or
- 4) Prison inmates, and certain parolees and probationers; or
- 5) On probation,<sup>11</sup> parole, home arrest, work furlough,

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<sup>8</sup> The effect of the *Cordova* case is that for purposes of criminal charges outside of Chapter 31, a pellet gun is a “firearm” and “deadly weapon”, but for purposes of criminal charges within Chapter 31, a pellet gun is not a “firearm” or “deadly weapon.”

<sup>9</sup> The FBI has taken the position that a resident Arizona felon cannot have rights to possess a firearm restored by a court. The FBI bases this position on 18 U.S.C. §§ 921(a)(20) and 922(d), as interpreted by the U.S. Supreme Court in *Caron v. U.S.*, 524 U.S. 308, 118 S.Ct. 2007, 141 L.Ed.2d 303 (1998), and A.R.S. § 13-3112.E.3, which bars anyone who has been convicted of a felony in any jurisdiction from getting an Arizona CCW permit. However, effective September 26, 2008, A.R.S. § 13-3112.E.3 was changed to authorize a convicted felon to obtain a CCW permit after restoration of rights by a judge. Therefore, the FBI’s basis for refusing to recognize a restoration of gun rights in Arizona has been eliminated.

<sup>10</sup> SB 1339, effective September 21, 2006, added the phrase “for an offense that would be a felony if committed by an adult” to A.R.S. § 13-3113.

<sup>11</sup> Pursuant to a conviction for domestic violence or a felony conviction. A.R.S. §13-3101.6(d), effective July 18, 2000. Effective September 30, 2009, “domestic violence”



- etc.; or
- 6) Minor (under age 18), except under defined circumstances, e.g., lawful hunting, shooting events, under specified adult supervision, etc.

18 U.S.C. § 922(d):

- 1) a person under indictment for or convicted of a crime which carries a sentence of more than one year (except state misdemeanors, but see # "9" below); or
- 2) a fugitive from justice; or
- 3) an unlawful user of controlled substances (drugs); or
- 4) a person who has been adjudicated mentally defective or has been committed to a mental institution; or
- 5) an illegal alien; or
- 6) a person who has been dishonorably discharged from the Armed Forces; or
- 7) a person who has renounced his/her U.S. citizenship; or
- 8) one who is subject to certain court issued restraining orders; or
- 9) one who has been convicted of misdemeanor "domestic violence" crime (such a person also may not possess a firearm or ammunition).<sup>12</sup>

2. Misconduct with firearms, A.R.S. § 13-3102

- a. **Carrying or transporting a firearm/deadly weapon concealed in furtherance of a serious offense, violent crime or other felony; or when failing to accurately answer law enforcement question whether carrying concealed deadly weapon.**  
A.R.S. §§ 13-3102.A.1 & 2.

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is expanded from family members to include those in a romantic or sexual relationship. A.R.S. §13-3601. Blanket "Domestic violence" gun possession prohibitions may be subject to constitutional attack. See *United States v. Skoien*, (7<sup>th</sup> Circuit Court of Appeals no. 08-3770 (Nov. 18, 2009)).

<sup>12</sup> Blanket "Domestic violence" gun possession prohibitions may be subject to constitutional attack. See *United States v. Skoien*, (7<sup>th</sup> Circuit Court of Appeals no. 08-3770 (Nov. 18, 2009)).

Carrying or transporting “concealed” means carrying a weapon on your person or in a means of transportation and within your immediate control in such a manner that “it is hidden from the ‘ordinary observation’ or the ‘ordinary sight’ of another person.” *State v. Adams*, 189 Ariz. 235, 941 P.2d 908 (App. 1997).

Effective July 29, 2010, carrying or transporting a concealed deadly weapon (not a pocket knife) in furtherance of a serious offense (A.R.S. § 13-706), a violent crime (A.R.S. § 13-901.03), or any felony, is misconduct with weapons. A.R.S. § 13-3102.A.1(a).

Effective July 29, 2010, failing to accurately answer a law enforcement question whether one is carrying or transporting a concealed deadly weapon (not a pocket knife) while carrying or transporting a concealed deadly weapon (not a pocket knife) is misconduct with weapons. A.R.S. § 13-3102.A.1(b).

- b. A person in Arizona under 21 years old who carries or transports a concealed deadly weapon (not a pocket knife) within his immediate control commits misconduct with weapons. A.R.S. § 3102.A.2, effective July 29, 2010.
- c. Other “misconduct with weapons,” A.R.S. § 13-3102.A.3 - A.R.S. § 13-3102.A.14

Misconduct with weapons also prohibits: manufacturing, possessing, transporting, selling or transferring a prohibited weapon;<sup>13</sup> possession of a deadly weapon by a prohibited possessor; selling or transferring a deadly weapon to a prohibited possessor; defacing a deadly weapon; knowingly possessing a defaced deadly weapon;<sup>14</sup> using or possessing a deadly weapon when committing a felony under chapter 34; discharging a firearm at an occupied structure in aid of a criminal street gang, criminal syndicate or a racketeering enterprise; entering a public establishment or public event with a deadly weapon after being asked to check in the weapon;<sup>15</sup> entering an election polling place

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<sup>13</sup> See A.R.S. § 13-3102.C & D for exceptions to this law.

<sup>14</sup> See A.R.S. § 13-3102.C & D for exceptions to this law.

<sup>15</sup> See A.R.S. § 13-3102.C for exceptions to this law. Effective Sep. 21, 2006, this statute was clarified to require “temporary and secure storage pursuant to section 13-

with a deadly weapon on election day;<sup>16</sup> possessing a deadly weapon on school grounds;<sup>17</sup> carrying a deadly weapon into a nuclear or hydroelectric generating station;<sup>18</sup> supplying a firearm to someone for use in the commission of a felony; or using a firearm in the furtherance of terrorism.

d. **Qualifications for CCW permit, A.R.S. § 13-3112**

- 1) **Resident** of Arizona **or** a U.S. **Citizen**,<sup>19</sup>

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3102.01.” The new section 13-3102.01 requires that “The storage shall be readily accessible on entry into the establishment or event and allow for the immediate retrieval of the weapon on exit from the establishment or event.” See also A.R.S. §13-3108.C for additional storage requirements and procedures, and prohibiting political subdivisions from requiring or maintaining any permanent or temporary records related to the storage of firearms that contains descriptions (serial numbers, etc.) of firearms or their owners who check their firearms under this statute. Section 13-3102.01 excludes events where liquor is being served pursuant to license under Title 4, *i.e.*, the requirement to supply readily accessible, temporary storage does not apply to public places or events where liquor is being served. Caution: The public establishment is not responsible for the negligent loss of a stored firearm. It is responsible only for the intentional or grossly negligent loss or destruction of the firearm. A.R.S. §§ 13-3102.H & 13-3102.01.

<sup>16</sup> See A.R.S. § 13-3102.C for exceptions to this law.

<sup>17</sup> See A.R.S. § 13-3102.C for exceptions to this law. In addition, **A.R.S. § 13-3102.I allows unloaded firearms to be carried on school grounds within a vehicle under the control of an adult provided that, if the adult leaves the vehicle, the firearm shall not be visible from the outside and the vehicle shall be locked, or any firearm for use in a program approved by a school.** This comment is meant to serve as a guide for basic information, but the issue involving firearms in school zones is complex. Specific questions on this topic should be directed to your attorney, local prosecutor or federal district attorney.

<sup>18</sup> See A.R.S. § 13-3102.C for exceptions to this law. Changes to 13-3102 occurred in August 2002 to include adding hydroelectric generating stations to restricted possession locations (13-3102.A.13), increasing the penalty for 13-3102.A.13 to a class 4 felony, and adding a new sub-section addressing the use of deadly weapons in the furtherance of terrorism (13-3102.A.15).

<sup>19</sup> DPS defines resident to mean any of the following:

- (1) A person who has lived in Arizona for six months immediately before the date of

- 2) **Twenty-one** years of age or older,
- 3) Not under indictment and not convicted of any felony or a misdemeanor crime of domestic violence,<sup>20</sup> as confirmed by **DPS/FBI criminal background investigation**,
- 4) Not suffering from mental illness and not adjudicated mentally incompetent or committed to a mental institution,
- 5) Not unlawfully present in U.S.,
- 6)<sup>21</sup> Have ever completed a DPS approved firearms safety **training** program,  
or  
Have ever demonstrated competence with a firearm by any of the following means (applicant must provide "adequate documentation"<sup>22</sup>):

- 
- application for a concealed weapon permit, or
  - (2) A person who remains in Arizona for a total of six months or more during each calendar year, or
  - (3) A member of the armed forces who has been stationed in Arizona for the 30 days immediately before the date of application for a concealed weapon permit.

NOTE: Effective on or about August 20, 1998, the requirement for Arizona residency was changed to Arizona residency **OR** U.S. Citizenship. (H.B. 2041, signed 5-20-98, effective date 8-20-98).

- Source: February 1996 DPS "Concealed Weapon Permit News;" Arizona Administrative Code, R13-9-101.14

<sup>20</sup> Blanket "Domestic violence" gun possession prohibitions may be subject to constitutional attack. See *United States v. Skoien*, (7<sup>th</sup> Circuit Court of Appeals no. 08-3770 (Nov. 18, 2009)).

<sup>21</sup> A.R.S. § 13-3112.E.6, F & N.1, as amended effective July 29, 2010

<sup>22</sup> (a) certificate of completion from DPS authorized training program, dated not more than five years prior to application, or current or expired Arizona CCW permit; or (b) "certificate, card or document [or affidavit from trainer] that shows the applicant has completed (1) any DPS approved firearms safety or training course or class available to the general public and offered by law enforcement, a junior college, a college or private or public institution, academy, organization or firearms training school; (2) any hunter education or hunter safety course approved by the Arizona Game and Fish Department or similar agency of another state; (3) any NRA firearms safety or training course; (4) any DPS approved law enforcement firearms safety or training course or class that is

a. "completion of any firearms safety or training course or class that is available to the general public, that is offered by a law enforcement agency, a junior college, a college or a private or public institution, academy, organization or firearms training school and that is approved by the Department of Public Safety,"

or

b. "completion of any hunter education or hunter safety course approved by the Arizona Game and Fish Department or a similar agency of another state,"

or

c. "completion of any National Rifle Association firearms safety or training course,"

or

d. "completion of any law enforcement firearms safety or training course or class that is offered for security guards, investigators, special deputies or other divisions or subdivisions of law enforcement or security enforcement and that is approved by the Department of Public Safety,"

or

e. "[providing] evidence of current military service or proof of honorable discharge or general discharge under honorable conditions from the United States Armed Forces,"

or

f. "[providing] a valid current or expired concealed weapon, firearm or handgun permit or license that is issued by another state or political subdivision of another state and that has a training or testing requirement for initial

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offered for security guards, investigators, special deputies or other divisions of subdivisions of law enforcement or security enforcement; (5) any police agency firearms training course and qualification to carry a firearm in the course of normal police duties; (6) any other firearms training acceptable to DPS; (7) Defense Department form 214, showing honorable, general or other than honorable conditions discharge from U.S. military, or certificate of completion of basic training, or other document demonstrating proof of current or former service in the U.S. armed forces.

issuance,”

or

g. “completion of any governmental police agency firearms training course and qualification to carry a firearm in the course of normal police duties,”<sup>23</sup>

or

h. “completion of any other firearms training that the Department of Public Safety deems acceptable,”

- 7) Has completed DPS application form, with fingerprints and an affidavit attesting that the applicant “has been furnished a copy of chapters 4 and 31 of this title and that the applicant is knowledgeable about the provisions contained in those chapters,”<sup>24</sup>  
and
- 8) Has paid **DPS fee** (currently \$60.00).

DPS has up to 60 days to complete background check, and 15 working days after completion of background check to issue or deny permit, valid for five years.

- e. **Qualifications for renewal of CCW permit**, A.R.S. § 13-3112.K & L; *Arizona Administrative Code*, R13-9-108
  - 1) Effective September 21, 2006, no renewal training is required;
  - 2) Submit **renewal application to DPS with required fee (\$43.00) no sooner than 90 days prior to CCW permit expiration date or up to 60 days after the CCW permit expiration date**; and
  - 3) Satisfactorily complete **criminal history check** (performed by DPS after receipt of application - see “prohibited possessor,” *supra.*);

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<sup>23</sup> Although not an Arizona CCW permit, retired police officers can obtain “certificates of firearms proficiency” that qualify them under federal law to carry concealed. 18 U.S.C. § 926.C; A.R.S. § 13-3112.W.

<sup>24</sup> Effective 9/21/06, A.R.S. § 13-3112.J was clarified to keep CCW applicant and instructor records confidential, except by court order.

- f. **A CCW permit does not affect laws against manufacturing; possessing; transporting, selling or transferring a prohibited weapon;<sup>25</sup> selling or transferring to a prohibited possessor; defacing a firearm (*i.e.*, obliterating the serial number); possessing a firearm during the commission of a crime; unlawfully discharging a firearm; or carrying the firearm into a prohibited place or into a place where the owner prohibits entry with a firearm;<sup>26</sup> polling places (on the day of election); places that serve alcohol (A.R.S. §§ 4-101.24, 4-229 & 4-244.30);<sup>27</sup> on school grounds; into nuclear generating station; State Parks (if posted); or anywhere else where validly posted no firearms. A CONCEALED-WEAPON PERMIT DOES NOT AUTHORIZE THE CARRYING OF A FIREARM WHERE FIREARMS ARE LAWFULLY PROHIBITED!**

Some people argue that CCW permittees can carry their guns in places where others cannot (*e.g.*, school grounds, public events and public establishments where no

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<sup>25</sup> “Knowing possession” of certain “prohibited” firearms is illegal under A.R.S. §13-3101 (*e.g.*, “saw-off” shotgun with barrel less than 18 inches in length). One need not know that a weapon is “prohibited” to be charged with “knowingly” possessing a “prohibited” weapon. One only need know that he “possesses” the weapon. *State v. Young*, 192 Ariz. 303, 965 P.2d 37 (App. Div. 1, 1998).

<sup>26</sup> Effective Sep. 30, 2009, A.R.S. §12-781 will protect the transportation or storage of firearms in locked motor vehicles or in locked motorcycle compartments on public and private parking lots, provided the firearm is not visible from outside the vehicle or motorcycle. This statutory protection does not apply to employer owned vehicles, secured parking lots with controlled access IF temporary firearm storage facilities are provided, or parking lots where specially designated alternate parking is provided for vehicles/motorcycles containing any firearms. This statutory protection does not apply to parking for single family detached residences or places where firearms are otherwise prohibited by law, *e.g.*, federal property.

<sup>27</sup> Effective Sep. 30, 2009, a CCW permittee, or a Sheriff’s volunteer posse or reserve member who has received approved firearms training and is approved by the Sheriff to carry concealed, in addition to other law enforcement personnel, may carry a concealed firearm in establishments that serve alcohol, UNLESS the establishment posts no firearms signs as specified by statute. However, a person in possession of a firearm may not consume alcohol in such establishments (class 3 misdemeanor). A.R.S. §§4-229, 4-244.31 & 4-246(C).

firearms are allowed). This argument is based on A.R.S. § 13-3102.C.4, which says that prohibitions against carrying weapons in such places does not apply to those persons who are "licensed, authorized or permitted pursuant to a statute of this state . . . ." Law enforcement does not accept this argument! Since § 13-3102.C.4 was enacted **prior to the CCW statute** (A.R.S. § 13-3112), it could not have contemplated CCW permits. However, the legislature has refused to pass legislation to clarify A.R.S. § 13-3102.C.4 since passage of the CCW statute.

Some lower courts have accepted the argument that § 13-3102.4 grants special rights to CCW permittees. The appellate courts have not ruled on this argument, but the Courts of Appeals have construed Arizona's firearms statutes narrowly to restrict the right to carry a firearm. Therefore, it is uncertain whether a CCW permit allows you to carry a gun into these otherwise prohibited places.

An Arizona CCW permittee is exempted from the "Brady" background check (18 U.S.C. § 922(s)(1)(C)).

A concealed weapon permittee carrying a concealed weapon in Arizona is obligated to have the CCW permit in his possession and must present the permit upon the request of law enforcement only if required by "any other law to carry the permit". A.R.S. § 13-3112.A, effective July 29, 2010..

If a CCW permittee is required by some other law to carry the permit (e.g., carrying firearm where liquor is served - A.R.S. §§4-229, 4-244.31 & 4-246(C), *infra*, see "Bars"), but does not have a CCW permit when carrying concealed, that person can be fined up to \$300.00 and the permit will be suspended by DPS, unless the permittee goes to court and presents a legible permit that was valid at the time he was cited for failure to have his permit. A legally carried firearm may not be confiscated for failure to have a permit, although law enforcement may take temporary custody of the firearm during an investigatory stop. A.R.S. § 13-3112.C & D., effective July 29, 2010.

### 3. State Preemption, A.R.S. § 13-3108(A); A.R.S. § 13-3114

Until the summer of 2000, A.R.S. § 13-3108(A), entitled



“Firearms regulated by state; state preemption,” stated that “Ordinances of any political subdivision of this state relating to the transportation, possession, carrying, sale and use of firearms in this state shall not be in conflict with this chapter.” In *City of Tucson v. Rineer*, 193 Ariz. 160, 971 P.2d 207 (App. 1998), review denied, Division Two of the Court of Appeals ruled that since the legislature had not made it clear that this was a preemption statute (a curious conclusion in view of the title and wording of the statute), cities, counties and towns could prohibit firearms in city parks or elsewhere. The Court said that local ordinances regulating firearms “may parallel or even go beyond” state statutes, so long as they do not conflict on the “same topic.” In the words of the Court, “Indeed, some [out-of-state] courts arguably have gone well beyond the particularized restriction we uphold here.”

In response, the legislature adopted and the Governor signed a new preemption statute that effectively reversed the *Rineer* decision, effective July 18, 2000, which was revised again, effective July 29, 2010. A.R.S. § 13-3108(A) now provides that “Except as provided in subsection D of this section, a political subdivision of this state shall not enact any ordinance, rule or tax relating to the transportation, possession, carrying, sale, transfer, purchase, acquisition, gift, devise, storage, licensing, registration discharge or use of firearms or ammunition or any firearm or ammunition components or related accessories in this state.” Subsection B bars political subdivisions from requiring the licensing or registration of firearms or ammunition or their components or related accessories and from prohibiting the ownership, purchase, sale or transfer of firearms or ammunition or their components or related accessories.

Effective July 29, 2010, subsection C prohibits any political subdivision of the State from enacting “any rule or ordinance that relates to firearms and is more prohibitive than or that has a penalty that is greater than any State law penalty.” Rules and ordinances that are inconsistent with or more restrictive than State law are null and void retroactively. Subsection C also prohibits any political subdivision from keeping records of (1) persons and guns left for temporary storage and retrieved (pursuant to A.R.S. § 13-3102.01); (2) gun purchases, sales and transfers (except in law enforcement investigations or federally licensed firearms dealer records).

Subsection D of A.R.S. § 13-3108 permits political

subdivisions to enacts rules, ordinances, etc. “pursuant to state law, . . . or relating to any of the following:” (1) sales taxes like those applied to other goods, (2) prohibiting a minor (less than 18 years old) from possessing or transporting a firearm,<sup>28</sup> (3) land use, such as zoning, like that applied to other commercial businesses, (4) regulating their own employees and contractors on the job, (5) limiting or prohibiting the discharge of firearms in parks, with specified exceptions for ranges, approved hunting, etc.<sup>29</sup> Effective July 29, 2010, political subdivisions may not prohibit carrying firearms in parks.

A violation of a local ordinance or rule enacted under A.R.S. § 13-3108.D is a class 2 misdemeanor, unless the political subdivision designates a lesser misdemeanor by ordinance.

Effective July 29, 2010 and retroactively applicable to prior local rules and ordinances, State preemption also applies to knives.

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- <sup>28</sup>However, political subdivisions may not prohibit minors from possessing guns
- (1) when accompanied by a parent, grandparent or guardian or certified hunter safety instructor or certified firearms safety instructor acting with the consent of the minor’s parent, grandparent or guardian;
  - (2) when on private property owned or leased by the minor or the minor’s parent, grandparent or guardian; or
  - (3) when the minor is fourteen to seventeen years old and engaged in
    - (a) lawful hunting or shooting events or marksmanship practice at established ranges or where shooting is legal,
    - (b) transporting an unloaded gun for the purpose of hunting,
    - (c) transporting an unloaded gun for the purpose of attending shooting events or marksmanship practice at established ranges or where shooting is legal,
    - (d) any activity relating to production of crops, livestock, poultry, livestock or poultry products, ratites (ostrich, etc.) or storage of agricultural commodities.

<sup>29</sup> It is permissible to discharge a firearm in a park or preserve (1) with “justification,” as explained in the justification section of this text; (2) at shooting ranges (A.R.S. § 13-1307), (3) in designated hunting areas; (4) to control nuisance wildlife with the appropriate permit; (5) by special permit from the chief law enforcement official of the political subdivision where the park is located; (6) as required by an animal control officer; and (7) “in self defense or defense of another person against an animal attack if a reasonable person would believe that deadly physical force against the animal is immediately necessary and reasonable under the circumstances to protect oneself or the other person.”

A.R.S. § 13-3114.A, provides:

“Except as provided in subsection B [pertaining to normal taxes and enforcement of State law], a political subdivision of this State shall not enact any ordinance, rule or tax relating to the transportation, possession, carrying, sale, transfer, manufacture or use of a knife or knife making components in this State.”

4. Juveniles & guns

- a. “Transfers” to juveniles, A.R.S. § 13-3109; 18 U.S.C. §922(x)

It is a class 6 felony under Arizona law to sell or give to a minor (under 18 years old), without written consent of the minor's parent or legal guardian, a firearm or ammunition. A.R.S. § 13-3109. There is a "temporary transfer" exception for firearms instruction/safety courses, hunting safety courses, shooting competitions, hunting and target shooting with consent of parent or guardian.

It is a federal crime to sell or give a juvenile (under 18 years old) a handgun or handgun ammunition. 18 U.S.C. §922(x). There are exceptions for temporary transfers, ownership without possession, etc. Temporary transfers for training, sport shooting, hunting, etc. require written consent by a parent. Written consent by the parent is even required when the parent is present with the juvenile for the hunting, training, etc. Violations are punishable by fines and imprisonment up to one year, or under certain circumstances, up to ten years. 18 U.S.C. § 924(a)(6).

- b. “Possession” by juveniles, A.R.S. §§ 8-341, 13-3111, 13-3113 & 18 U.S.C. § 922(x)

If a juvenile is adjudicated delinquent for committing a misdemeanor, A.R.S. § 8-341.R permits the juvenile court to prohibit that juvenile from possessing a firearm while the juvenile is under the jurisdiction of the Department of Juvenile Corrections or the juvenile court. Effective 9/21/06.

If a juvenile is adjudicated delinquent for an offense that would be a felony if committed by an adult, the juvenile

is a prohibited possessor.<sup>30</sup>

A.R.S. § 13-3111 prohibits a minor from possessing firearms unaccompanied by a parent, grandparent or guardian, or certified instructor acting with the consent of a parent or guardian, except on private property not open to public or private property owned by the minor or the minor's family or guardian. There are exceptions to this prohibition for minors ages 14 to 17 years engaged in lawful hunting or shooting events at established ranges or other areas where the discharge of a firearm is not prohibited, transporting unloaded firearms for hunting, transporting unloaded firearms to shooting ranges or areas between 5:00 a.m. and 10:00 p.m. (A minor less than 14 years of age is not criminally responsible in the absence of clear proof that the minor knew the conduct was wrong. A.R.S. § 13-501.) Firearms possessed by minors in violation of this law are required to be seized by a peace officer who discovers the violation and will be forfeited upon adjudication of a violation of this law, unless the identity of the lawful owner of the firearm is known, then it must be returned to the lawful owner. In addition, the minor's driver's license can be revoked or its issuance can be delayed until the minor is 18, plus a fine of \$250 (possession unloaded firearm not in motor vehicle) to \$500 (possession loaded firearm or any firearm in motor vehicle). Parents or guardians are jointly and severally liable for the minor's fines and liable for any civil actual damages resulting from unlawful use of the firearm by the minor, IF the adult knew or reasonably should have known of the minor's unlawful conduct and made no effort to prohibit it.

In December, 1999, Division Two of the Arizona Court of Appeals declared a former version of A.R.S. § 13-3111 to be an unconstitutional "special law," but the statute remained on the books. *In Re Cesar R.*, 197 Ariz. 437, 4 P3d 980 (Ct. App. 1999), *review denied*. In 2006, the legislature removed the "special law" section, thereby resurrecting the statute effective September 21, 2006.

Effective July 18, 2000, juveniles are also subject to local firearms laws enacted by political subdivisions of the

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<sup>30</sup> SB 1339, effective September 21, 2006, added the phrase "for an offense that would be a felony if committed by an adult" to A.R.S. § 13-3113.

state pursuant to A.R.S. § 13-3108.C. See the discussion in the earlier section entitled “State Preemption.”

Juveniles under 18 years of age are prohibited by federal law from possessing handguns or handgun ammunition, but may possess long guns. 18 U.S.C. § 922(x). There are exceptions that permit juveniles to possess handguns for certain sport shooting activities, ranching, ownership without possession, etc. Under most circumstances, the written consent of the juvenile’s parent or guardian is required, even if the juvenile is accompanied by the parent or guardian. A juvenile is permitted under federal law to use a handgun at the place of residence in self-defense or defense of another without written permission. Violations are punishable by fines and imprisonment by up to one year. 18 U.S.C. § 924(a)(6).

Federally licensed gun dealers are prohibited from transferring handguns to persons under 21 years of age. 18 U.S.C. § 922(b). Federally licensed gun dealers are prohibited from transferring long guns to juveniles under 18 years of age. *Id.*

Thus, federal law permits a person 18 to 21 years old to own or possess a handgun or long gun and permits a person less than 18 years old to possess a long gun, but a person has to be at least 21 years old to purchase a handgun from a federally licensed dealer and at least 18 years old to purchase a long gun from a federally licensed dealer.

5. Misconduct with body armor, A.R.S. § 13-3116

Enacted in 1999, this Arizona statute creates a separate class 4 felony for anyone who knowingly wears or otherwise uses body armor during the commission of any felony.

6. Remote Stun guns, A.R.S. § 13-3117

Enacted in 2005, this Arizona statute creates a separate class 4 felony for anyone who knowingly uses or threatens to use a stun gun against a law enforcement officer who is engaged in the

performance of his/her official duties.<sup>31</sup>

F. Ch. 5: Responsibility

1. Insanity - A person who commits a criminal offense “may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that person did not know the criminal act was wrong.” A person found guilty but insane may be committed by the court for a period of time equal to the prison confinement the person would have faced of found guilty of the offense. The defendant has the burden of proving the insanity defense by clear and convincing evidence. A.R.S. § 13-502.
2. Underage - A juvenile less than 14 years old at the time the juvenile commits a crime cannot be charged as an adult, unless the juvenile has a “historical prior felony conviction” (as defined in A.R.S. § 13-604, which includes a felony “involving the use or exhibition of a deadly weapon” - § 13-604.U.1(iii)). A.R.S. § 13-501.C. A juvenile who is at least 15 years old, may be charged as an adult for commission of a class 1 or 2 felony, or for commission of certain class 3, 4, 5 or 6 felonies (including those that involved the “use or threatening exhibition of a deadly weapon”). A.R.S. § 13-501.B. A Juvenile fifteen, sixteen or seventeen years old must be charged as an adult if the juvenile commits first or second degree murder, forcible sexual assault, armed robbery, aggravated DUI, any other violent felony, or if the juvenile commits a felony and is a “chronic felony offender” (as defined in A.R.S. § 13-501.D, which includes at least two prior felonies for which the juvenile has been adjudicated a delinquent). A.R.S. §13-501.A.

IV. CIVIL LAWS IMPACTING ON USE OF FIREARMS

A. Explanation of sources of civil law, *i.e.*, court made law (common law) and statutory law

There are two sources of civil laws: (1) the rules that have evolved over the centuries as a result of "reported" or "published" court decisions, *i.e.*, "common law," and (2) rules that have been passed by the legislature, *i.e.*,

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<sup>31</sup> Use of a “Permitted Remote Stun Gun” or a “Remote Stun Gun” during the commission of a crime is an “aggravating circumstance” that can increase the sentence imposed. A.R.S. §§ 13-702 and 13-710.

statutes or printed laws.

Common law consists of the cases that have been put into the law books. Newspaper and magazine accounts of trials do not count. They are not precedents until they have been printed in law books known as "reporters." Over many years, the common law has developed rules, which if violated, may give someone the right to sue the violator.

In Arizona and the United States, most of the **civil laws** are not written into statutes. They are legal principles that come from hundreds of years of court decisions. These principles are continually being changed by more court decisions and legislation. All the publicity about "tort reform" concerns lobbying efforts to pass legislation to change certain common law rules that have been developed by the courts.

Under civil law, if a person kills, wounds, strikes or threatens someone with a firearm under circumstances where that person has violated a legal "duty" owed to the victim, that person can be sued by the victim (if alive), the victim's estate (if the victim is dead) or certain persons related to the victim for wrongful death, loss of consortium (*e.g.*, loss of love, affection, sexual ability), funeral expenses, medical expenses, loss of income and other civil remedies and damages, including punitive damages.<sup>32</sup> In Arizona, the same legal "justifications" are defenses to civil lawsuits and criminal charges. A.R.S. § 13-413. A legal "duty" can be created by statute, contract, or circumstances where the law imposes a duty on someone. For example, there is no duty to avoid harming or killing an assailant who is attacking with a deadly weapon, but there

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<sup>32</sup> A.R.S. §§ 12-611 through 613 set forth statutory rules for wrongful death actions:

Wrongful death statute - preserves liability beyond death of victim - purely statutory remedy.

Parties plaintiff - surviving spouse, child, parent or personal representative on behalf of estate of deceased, with damages distributed to parties in proportion to their damages or as asset of estate.

Measure of damages = fair and just with reference to the injury resulting from the death to the surviving parties, and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default. . . not subject to the debts or liabilities of the deceased, unless the action is brought on behalf of the estate.

is a duty to avoid harming or killing another person who might become the victim of a stray bullet fired at the assailant.

If a person brandishes a firearm in a manner which causes someone (the victim) reasonably to fear death or injury in violation of a duty owed to the victim, the violator can be sued by the victim for assault, mental distress and other civil remedies and damages. Justification is a defense. A.R.S. § 13-413.

One cannot be held liable for a civil wrong (tort) in Arizona if the conduct was justified under the law. (A.R.S. § 13-413). However, being found legally justified in a criminal case does not protect against a civil suit. *Pfeil v. Smith*, 183 Ariz. 63, 900 P.2d 12 (App. 1995). The differences between civil and criminal cases will be explored later in this treatise.

Now, let's look at some examples of civil laws that affect carrying of a firearm, concealed or openly.

1. Intentional acts - assault, false arrest and false imprisonment
  - a. Intentional torts: These are acts which are done intentionally, rather than accidentally. Intentionally shooting or striking a person without justification is an intentional tort.
    - 1) **Battery** is an offensive or harmful touching of another in violation of a duty owed to that person. Generally, everyone has a duty to everyone else to avoid such an offensive touching. However, a battery can be committed without personally touching the other person. If a person puts into force or action the means by which the offensive or harmful touching occurs, that person has committed a battery. For example, if a person intentionally shoots a victim without justification, that person has committed a battery despite having not directly touched or contacted the victim. The victim can sue that person for the resulting damages.
    - 2) **Assault** is a threatened harmful or offensive contact. Think of it as a threatened battery without the need for actual contact. Intentionally pointing a firearm at a victim without justification is an assault. The victim can sue the person who pointed the firearm for assault and recover the resulting damages for fright, mental duress, etc.



- 3) False arrest or false imprisonment occurs when a person restrains someone's freedom without legal right or justification. For example, if a person points a firearm at the victim and restrains the victim's freedom, without justification, the victim can sue that person for false imprisonment. There need not have been an actual arrest or imprisonment in order to trigger the right to sue. Use of a firearm to restrain the person's freedom without justification is likely a false arrest or false imprisonment, and the victim can sue for damages, including mental anguish, etc.

2. **Negligence - accidental discharge, accidental shooting**

- a. **Negligence** is a tort best known as an "accident." In other words, a person who did not intentionally harm the victim or the victim's property, but accidentally harmed the victim or the victim's property in violation of a duty to the victim has probably acted negligently. Careless or improper use of firearms can easily lead to being sued for negligence.

- 1) **Accidental discharge of firearm can easily lead to being sued for negligence.** Obviously, if a person accidentally shoots a firearm and strikes a victim or the victim's property, damage will likely result. The victim can sue that person for negligence. Although justification is a theoretical defense, it is hard to imagine a circumstance where a person would be justified to be careless with a firearm. An example of an accidental shooting that resulted in a civil lawsuit is *Mack v. Barney*, 124 Ariz. 5, 606 P.2d 823 (Ariz. App. 1980). The *Mack* case involved a hunting accident in which the defendant slipped and fell and his rifle discharged, causing plaintiff (victim) to be shot in both ankles.
- 2) **Accidental shooting of a person, animal or property can also result when a person intentionally shoots a firearm in the mistaken belief that the bullet will not strike any person, animal or property.** Signs warning against shooting a firearm within 1/4 mile of an occupied structure are intended to guard against the negligent injury or damage that can result from such conduct. **Shooting a firearm blindly through bushes**

or trees without justification and hitting someone or someone's animal or property can result in being sued for negligence and the resulting damages.

3) Shooting at a criminal, even with legal justification (A.R.S. § 13-401), and hitting a bystander may constitute negligence. The bystander is owed a general duty of care to avoid injury. The bystander might sue for negligence and battery.

3. Convicted criminals are restricted from denying the elements of the criminal offense in a subsequent civil suit.

A.R.S. § 13-807 prohibits a criminal convicted in a criminal proceeding from subsequently denying in any civil proceeding brought by the victim against the criminal the essential allegations of the criminal offense of which the criminal was convicted, including convictions resulting from no contest pleas. However, the criminal may raise "affirmative defenses" in the civil proceeding. See *Williams v. Baugh*, 2 CA-CV 2006-0128 (App. Div. 2, Feb. 20, 2007).

#### V. "JUSTIFICATION" FOR USE OF DEADLY FORCE - THE KEY TO KNOWING WHEN A FIREARM CAN BE USED AGAINST ANOTHER PERSON

Up to now, the focus has been on the laws that prohibit using a firearm. Now, the focus will shift to the circumstances under which the law "justifies" use of deadly force or "defensive display" of a firearm. This is a critical part of the legal studies in this course. There are no stupid questions! Anyone with questions should ASK THE INSTRUCTOR!

IMPORTANT NOTICE: In each of the justification examples, where the law justifies the use of deadly force, there is an important exception. Even though the law might justify use of physical or deadly force against one person, that force may not be used recklessly to injure an innocent bystander. There is no justification for the reckless injury or killing of an innocent bystander. (A.R.S. § 13-401). In addition, negligently injuring or killing an innocent bystander can lead to a civil negligence lawsuit.

IMPORTANT NOTICE: In each of the justification examples, the law requires the defendant to raise the justification defense. In a civil case, the defendant must prove justification by a "preponderance of the evidence," and the judge or jury is free to decide whether the defendant's conduct was justified based on the "preponderance of the evidence." *Pfeil v. Smith*, 183 Ariz. 63, 900

P.2d 12 (App. 1995). In a criminal case, “once any evidence of self-defense [i.e., justification] is presented, the burden is on the state to prove beyond a reasonable doubt that the conduct was unjustified.” A.R.S. §§ 13-103 and 13-205; *State v. Duarte*, 165 Ariz. 230, 231, 798 P.2d 368, 369 (1990).<sup>33</sup> From 1997 to April 24, 2006, justification defenses were treated as “affirmative defenses” under a law passed at the urging of prosecutors. That law was reversed in 2006 by the legislature with SB 1145, effective April 24, 2006. A.R.S. §§ 13-103 and 13-205.

One cannot assert a justification defense while denying the underlying assaultive conduct. *State v. Miller*, 129 Ariz. 42, 43, 628 P.2d 590, 591 (App. 1981); *State v. Ruggiero*, 211 Ariz. 262, 120 P.3d 690 (App. Div. 2, 2005), review denied (2006). The defendant can face a criminal trial, be acquitted based on justification, and still face a civil trial to decide again whether he was justified.

There is no duty to retreat before acting with justification, i.e., Arizona is a “stand your ground” jurisdiction. *State v. Jackson*, 94 Ariz. 117, 382 P.2d 229 (1963); *Macias v. State*, 36 Ariz. 140, 238 P. 711 (1929); A.R.S. § 13-411.

THE POLICE HAVE NO DUTY TO PROTECT AN INDIVIDUAL. Any discussion of justification triggers consideration of alternatives to self-defense. A common misunderstanding is that law enforcement officers have a duty to protect you, if possible. This is not true. Courts have held that neither the state nor the police owe a duty to protect the individual. Some of the more recent court decisions include: *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *Hernandez v. City of Goshen*, U.S.C.A. 7th Cir. Mar. 31, 2003; *Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 119 Cal.Rptr.2d 709, 45 P.3d 1171 (2002); *Ashburn v. Anne Arundel County*, 306 Md. 617, 510 A.2d 1078 (1986); *Everton v. Willard*, 468 So.2d 936 (Fla. 1985); *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983); *Weiner v. Metro Transportation Authority*, 55 N.Y.2d 175, 448 N.Y.S.2d 141 (1982); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981). One federal court even boldly proclaimed that “there is no constitutional right to be protected by the state against being murdered by criminals or madmen.” *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

#### A. Justification - A.R.S. §§ 13-404 & 13-405

##### 1. Self-defense (A.R.S. §§ 13-404 & 13-405); “Defensive Display”

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<sup>33</sup> “If evidence was presented that raises the issue of self-defense [or some other justification], then the state has the burden of proving beyond a reasonable doubt that the defendants did not act in self-defense.” *State v. Duarte*, 165 Ariz. 230, 232, 798 P.2d 368,, 370 (1990), stating the required jury instruction in justification cases.

(A.R.S. § 13-421)

Self-defense is the most critically important part of CCW training on the lawful use of deadly force! Self-defense, by far, is the most likely reason for the justified use of a firearm against another human being. Several scenarios will be reviewed as part of your judgmental shooting training.

- a. One would be justified in threatening or using **physical force** against another person when and to the extent a reasonable person in that position would believe that physical force is immediately necessary to protect oneself against the other person's use or attempted use of **unlawful physical force**. (A.R.S. § 13-404) . One would be justified in using **deadly physical force** when a reasonable person in that position would believe that deadly physical force is immediately necessary to protect oneself against the other person's use or attempted use of **unlawful deadly physical force**. (A.R.S. § 13-405).

It is important to understand that the law permits a *measured* self-defense. Generally, one can only use the force necessary to resist the unlawful force. One can **resist unlawful physical force with physical force**. One can **resist unlawful deadly force with deadly force**.

- b. Effective Sep. 30, 2009, there is a new self-defense justification that permits the “defensive display” of a firearm “when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the use or attempted use of unlawful physical force or deadly physical force.” A.R.S. § 13-421. In other words, a person threatened with unlawful physical force or deadly physical force can respond with “defensive display of a firearm.”

“Defensive Display” means (1) verbally informing an aggressor that one is armed; (2) exposing or displaying a firearm in a manner that a reasonable person would understand is meant to protect against the aggressor's use or attempted use of unlawful physical force or deadly physical force; or (3) placing one's hand on a firearm that is contained in a pocket, purse or other means of containment

or transport. One may not use the defensive display justification if he/she provoked the fight or altercation, and one may not use the defensive display justification if one is committing a "serious offense" or "violent crime" as defined by other statutes (A.R.S. §§ 13-706 and 13-901.03).

The defensive display justification is a much more restrictive version of the statutory right of a police officer to threaten deadly physical force in response to any potential threat of physical force. A.R.S. § 13-410(D). However, witnesses are much more likely to become alarmed if they see a non-police officer draw a firearm, so the "reasonable person" standard in the defensive display statute may be difficult to apply in practice. Therefore, under most circumstances, the CCW permittee should refrain from actually drawing a gun in self-defense, unless faced with an imminent threat of serious bodily injury or death. If confronted only with a threat of unlawful, non-deadly physical force, defensive display should be restricted to verbally informing the aggressor that you are armed and/or placing your hand on the firearm without drawing it.

One cannot use self-defense physical force in response to mere words, no matter how offensive. Similarly, **ONE CANNOT USE DEADLY FORCE IN RESPONSE TO MERE WORDS** or, in most cases, to resist unlawful physical force. Effective Sep. 30, 2009, "defensive display" can be used in self-defense to resist threats of unlawful physical force or unlawful physical force.

The difficulty comes when trying to determine what force one may use as a confrontation evolves from mere words to physical force to deadly force. In general, one cannot be the aggressor. In reality, one should avoid any confrontation, unless circumstances require one to defend oneself or another.

EXAMPLE: Betty Shopper is walking through a shopping mall with her child, and three, young, males, wearing gang "colors," are walking toward her. As the three, young males walk past her, one of them bumps her shoulder. He immediately turns, flashes a gang sign, "flips her the bird," and starts yelling at her. He uses more profanity than she

has ever heard before, and he directs it at her and her child. She ignores him and starts to walk away, but he and the other two, young, males follow. Now, they are all yelling at Betty and cursing her. They walk circles around her as she walks down the mall. They dare her to "step outside and get some action," and they graphically describe how they are going to "love" her with her child watching. No one comes forward to help, and there are no security personnel or police in view. She is carrying a loaded pistol under her jacket. One of the young males approaches within two inches of her face and screams that he is going to "f\*\*\*" her.

**SHE MUST KEEP HER COOL!** If she pulls her gun and shoots, you may not be justified. Until she is threatened with imminent death or serious physical injury, she cannot use deadly force. Displaying her gun might be a justified "defensive display," but it might lead to a struggle over her gun. Telling the youths that she is armed is probably a permissible "defensive display," but that gives away a tactical advantage (surprise) and may cause the situation to escalate. Even if one of the youths shoves her, she must keep her cool and her balance! She needs to focus her anger and start planning "what if." She must plan what she will do if one of the youths pulls a knife, if one pulls a gun, if more than one pulls knives or guns, if one produces a club, etc. She must think it through and look for tactical advantage. What escape routes are available? What cover is available? Which of the youths is closest? She must keep a clear view of all three youths! She must try to maximize her distance from the youths. Are there any bulges under their clothes that indicate a possible weapon? Is there a restaurant or crowded store where increased security or help is available? How is she going to keep her child safe and out of the line of fire if deadly force becomes justified and necessary? Can she use deadly force without hitting someone else; if so, how does she need to improve her position; if not, can she move into a position where use of deadly force is possible and risk of harm to bystanders is minimized? In she has to focus, think, plan and stay cool, but remember that mere words never justify the use of deadly force, and defensive display means revealing that she is armed.

- c. There are important **limitations on self-defense**. One cannot use force against a police officer, even if one

believes he is being illegally arrested, unless the physical force used by the police officer exceeds that allowed by law. One cannot provoke a fight and then act in self-defense, unless (a) he first withdraws from the fight or clearly communicate his intent to withdraw, but reasonably believes he cannot safely withdraw, and (b) the other person nevertheless continues or attempts to use unlawful physical or deadly force against him. A.R.S. § 13-404(B)(3)(a) & (b).

d. Examples of self-defense cases:

Examples from real cases help understand self-defense laws. The goal is to apply the foregoing legal principles to the examples. These examples are drawn from **real cases** involving real people. The results may seem unfair in some cases, but people can differ on what constitutes a "reasonable" belief that self-defense is required. Generally, the clearer the need for self-defense, the stronger the likelihood that a claim of self-defense will be convincing to the police, prosecutors, judges and juries.

EXAMPLE: Wilford Worker is driving to work when a bearded, filthy-looking man in a VW microbus starts honking at Wilford. The VW driver violently shakes his fist at Wilford. His eyes are red. He follows Wilford through heavy traffic, and runs a red light to keep "on Wilford's tail." Suddenly, Wilford finds himself caught in heavy traffic behind a red light. There are cars on his left and cars on his right. Wilford cannot drive forward, to the left, to the right, or to the rear. The VW driver jumps from his VW and runs up to Wilford's car door. The VW driver begins beating his fists on the driver's window and windshield of Wilford's car. Wilford pulls his gun and points it at the VW driver!

If Wilford had not pointed the gun at the VW driver, he might have fallen with the justified "defensive display" statute. But Wilford likely crossed the line and committed an aggravated assault because he was not in reasonable apprehension/fear of imminent seriously bodily injury or death. Wilford lost his cool. He did not look to see if the VW driver had a club, knife, or any weapon. Wilford was focused on the VW driver's dirty, bearded, terribly contorted face, instead of scanning for weapons. Notwithstanding the possible "defensive display" justification, by producing his gun before he had the right to shoot, Wilford risked

escalating the situation, and he lost the tactical advantage of surprise. Nonetheless, he made the gun more accessible and ready to use (without the need to point it at the VW driver). Wilford should have kept an eye on the VW driver's hands, scanned for weapons, had his gun readily accessible and prepared to speed away when traffic began to move.

Someone saw the incident and called the police. The police arrive on the scene, but the VW driver is gone and no one saw his license number. Wilford is lucky! None of the witnesses say Wilford pointed the gun at the VW driver or even saw the gun. Wilford is not charged, and the police tell him to drive away NOW! Wilford complies and never hears from the police.

EXAMPLE: Harold and his wife are a passenger in the family car. Harold's wife is driving north on the freeway. Suddenly, a car pulls up next to them and the driver rolls down his window and begins yelling something and shaking his fist. He "flips the bird," and acts like a madman. Harold and his wife cannot understand why this guy is so mad at them.

Harold's wife speeds up and maneuvers through the freeway traffic. The madman is following closely, and each chance he gets, he pulls up beside them and starts yelling and shaking his fist again. Harold's wife drives off the freeway onto an access road, and the madman follows. She re-enters the freeway, and the madman follows, honking his horn and shaking his fist all the way.

As the madman pulls up next to Harold and his wife again on the freeway, Harold decides to let him know that Harold is armed. Harold holds up his pistol to the window, being careful not to point it at the madman. He sees Harold's pistol and takes the next freeway exit.

A few minutes later, a police car pulls up behind Harold and his wife, and the policeman indicates they should pull off the freeway. Harold's wife complies, and Harold is arrested for aggravated assault. The jury rejects Harold's "defensive display" defense. Harold is sentenced to a minimum of 3 1/2 years in prison.

This all really happened. Although this freeway dispute occurred between occupants of moving vehicles, Harold and his wife were never threatened with physical force or deadly physical force. Harold was not legally justified to defensively display his gun or threaten the use of deadly physical force, but displaying his gun under these



circumstances constituted such a threat in the eyes of the judge. Moreover, Harold did not use good tactical judgment. He revealed that he was armed, thereby losing the tactical advantage of surprise if the other driver had somehow cornered Harold and his wife. Although Harold was trying to dissuade the other driver from doing anything, Harold risked escalating the situation without having been threatened with unlawful physical force or deadly physical force. Moreover, even if the madman had been shooting at Harold, shooting back in heavy freeway traffic is almost certainly a legal and tactical blunder. A moving car is not a good defensive position from which to use a gun! Harold's wife should have driven off the freeway and searched for a fire station (they are more plentiful than police stations; they are usually open; there is usually someone awake and on duty to help) or some other location where she might find help. Under a worse case scenario, she needed to improve their tactical advantage, *i.e.*, seek cover and a stable position from which Harold could safely defend them.

EXAMPLE: Fred Father lives in California, is in his mid-forties and has an adult daughter who has been involved in a tumultuous marriage. Fred's daughter's divorce is pending, and she has moved back into Fred's house. Her husband is constantly calling and threatening her and Fred, and he has repeatedly come to Fred's home and beat on the door, refusing to leave. Fred has called the police several times, and Fred and his daughter have obtained a restraining order to keep her husband away from them. Nonetheless, the daughter's husband continues to call and visit Fred's house at all hours of the day and night, always leaving before the police arrive.

Out of concern for his daughter's safety, Fred arranges with his church to travel with his daughter to Phoenix, Arizona to stay in a "safe house." They arrive in Phoenix and learn that the safe house is a small unit at a motel. They move into the safe house, planning to stay a few weeks, while the daughter's divorce becomes final and her husband cools off.

Late one night during the first week at the safe house, Fred hears a loud pounding at the door and the yelling of his daughter's husband. Fred goes to his daughter's side. The pounding at the door becomes louder, and your daughter's husband crashes through the door. He has a gun in one

hand. He beats Fred until Fred is semi-conscious, then he focuses his attention and anger on Fred's daughter. Fred stumbles outside into the parking lot to get his pistol from his car. The husband sees Fred leave and pursues Fred into the parking lot. Fred heads for his car, where he has a Walther 9mm pistol, and he retrieves the pistol. The husband is still coming after Fred with his own gun in his hand, pointed at the ground. Fred shoots him several times, killing him.

The police arrive, they question Fred and his daughter off and on for over ten hours, they seize Fred's gun, but they do not arrest Fred. The investigating officer tells Fred that he doubts that any charges will be filed against him, but it is up to the county attorney. Fred and his daughter return to California.

Months go by, and Fred repeatedly calls the Phoenix homicide detective who investigated the case. The detective's assurances become stronger, but Fred never receives any official notification that no charges are being filed against him. Finally, nine months after the shooting, the police investigator tells Fred that the county attorney is not going to charge Fred with a crime, but Fred will receive no official notification. Six months later (over a year after the shooting), with the aid of his attorney, Fred recovers his pistol from the Phoenix police department. Fred has been involved in the "justified" use of deadly force, but Fred will never receive any official ruling or notification. Fred will never receive any explanations or communications from the county attorney's office. Fred cannot deduct his legal expenses from his income for tax purposes. Yet, Fred was lucky.

The U.S. and all the state criminal justice systems are designed to prosecute people. In most states, the criminal justice system has no established procedures for officially clearing people without a trial. There is simply no prosecution, or charges are dismissed. There is no hero's thank you, no official document to show an official or employer who asks about the case, and no reimbursement for expenses and legal fees. In short, until citizens require their local and national governments to treat them differently when they act in self-defense, those who act in self-defense will be treated as though they did something terribly wrong, rather than being congratulated for legally acting decisively to save their lives. Texas and some counties in Arizona use

grand juries to review defensive shootings and issue “no bills” where the shootings were justified, effectively clearing citizens who have used or threatened to use deadly force with justification.

Government's attitude toward and treatment of those who legally act in self-defense may not represent our national moral and legal values, but government's attitude will change only when citizens become actively involved in their government and demand that those in government protect the citizens' rights and values.

**EXAMPLE:** Sam Shopper is confronted by several apparent gang members in a parking lot outside a Phoenix mall. None of the five gang members is visibly armed, but they have nearly surrounded Sam, as they shout threats at him and demand his money. There is a path of escape, but Sam is unsure whether he can outrun the gang.

Sam has a tough choice. Since Sam is in a place where he has a right to be, he is not legally obligated to run, and he may defend himself with deadly force in order to avoid imminent great bodily harm or death. *State v. Palomarez*, 134 Ariz. 486, 657 P.2d 899 (Ariz. App. 1982). Although none of the attackers is obviously armed, **if the circumstances are such that a reasonable person in Sam's position would consider himself in imminent danger of losing his life or sustaining great bodily harm, then use of deadly force would be justified.** *Walker v. State*, 52 Ariz. 480, 83 P.2d 994 (1938); *State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (Ariz. App. 1993); *State v. Buggs*, 167 Ariz. 333, 335, 806 P.2d 1381, 1383 (Ariz. App. 1990). So, Sam pulls his gun as the gang members charge him. Sam fires five, quick shots, and the gang members flee. Two of Sam's shots wound other shoppers in the parking lot. Sam is arrested and charged with multiple counts of aggravated assault. He is held in jail, loses his job, and spends many thousands of dollars to hire a lawyer, **At trial, “once any evidence of self-defense [i.e., justification] is presented, the burden is on the State to prove beyond a reasonable doubt that the conduct was unjustified.”** A.R.S. §§ 13-103 and 13-205; *State v. Duarte*, 165 Ariz. 230, 231, 798 P.2d 368, 369 (1990). The State must prove that Sam acted recklessly in wounding the bystanders. The jury acquits Sam on all charges, but Sam never recovers his expenses, or even

receives an apology from the prosecutors, and lives in constant fear that one of the bystanders who Sam accidentally shot will sue him. Sam will not even be able to deduct his legal expenses from his income taxes.

What if Sam had succeeded in escaping by running back to the mall. After waiting ten minutes, he returned to his car in the parking lot. As he neared his car, he sees the same gang standing nearby. Even if he had the right to use self-defense under the circumstances that existed ten minutes earlier, he no longer has that right, unless the gang members again attack him. In other words, even though Sam might "feel" that the gang will attack him, until the attack begins or is reasonably imminent, Sam is not justified to use physical force or deadly physical force. *State v. Buggs, supra*. The moral - one does not go back to the fight from which one has escaped.

- e. **Duress** is often confused with self-defense, but it is different. If someone puts a gun to a man's head or to his loved one's head and threatens to shoot unless the man attacks an innocent third party, that man is being asked to act under duress. Although duress is a defense to committing many crimes, **duress is never a defense to shooting someone**. One is not justified in using deadly force against an innocent third person in order to save himself or another from harm.

EXAMPLE: Two thugs break into Howard Homeowner's house, tie and bind Howard and his wife, rummage through their possessions, and begin to argue violently between themselves. One thug is armed and the other is not. While the unarmed thug is outside, "cooling off," the armed thug moves close to Howard and his spouse, unties Howard, hands him an unloaded shotgun he found in Howard's closet, moves behind Howard's wife, puts his .357 magnum revolver to the wife's head, throws Howard one round of "buckshot" from a box of shells he found with the shotgun, and orders Howard to go outside and shoot the unarmed thug or "I will blow your wife's head off!" The armed thug promises that if Howard does as he is told, the armed thug will leave Howard and his wife unharmed, and Howard can claim that he shot one thug while the other got away.

Tough choice! Legally, Howard cannot shoot the

unarmed thug in self-defense. Howard would not be justified because the unarmed thug is not an immediate threat to Howard or his spouse, and the unarmed thug is no longer in the process of committing burglary or some other offense that might justify use of deadly force. If Howard shoots the unarmed thug, he cannot defend himself by claiming that he was coerced by the armed thug. Will Howard shoot the unarmed thug without (legal) justification (and without a guaranty that the armed thug will leave Howard and his wife unharmed), or refuse to follow the armed thug's instructions and risk that his wife (and perhaps himself) will be killed, or take the even greater risk that he can deal with both thugs with a single load of buckshot without harming his wife? (Hint, there is no legally and morally correct choice.)

2. **Defense of another person - A.R.S. § 13-406**

The rules for determining whether you are justified in using deadly force to defend someone else are similar to those for self-defense.

- a. **One would be justified in threatening or using physical force or deadly physical force against another person to protect a third person if, under the circumstances known to one, a reasonable person would believe (1) that the third person would be justified to use such force against the other person, and (2) a reasonable person would believe that intervention is immediately necessary to protect the third person.**
- b. **EXAMPLE:** As Bill Bankcustomer approaches an ATM late at night to withdraw some cash, Bill stumbles onto a drug arrest. The area around the ATM is deserted, except for a uniformed police officer, the suspect and Bill. Bill is close enough to clearly overhear the officer warning the suspect of his rights and notifying the suspect that he is being arrested for sale of cocaine. Bill personally recognizes the officer from an occasion when Bill was a juror and the officer testified as a witness. Bill informs the officer of his presence and "stands by" as the lone police officer is hand-cuffing the suspect. Bill has a loaded 1911 style 45 ACP (a semi-automatic pistol) in "condition 1" (cocked with a round in the chamber and the safety on) with night sights in a holster under his jacket, and Bill knows how to use it (Bill has taken several pistol courses and practices regularly).

Suddenly, the suspect spins around and seizes the officer's pistol, stands up, points the pistol at the officer's head and snarls "You're a dead mother f---er!" Bill has a clear, unobstructed, profile view of the officer and the suspect who are 15 feet from Bill. The light from the ATM is reflecting off the faces of the officer and the suspect, and they are outlined by the well-lit bank building, which will be an effective "back stop."

Although Bill has no legal duty to aid the officer, Bill may legally shoot the drug suspect! The officer would be justified to shoot the suspect in self-defense, and Bill's immediate intervention appears reasonably necessary to save the officer.

In analyzing when one can use deadly force in defense of another, it is helpful to use self-defense examples, and imagine that one is coming to the defense of a person who is justified to use self-defense. The additional factor one must consider is whether one's intervention would be immediately necessary. If so, one is justified to use deadly force to protect another.

3. Defense of property - A.R.S. §§ 13-407 & 13-408

- a. One may **threaten** to use **deadly physical force** or **threaten to use or use physical force** to the extent that a reasonable person would believe it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by another person on one's property (**real property or human lodging**, *e.g.*, trailer, camper, etc.) or property in one's lawful possession or control. (A.R.S. § 13-407.A)
  - 1) One may **use deadly force** under the foregoing circumstances only in self-defense or in defense of a third person (A.R.S. § 13-407.B), and to stop a burglary in the 1<sup>st</sup> or 2<sup>nd</sup> degree if the trespasser has entered a residence to harm a person or steal personal property (A.R.S. § 13-411, discussed later).
  - 2) **EXAMPLE:** Pat Partygoer is throwing a New Year's party at her home. Her living room is crowded with guests. A party crasher walks into her house. Pat does not know him, and none of her guests know

him. Pat asks the party crasher to leave, and he says "Kiss my a--!" Pat again asks him to leave, and he moves his face within two inches of her face and snarls "Go f--k yourself!" Pat has a Sig Sauer model 226 (a 9mm semi-automatic pistol) in a drawer near the living room telephone. May she legally retrieve her pistol, point it at the party crasher, and demand that he leave?

Pat may legally threaten the use of deadly force to evict a trespasser, and the party crasher is a trespasser. However, this is where judgmental shooting and tactics must also be considered. By playing the "what if" scenario, one will see that the law permitting one to threaten deadly force to evict a trespasser does not offer a useful tactic in most urban situations. Let's practice "what if."

Pat points her Sig Sauer at the party crasher, three inches from his face, and says, "Get out of my house or I'm going to blow your head off!" (Pat watches too much TV.) The party crasher stares into the muzzle of the Sig and says, "How would you like me to take that gun and stuff it up your ---?" Now what does Pat do? Pat legally may **threaten** deadly force to evict a trespasser, but she may not **use** deadly force against a mere trespasser.

Moreover, Pat's living room is filled with her guests. Imagine the dire possibilities if Pat and the party crasher get into a fight for control of her pistol. By legally threatening deadly force to evict a trespasser, Pat has put herself and her guests into a potentially deadly situation. Now, what does Pat do?

Despite her legal right to threaten deadly force, Pat should have exercised better judgment. Under the circumstances of this "what if" example, Pat was stupid to go for her gun and threaten deadly force to evict a trespasser. There were several, better tactics to handle the situation. Next time, Pat should call 911 and stay near her gun in case the party crasher has a weapon. Pat should have an alternative to a pistol, such as chemical spray or another non-deadly tool. Leave it to the police to evict the trespasser.

- b. You may use **physical force** against another when and to the extent a reasonable person would believe it necessary to

prevent what a reasonable person would believe to be an attempt to commit or commission by another of theft or criminal damage involving **tangible movable property under one's possession or control** (A.R.S. § 13-408), and one may use **deadly physical force in self-defense, defense of another** or to prevent certain **special crimes** (see below).

EXAMPLE: Like the law that permits threatening deadly force to evict a trespasser, the law permitting use of physical force to stop theft of one's property should be tempered by judgment and tactical considerations. Let's play "what if."

Joe Sixpack is sitting at home in his living room in front of a large window, watching TV during the evening. Joe suddenly sees the motion activated flood light above his front door illuminate a figure that is using a wire coat hanger to open Joe's locked Porsche automobile, which is parked on the street in front of Joe's house. May Joe legally go outside and physically stop the theft of his prized car from in front of his house? Sure he may, but should he? Joe should think about tactics and judgment, not merely what "rights" he may legally exercise. Let's continue the "what if" game.

Joe tucks his Beretta model 92F (a 9mm semi-automatic pistol) into his waistband, puts on a jacket to conceal the Beretta, and goes out to confront the jerk who is stooped over his beautiful Porsche. Joe knows that he may threaten or use **physical force** to stop the thief, so Joe approaches and shouts "Hey, what the hell are you doing?" Joe plans to deck this jerk when he turns around, unless the thief flees (Joe assumes the thief will flee). Then . . . the thief turns and stands erect as Joe approaches closer. Joe thinks to himself, "My God! He is at least six foot seven and his shoulders completely block my view of the Porsche!"

At this point, Joe thinks to himself, "I can threaten or use only physical force to stop this theft, but I don't think my threat or use of physical force will do anything to this monster. I cannot threaten deadly force because he is not a trespasser on my property (and that would be stupid anyway - recalling the party crasher at the New Year's party). I cannot use deadly force because my life is not in apparent, imminent danger. I'm screwed!"

Under this scenario, Joe is really going to feel stupid



just standing there as this guy drives away in Joe's Porsche, but Joe did not take time to call the police. Does Joe recall the amount of the deductible on his auto insurance? Wait, let's continue "what if."

Undeterred by the obvious superior physical abilities of the guy who will soon be driving Joe's Porsche, Joe stupidly says "Leave my car alone, or I'll kick your a--." (Ah! It is so satisfying to use one's right to threaten physical force to stop the theft of one's Porsche.) Then, the monster does something stupid. He pulls a BIG knife from behind his back, and says "I'm gonna cut your f---ing head off" and steps toward Joe. (Now, isn't Joe glad that he tucked his Beretta into his waistband?)

At this point, Joe will be justified to threaten or use deadly force in self-defense, and he does so. Unfortunately, this guy is so BIG and mean that he doesn't drop his knife and cease being a threat to Joe until Joe has fired 14 of the 15 rounds in his Beretta, and guess what? Joe's Porsche acted as the bullet stop for at least 10 of those rounds. Joe is now seriously depressed and regrets his decision to stop the thief himself, rather than call the police. Now, how much deductible did Joe have on his Porsche insurance?

Obviously, Joe should have called the police before going outside to save his precious Porsche. Joe would have been wise to wait to let the police handle the situation. Under this scenario, Joe proceeded at his own risk when he exercised his "right" to use physical force to stop a theft. Was it worth the risk?

#### 4. **Self-Defense -- Castle Doctrine**

Effective April 24, 2006, the "Castle Doctrine" was implemented in Arizona by SB1145 as A.R.S. §§ 13-418 & 13-419:

A person is justified in threatening to use or using physical force or deadly physical force against another person if the person reasonably believes himself or another person to be in imminent peril of death or serious physical injury and the person against whom the physical force or deadly physical force is threatened or used was in the process of unlawfully or forcefully entering, or had unlawfully or forcefully entered, a residential structure or occupied vehicle, or had removed or was attempting to remove another person against the other person's will from the residential structure or occupied vehicle. A person has no duty to retreat before

threatening or using physical force or deadly physical force pursuant to this section. A.R.S. § 13-418.

13-419. Presumption; exceptions; definition

A. A person is presumed to be acting reasonably for the purposes of sections 13-404 through 13-408 and section 13-418 if the person is acting against another person who unlawfully or forcefully enters or entered the person's residential structure or occupied vehicle, except that the presumption does not apply if:

1. The person against whom physical force or deadly physical force was used has the right to be in or is a lawful resident of the residential structure or occupied vehicle, including an owner, lessee, invitee or titleholder, and an order of protection or injunction against harassment has not been filed against that person.

2. The person against whom the physical force or deadly physical force was used is the parent or grandparent, or has legal custody or guardianship, of a child or grandchild sought to be removed from the residential structure or occupied vehicle.

3. The person who uses physical force or deadly physical force is engaged in an unlawful activity or is using the residential structure or occupied vehicle to further an unlawful activity.

4. The person against whom the physical force or deadly physical force was used is a law enforcement officer who enters or attempts to enter a residential structure or occupied vehicle in the performance of official duties.

5. **Prevent special crimes - A.R.S. § 13-411**

a. **A person may threaten or use both physical force and deadly physical force against another to the extent the person reasonably believes that such force is immediately necessary to prevent against the other's commission of arson of an occupied structure,<sup>34</sup> burglary in the second**

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<sup>34</sup> Although A.R.S. § 13-411 contains no limitations or even reference to residence or home, the courts **previously** construed it to apply to threatened arson or burglary of one's residence (see discussion of *State v. Garfield* in following footnote). The declaration of policy which accompanied the passage of this law by the Arizona legislature states that "The legislature finds that homes of Arizona residents are being burglarized and violated at an alarming rate that is endangering the residents' safety, health and property, thereby depriving them of their safe and peaceful enjoyment of their homes." The statement of policy continues, "It is the legislative intent to establish

**or first degree,**<sup>35</sup> kidnapping, manslaughter, second or first degree murder, sexual conduct with a minor, sexual assault, child molestation, **armed robbery,** or aggravated assault. A person acting to prevent one of these crimes will be presumed to be acting reasonably. This “presumption” was said to disappear if there was any evidence that the person acted unreasonably. *State v. Martinez*, 202 Ariz. 507, 47 P.3d 1145 (App. Div. 1, June 4, 2002), review denied. This “disappearing presumption” was based on the defendant having the burden to prove justification, but, as noted earlier, that burden was returned to the state, effective April 24, 2006. A.R.S. §§ 13-103 and 13-205. Therefore, the “disappearing presumption” analysis of *State v. Martinez* may be invalid effective April 24, 2006. Since that date, the presumption of reasonableness may remain until the state proves beyond a reasonable doubt that the conduct was not justified.

**One has no duty to retreat before threatening or using deadly physical force to prevent these special crimes (A.R.S. § 13-411).** Nonetheless, “retreat” can have two useful purposes: (a) shooting tactics include maximizing the

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a policy by this law giving notice to all citizens, law enforcement personnel and the state courts that a person’s home, its contents and the residents therein shall be totally respected and protected in Arizona, and that the law enforcement officials and courts shall apply this and all other applicable criminal laws relating to the protection of the home and its residents promptly and severely so as to restore the total sanctity of the home in Arizona.” This **previous** court interpretation (limiting application of the law to one’s home) was effectively repealed by the legislature, effective April 24, 2006, with the passage of SB1145, adding the following subsection to A.R.S. § 13-411: “d. this section is not limited to the use or threatened use of physical or deadly physical force in a person’s home, residence, place of business, land the person owns or leases, conveyance of any kind, or any other place in this state where a person has a right to be.”

<sup>35</sup> See preceding footnote. Burglary of an occupied motel room has been ruled to fall within this justification defense. A.R.S. §§ 13-411 & 13-1505A); *State v. Gardella*, 156 Ariz. 340, 342, 751 P.2d 1000, 1002 (Ariz. App. 1988); *State v. Hussain*, 189 Ariz. 336, 942 P.2d 1168 (App. 1997). In other words, one may defend against a burglary of one’s temporary “home” in a motel, etc. *State v. Garfield*, 208 Ariz. 275, 92 P.3d 905 (App. Div. 2, 2004) ruled that a person invited to another’s residence to protect the sanctity of another’s residence also may assert justification under A.R.S. § 13-411.

distance between one and one's target and minimizing one's exposure, and (b) evidence that one tried to avoid having to use deadly force will aid in one's justification defense.

EXAMPLE: Constance Taxpayer drives home after work, and is looking forward to seeing her kids. Constance's husband is on a business trip. She plans to take the kids to the movies.

First Scenario - Constance sees a man preparing to throw a "Molotov Cocktail" (fire bomb) through the front window of her house. She yells "Stop," but he lights the rag fuse and moves to throw the Molotov Cocktail into the house. Constance may threaten or use deadly force to stop him.

Second Scenario - As Constance enters the house, she hears her children screaming. She rushes into the living room, sees that the back door has been shattered inward, and sees a large, filthy, man trying to drag her youngest child out of the house. Constance yells "Stop," but the man ignores her. Constance may threaten or use deadly force to stop him.

Third Scenario - After dinner, a movie, and a quiet drive home, Constance and her children fall asleep quickly. Constance awakens to the sound of shattering glass, and she sees a dark hulk climbing through her bedroom window. She yells "Stop," but the hulk steps through the broken window and moves toward Constance's bed. Constance may threaten or use deadly force to stop the intruder. She need not turn confirm that the hulk is armed, but she needs to be sure of her target! Unbeknownst to Constance, her husband has returned from his business trip, got drunk with his associates after closing a multi-million dollar deal, lost his keys, and stumbled through the glass door while trying to open it.

EXAMPLE: Paul Plumber drives to the gas pump at a convenience store where he often buy gas. Paul enters the store to pre-pay for the gas. Two people are standing stiffly and quietly by the lottery display near the cashier's counter, and a third person is standing nervously behind the counter. Paul offers \$20.00 to pre-pay for the gas, and the man behind the counter visibly bites his lip and says "Pay after you fill up."

Paul goes back to his car to fill up, but stops midway

because he has a vague feeling that something is wrong. Paul looks back toward the convenience store and sees that no one is moving, except the man behind the counter, who has his right arm extended out and downward toward the floor behind the counter. Then Paul sees it - the man behind the counter is holding a gun in his right hand.

Paul quickly walks to his car, retrieves his S&W model 66 (a double action revolver), and walks to the pay phone on the front, right end of the convenience store. As Paul dials 911, the man he saw with the gun starts to exit the store, sees Paul, turns toward Paul, and raises his gun toward Paul. Paul can use deadly force in self-defense, but the robbery is over! Paul could have used his gun earlier to stop the robbery, but tactical and safety considerations made such an effort very risky and foolish.

5. Private Prison Guards - A.R.S. § 13-416

Private correctional guards (“security officers”) who meet the standards established by the American Correctional Association may use “all reasonable and necessary means, including deadly force” to prevent a prisoner in the custody of a private contractor from escaping, taking a hostage, causing death or serious injury to another.

6. Necessity Defense - A.R.S. § 13-417

a. Passed in 1997, A.R.S. § 13-417 creates a justification defense for a person who is compelled to engage in certain conduct, provided:

- (1) the conduct was necessary in order to avoid imminent public or private injury greater than the injury that might result from the conduct;
- (2) the accused person did not intentionally, knowingly or recklessly place himself in the situation in which it was probable that the person would have to engage in the proscribed conduct; and
- (3) the conduct does not result in a homicide or serious physical injury.

It would seem that the “necessity defense” would not apply

to the use of deadly force because the use of deadly force “might result” in death. No threatened injury could be greater than death, therefore use of deadly force would not constitute a “necessity.” Clearly, if death or serious physical injury actually results, the “necessity defense” would not apply. Whether the **threatened** use of deadly force might be recognized by a court as a potential “necessity defense” remains unresolved. It is conceivable that a person might threaten the use of deadly force, without causing death or serious physical injury, in order to avoid imminent death or serious injury to the accused person or another person, thereby meeting the requirements for the “necessity defense.”

**B. Applicability in criminal and civil cases - A.R.S. § 13-413**

1. No person in this state shall be subject to civil liability for engaging in conduct otherwise justified under the statutes previously examined in this text.
2. Although Arizona has a strong policy that justification can be used in criminal and civil cases, one must remember that it is far easier to “prove” a civil case than a criminal case. If Sam Shooter uses or threatens the use of deadly force, and the county prosecutor decides there is no criminal case or Sam is acquitted, the victim or the victim's family can still sue Sam in a civil case for damages. *Pfeil v. Smith*, 183 Ariz. 63, 900 P.2d 12 (App. 1995). Plaintiffs in such cases usually lose, especially in Arizona. Nonetheless, if one is required to use deadly force, he/she faces the potential of a civil lawsuit. One’s responsibilities and potential liabilities for carrying a concealed weapon are great, so do not take them lightly. **NEVER USE A GUN IF IT CAN BE AVOIDED, CONSIDERING ONE’S SAFETY AND THE SAFETY OF OTHERS NEARBY.**

**C. Attorney’s fees; costs - A.R.S. § 13-420**

The court shall award reasonable attorney fees, costs, compensation for lost income and all expenses incurred by a defendant in the defense of any civil action based on conduct otherwise justified pursuant to this chapter if the defendant prevails in the civil action. A.R.S. § 13-420, effective April 24, 2006.

**D. Additional special statutes regarding justification**

1. Execution of public duty (A.R.S. § 13-402)

- a. Pursuant to judgment or direction of court, or in the lawful execution of legal process (A.R.S. § 13-402.B.1)

EXAMPLE: A police officer serving a search or arrest warrant can use deadly force if it becomes necessary in the course of serving and executing the warrant.

- b. Assist a police officer (§ 13-402.B.2)

EXAMPLE: Sig Sauer, a CCW permittee, observes a police officer trying to make an arrest, and the suspect suddenly turns and disarms the officer or fights with the officer for control of the officer's gun. Sig may assist the officer with deadly force, if necessary. It does not matter whether the officer was acting legally, so long as Sig reasonably thought the officer was acting legally.

NOTE: Sig's conduct must be such that a "reasonable person" would believe the conduct was required or authorized by court or to assist a peace officer in the performance of official duties.

EXAMPLE: Sig Sauer sees an unmarked car with flashing red lights beside the road, with a pickup pulled over in front of it. A man exits the pickup and begins exchanging gunfire with the driver of the unmarked car. Would Sig be justified in firing at the driver of the pickup? Maybe, but what if the person from the unmarked car is driving a fake police car? Not likely, but it has happened. The point is that if Sig's assumptions are wrong, he proceeds at his own risk. Even if Sig justifiably intervenes, if he **recklessly** shoots someone else in the process (e.g., a passing motorist), Sig would not be justified in shooting that third person.

2. Maintaining order (A.R.S. § 13-403)

- a. If one is responsible for the maintenance of order in a place where others are assembled or on a common motor carrier of passengers, or one is acting under the direction of someone with that responsibility, one may use physical force to the extent that a reasonable person would believe it necessary to maintain order, but one may use deadly force

only if reasonably necessary to prevent death or serious physical injury. (A.R.S. § 13-403.3)

3. Use of physical force and deadly force during arrest or detention (§§ 13-409 & 13-410)
  - a. One may threaten or use **physical force** to arrest or assist in making an arrest or detention or in preventing or assisting in preventing the escape after arrest or detention of another person, **if the other person uses or threatens to use physical force** and (a) a reasonable person would believe that such **force is immediately necessary** to effect the arrest or detention or prevent the escape, (b) **one makes known the purpose** of the arrest or detention or believes that it is otherwise known or cannot reasonably be made known to the person, and (c) a **reasonable person would believe the arrest or detention to be lawful**. (A.R.S. § 13-409). NOTE: The circumstances under which one may use physical force to arrest or capture an escapee or assist in an arrest or capture of an escapee are complex and confusing. For that reason, one should avoid injecting oneself into such situations.
  - b. One may **threaten the use of deadly force** under the foregoing circumstances if a reasonable person effecting the arrest or preventing the escape would believe the **suspect or escapee is (a) actually resisting** the discharge of a legal duty **with deadly physical force or with the apparent capacity to use deadly physical force**, or (b) a felon who has escaped from lawful confinement, or (c) a felon who is fleeing from justice or resisting arrest with physical force. NOTE: This statute should not be relied upon as justification for shooting an escaping felon. It is likely that one will have an uphill battle to establish justification under this statute, unless one is actually acting in self-defense. The facts to justify such a shooting will be very difficult to establish. In addition, the first requirement that the escapee must actually be using deadly force before one can threaten use of deadly force is absurd! If an escapee is shooting at his pursuers, why would any statute authorize only threatened deadly force in response?
  - c. One may use deadly physical force under the foregoing



circumstances only if a reasonable person effecting the arrest or preventing the escape would believe the suspect or escapee is actually resisting the discharge of a legal duty with deadly physical force or with the apparent capacity to use deadly physical force. A.R.S. § 13-410.B NOTE: Again, justification for shooting a fleeing felon is difficult to establish. Leave law enforcement to the police!

- d. Examples of cases concerning use of physical and deadly force during arrest or detention involve police officers. There are no "published" Arizona cases (printed in a recognized legal "reporter" to give them legal precedential value) where this statute has been applied to non-peace officers. In general, leave arrests and detention to police officers. One's potential liability for arrests and detentions which do not involve one's house or property are too great for one to get involved, unless another justification is present. If the life of the police officer or oneself does not appear in jeopardy, one should not even think about using or displaying one's firearm to capture an escapee or assist in an arrest (unless asked by the officer - see below).

If one believes it is appropriate to aid a police officer, but one is unsure, follow this procedure if the circumstances permit: (1) inform the officer that you are armed, (2) ask the officer if he wants your assistance, (3) if the situation does not dictate the assistance that is needed, ask the officer how he would like you to assist, (4) follow the officer's instructions, and (5) stop assisting the officer when he tells you to stop. A.R.S. § 13-2403.B provides that a person who acts reasonably and aids a police officer at the direction of the police officer shall not be held liable to any person for damages resulting therefrom. A.R.S. § 13-3802 gives a police officer, sheriff, etc. the right to "command" you to aid him in the execution of process in order to overcome resistance.

A.R.S. §§ 13-3884 & 13-3889 authorize citizen's arrests under certain circumstances and in prescribed manners, however one should exercise such a right only under the most dire circumstances. Even under dire circumstances, one is not obligated to make such arrests.

#### 4. Domestic violence justification (A.R.S. § 13-415)

- a. As noted earlier, the justification of self-defense normally requires an “imminent” threat of serious bodily injury or death. However, a special statute alters the requirement for an “imminent” threat of serious bodily injury or death in certain cases involving prior acts of domestic violence, as defined in A.R.S. § 13-3601.A. Basically, A.R.S. § 13-415 (1) permits a judge or jury to consider evidence that the victim had a history of committing acts of domestic violence against the accused, and (2) requires the judge or jury to determine whether the accused was justified "from the perspective of a reasonable person who has been a victim of those past acts of domestic violence."
- b. There are no “reported” cases interpreting this Arizona law. The circumstances under which prior domestic violence will justify use of deadly force cannot be defined, but it is clear that the legislature intends that evidence of prior domestic violence must be considered in evaluating a claim of self-defense or defense of another.

## VI. JUDGMENTAL SHOOTING

### A. Shoot vs. No Shoot Situations

1. Self-defense justification
2. Defense of another justification
3. Defense of premises justification
4. Combination of justifications
5. Confrontations that accelerate into justification situations vs. confrontations where use of deadly force is not justified

Harold Host is hosting a party at his home. A party crasher enters the house. He is drunk and belligerent. Harold asks him to leave, but he refuses. Harold starts to push him out the door (justified physical force to evict a trespasser), but the crasher turns and swings at Harold. Harold strikes the crasher, and the crasher pulls a knife.

Avid Shopper gets into an argument with a stranger while walking in the mall. Avid loses his temper and punches or pushes

the stranger. The stranger punches or pushes Avid back. Avid realizes that he is acting like a fool, so Avid apologizes and walks away. The stranger comes after Avid, teasing and taunting. The stranger steps in front of Avid and pulls a knife.

Peter Parker gets into an argument with a stranger who has taken his parking space at a crowded parking lot. They exchange heated words. Peter loses control and strikes the stranger. The stranger pulls a knife.

B. Group discussion of, participation in and analysis of shoot vs. no shoot situations

The instructor or seminar leader will ask students to create their own scenarios and analyze them. Students will be asked to explain the legal principals and the tactical/safety considerations. This is the “what if” game.

VII. OTHER CONCEALED WEAPON CONSIDERATIONS

A. Contact with law enforcement personnel

1. Declaring possession of weapon and CCW permit

When asked by a law enforcement officer if one has a CCW permit, the permittee must answer truthfully and produce the CCW permit if required by any other law to carry the permit. If the officer asks if one has a firearm, one is obligated to answer truthfully (A.R.S. § 13-3102.A.1(b)), and should describe the firearm, its location and its status (unloaded, loaded, unchambered, chambered, "condition 1," "condition 2," etc.).<sup>36</sup> The law does not require that one **volunteer** to law enforcement officers that one is a CCW permittee or is armed, but one should consider doing so in particular situations (e.g., if the presence of a firearm is likely to become a safety concern).

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<sup>36</sup> Condition 1, Condition 2, and Condition 3 are generally accepted terms to define the loaded condition of a single-action semi-automatic pistol of the 1911 type or the double/single action H&K USP type. Condition 1 = loaded round in chamber, cocked, safety on; Condition 2 = loaded, round in chamber, uncocked; Condition 3 = magazine loaded and in gun, no round in chamber, uncocked. Law enforcement personnel untrained with such firearms may not understand such “conditions.”

2. Conduct with law enforcement personnel during volatile situations

In volatile situations when one comes into contact with law enforcement personnel, one should assess the situation quickly. Unless one can immediately leave the area, generally one should make it clear to law enforcement personnel that one is a CCW permittee and is armed. This is common sense and safety, but not a steadfast rule. One does not want to alarm an officer or interfere with an officer. One wants to protect against surprise or concern under circumstances where an officer might discover that one is armed and mistakes one's intentions. Such disclosure is not required by law. One must bear in mind that law enforcement personnel in volatile situations are operating under stress, are likely experiencing the physiological effects of adrenaline, may be concerned primarily with their own safety, and are armed. One wants to avoid becoming a threat or target simply because one is armed.

If a police officer stops you while you are driving and armed, follow some common sense rules: (1) keep your hands visible, preferably on the steering wheel; (2) if your gun is accessible in the car or if the officer asks whether you have a gun, inform the officer that you are armed, that you have a CCW permit, and the location of your gun; (3) follow the officer's instructions (depending upon the officer and the circumstances, you may or may not be asked to surrender your gun during the traffic stop); (4) if you are asked to surrender your gun, be certain that you communicate with the officer clearly regarding how you are to present the gun, and always remember the four basic safety rules.

3. Surrendering a firearm upon request of law enforcement (A.R.S. § 13-3102.J)

If a law enforcement officer asks for your firearm, you should ask the officer how he would like you to present it to him, and follow his instructions in a safe manner. While the circumstances will determine whether the law enforcement officer can legally seize your firearm for possible forfeiture (A.R.S. §§ 13-3105, 13-3111.F, 13-3601, 13-3602, 13-3624, 13-3895, 13-4305), **LAW ENFORCEMENT PERSONNEL ARE ALWAYS AUTHORIZED TO REQUEST THAT YOU SURRENDER YOUR FIREARM TEMPORARILY TO ENSURE THEIR OWN SAFETY.** (A.R.S. § 13-3102.J). Any person who is lawfully arresting you is authorized to take your firearm and turn it over to the magistrate before whom

you are to be taken (A.R.S. § 13-3895).

4. Law enforcement seizure of guns in domestic violence cases - A.R.S. §§ 13-3601 - 13-3602.

Effective July of 1996, law enforcement officers responding to domestic violence cases may question persons present to determine whether a gun is "present on the premises" and may seize any and all guns (found in "plain view" or pursuant to a consent to search). The gun(s) may be seized only from the aggressor or aggressors in a domestic violence case, not from the victim, unless the victim is also an aggressor. In order to seize the gun(s), the officer must "reasonably believe" that the gun(s) poses a serious risk to the victim or to another household member. The officer who seizes the gun must provide a receipt. The law enforcement agency that seizes the gun(s) must keep it for "at least seventy-two hours," may not return the gun until after the victim is notified that it is being returned, and a prosecutor can seek a court order to keep the gun(s) for up to six months. Courts can also prohibit the person from whom the gun(s) is seized from buying any guns while the order is in effect. The statute provides the gun owner the right to a hearing if a prosecutor files a notice of intent to keep the gun for up to six months. However, the statute provides no protection or remedy for those from whom guns are "temporarily" seized for "at least seventy-two hours." Nor does the statute define how long beyond 72 hours law enforcement may keep a gun before the prosecutor must apply for court permission. A.R.S. §§ 13-3601 - 13-3602. Effective September 30, 2009, "domestic violence" is expanded from family members to include those in a romantic or sexual relationship. A.R.S. §13-3601.

In addition to on scene seizures of firearms, A.R.S. § 13-3602 authorizes the court to enter a protective order taking guns in domestic violence cases. If the Court finds that the defendant is a "credible threat to the Physical safety of the plaintiff" or other specific persons, the Court may prohibit the defendant from possessing any firearms and may order the defendant to turn over any guns he owns or possesses to law enforcement for the duration of the order. A.R.S. § 13-3602.G.

5. Federal "Domestic Violence" prohibition against gun possession. *Omnibus Consolidated Appropriations Act of 1997 (amending the Gun Control Act of 1968); 18 U.S.C. § 922(g)(9).*

Under a federal law, which became effective September 30, 1996 and which applies **retroactively**, it is unlawful for any person who has been convicted of a "misdemeanor crime of domestic violence" to possess, ship, transport, or receive firearms or ammunition. According to a November 26, 1996 BATF letter to "All State and Local Law Enforcement Officials," anyone who has been convicted of any misdemeanor crime of domestic violence must surrender all firearms and ammunition or face federal prosecution. The BATF has asked local law enforcement to cooperate with it in enforcing this new law.

Under this federal law, a misdemeanor crime of domestic violence includes any misdemeanor involving the use, attempted use or threatened use<sup>37</sup> of physical force or threatened use of a deadly weapon<sup>38</sup> against a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. This federal law does not exempt governmental employees, *i.e.*, police officers and others in government service who have been convicted of "domestic violence" cannot possess guns or ammunition, even in the performance of their duties. BATF has warned local law enforcement agencies to consider "appropriate action" against their employees who fall under the new law. The BATF has threatened criminal penalties against such persons who continue to possess guns or ammunition and has warned that the guns and ammunition of such persons are subject to seizure and forfeiture.

This federal law contains confusing, complicated exceptions, such as pardons, whether the person was represented by counsel, etc. These exceptions may make the law difficult or even

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<sup>37</sup> The Federal law incorporates state law "domestic violence" crimes, and Arizona's domestic violence statute (A.R.S. § 13-3601) includes assault, threatening and intimidation (A.R.S. §§ 13-1201 - 13-1204) as "domestic violence" crimes. Therefore, in Arizona, the threatened use of physical force against a spouse, etc. would be included as a "domestic violence" crime.

<sup>38</sup> As explained earlier in this treatise, under Arizona law, the threatened use of a deadly weapon constitutes felony aggravated assault, which disqualifies a person from possessing a firearm. A.R.S. §§ 13-1204, 13-3101.6, 13-3102.4; 18 U.S.C. 922(d).

impossible to constitutionally enforce. If you think that you might fall under this new law, consult an attorney regarding continued possession of firearms or ammunition.

In addition, blanket “domestic violence” gun possession prohibitions may be subject to constitutional attack. See *United States v. Skoien*, (7<sup>th</sup> Circuit Court of Appeals no. 08-3770 (Nov. 18, 2009)).

6. Court prohibitions against possessing firearms

When a person is released from pretrial confinement, the court can prohibit the person from possessing any “dangerous weapon.” A.R.S. § 13-3967. As noted earlier, domestic violence protective orders can also require a defendant to surrender his firearms to law enforcement for the duration of the protective order. A.R.S. § 13-3602.G.

7. **Defending oneself in a shooting investigation**

One of the easiest rules to remember but the most difficult rule to follow concerns how to respond to police when they are investigating a shooting incident in which **you** are involved. The rule is simple - **DO NOT GIVE THE POLICE A STATEMENT!** You should be polite but firm with the police, and **tell them that you will not give a statement and that you want to talk to your lawyer.**

The reasons for this rule are simple. First, you will not be in any condition to give a complete, well-reasoned statement for some time after you have shot someone. Your body and mind will be going through some of the most stressful moments of your life. Even combat does not prepare someone for being asked to give a legal statement after a shooting. Your statement will be full of inaccuracies, missing details, excited word choices that you will later regret, confusing or even conflicting sequences of events, etc. This is why police officers are trained to seek legal advice before giving statements about shootings in which they have been involved.<sup>39</sup> Police officers are always taken from the scene of a

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<sup>39</sup> While it is true that police officers can be required and often are required to give statements to their departmental internal affairs investigators immediately after a police shooting, those statements cannot be used against them in any criminal proceeding. The simultaneous and separate criminal investigation is different. Officers are not

shooting, and their statements are prepared after several interviews over a period of time. You should do the same with your lawyer.

Second, you will need the help of someone who is familiar with criminal and civil procedural rules. There is much to be considered in deciding when, how and to whom a statement will be given. Even if the officer truly wants to help you, he has not been trained to protect your legal rights under criminal and civil law.

## B. Responsibility to report shooting incidents

A.R.S. § 13-3806 requires medical personnel to report gunshot and knife wounds which may have resulted from illegal or unlawful activity, including fights, etc., or risk being charged with a class 3 misdemeanor.

A.R.S. § 15-507.01 requires school personnel who observe a firearms violation on school premises to report the violation to the school administrator.

There are no general, statutory requirements for other persons to report shooting incidents or firearms violations. The right against self-incrimination (U.S. Constitution, Fifth Amendment) protects you from any requirement to report a shooting or firearms violation which you have committed. However, this does not mean that it is in your best interest to refrain from reporting serious shooting incidents. If you fail to report such an incident, you are later arrested, and you claim that you acted justifiably, your earlier silence might be used as evidence that you knew you had acted improperly. Similarly, failure to report serious shooting incidents involving others might lead to you being charged as a participant with the others in criminal conduct.

## C. Carrying concealed weapon on private property of another

1. Criminal trespass (A.R.S. §§ 13-1501 - 1505) does not limit rights of property owners to ask someone to leave with one's firearm.

A common misunderstanding is that if you are on private

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required to give statements to the criminal investigators, and most officers are advised by their police unions and other professional organization not to do so. *Garrity v. State of N.J.*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).



property open to the public, A.R.S. § 13-3102.A.10 limits the authority of the property owner to ask someone to leave because one has a gun, unless the owner first offers to store the gun. Do not be confused. A.R.S. § 13-3102.A.10 defines a specific firearms offense (refusing to surrender your firearm for storage at a “public establishment” or “public event” as defined in A.R.S. § 13-3102.K.1&2) that is a class 1 misdemeanor. Generally, a private business is not a “public establishment” or “public event” under this statute, and private businesses retain the right to restrict guns. If one is told to leave private property because one has a firearm, one must do so or risk being arrested and charged with criminal trespass (A.R.S. § 13-1501 - 13-1505).

#### D. Local Government buildings; Public places and public events

If one goes to a “public establishment” or “public event,” and the operator or sponsor asks one to remove one’s weapon and place it in the custody of the operator or sponsor, one must do so or leave. Failure to do so is a class 1 misdemeanor under A.R.S. § 13-3102.A.10. Effective July 18, 2000, this provision applies to municipal and county structures, vehicles or crafts (“public establishments” under A.R.S. § 13-3102.K.1) and “public events” (special events sponsored, licensed or permitted by a public entity - A.R.S. § 13-3102.K.2). As part of the new state preemption law (A.R.S. § 13-3108), cities, counties and towns may no longer have ordinances or rules regulating where firearms may be carried, except as specified in state law. **State law requires state and local governments to offer to check firearms at readily accessible site, immediately retrievable at departure, if they want to prohibit them from being carried in their buildings.** A.R.S. § 13-3108.C.

#### E. Federal facilities

**One may not take a firearm into federal offices, courts, etc.,** but one cannot be prosecuted for doing so unless the facility is posted. One may not take a firearm into a military post without the authorization of the post commander.

#### F. Arizona CCW permit applicability outside Arizona - Reciprocity

**Remember that an Arizona CCW permit carries no force of law outside Arizona, unless recognized by another state. Some states unilaterally recognize Arizona permits and some states have formal mutual recognition agreements with Arizona, i.e., reciprocity agreements. In addition, Arizona recognizes permits from all states that meet Arizona**

**statutory requirements.** A.R.S. §13-3112.U. effective 9/21/06. DPS tries to keep track of those states recognize Arizona CCW permits. See the list at [http://www.azdps.gov/services/concealed\\_weapons/reciprocity](http://www.azdps.gov/services/concealed_weapons/reciprocity). The list of States that recognize Arizona CCW permits effective July 5, 2010 is below:

**States Recognizing Arizona Permits 2010:**

Alabama  
Alaska  
Arkansas  
Colorado  
Delaware  
Florida  
Georgia  
Idaho  
Indiana  
Kansas  
Kentucky  
Louisiana  
Michigan  
Mississippi  
Missouri  
Montana  
Nebraska  
New Hampshire  
New Mexico  
North Carolina  
North Dakota  
Ohio  
Oklahoma  
Pennsylvania  
South Carolina  
South Dakota  
Tennessee  
Texas  
Utah  
Virginia  
West Virginia  
Wyoming

**NOTE: Some cities, towns or counties within these states may not recognize Arizona CCW permits or might have their own local gun laws. You are responsible for knowing the gun laws in any state, city, town or county where you**

carry a gun. Since the laws in all the states constantly change, the foregoing recognition list will continue to change. For current information, you should check with DPS, your instructor, the National Rifle Association or the appropriate state, city, town or county before traveling outside Arizona to learn about new CCW reciprocity agreements, whether your CCW permit is recognized currently at your travel destination, and whether a permit from out-of-state is recognized in Arizona.

Arizona Recognizes Permits from other States if the permittee meets the following requirements: (A.R.S. §§ 13-3112.T & V)

1. The permit or license is recognized as valid in the issuing state.
2. The permit or license holder is all of the following:
  - (a) Legally present in Arizona.
  - (b) Not legally prohibited from possessing a firearm in Arizona.
3. At least 21 years of age.
4. Not under indictment for or convicted of a felony offense in any jurisdiction (unless conviction has been set aside, vacated and rights restored).
5. Not a “prohibited possessor” under any state or federal law.

DPS is constantly compiling a list of states meeting Arizona’s recognition requirements. This means all out-of-state government (state, county, city) issued bonafide CCW permits will be recognized in AZ if the permit is valid throughout the state of issue. DPS will enter into new written agreements with states that require a written agreement.

#### G. National Parks are different than National Forests

Effective February 22, 2010, carry within National Parks is governed by the laws of the state where the park is located.<sup>40</sup> This new federal law, like most federal laws that grant or confirm rights in the U.S., has been thrown into the “statutes at large,” rather than the U.S. code.

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<sup>40</sup> “Protecting the Right of Individuals To Bear arms in Units of the National Park System and the National Wildlife Refuge System.--The Secretary of the Interior shall not promulgate or enforce any regulation that prohibits an individual from possessing a firearm including an assembled or functional firearm in any unit of the National Park System or the National Wildlife Refuge System if-- (1) the individual is not otherwise prohibited by law from possessing the firearm; and (2) the possession of the firearm is in compliance with the law of the State in which the unit of the National Park System or the National Wildlife Refuge System is located.” 111<sup>th</sup> Congress, HR 627; Pub. Law 111-24, § 512; 123 Stat. 1725 (2009).

The law revokes rules that had been promulgated by the Park Service/Dept. of Interior. However, new rules have been written to address firearms within “federal facilities” within the parks, and those rules prohibit firearms within those “federal facilities.”

In addition to the prohibition of firearms in “federal facilities” within national parks, many of the private concessions (hotels, restaurants, etc.) within the national parks also post their facilities to prohibit firearms.

Although it is permissible to carry and shoot a firearm in Arizona in the national forests, there are a growing number of areas within the national forests that are posted no shooting. If you discharge a firearm within one of these areas, you can face federal criminal charges.

#### H. State Parks

Many state and county parks are posted no weapons. If you are entering a state or county park, look to see if it is posted. If it is not posted, you may take your firearm with you into the park.

#### I. Bars

As noted earlier in this CCW course, without a CCW permit, one may not take a gun into a commercial establishment that serves alcohol for consumption on the premises. Effective Sep. 30, 2009, a CCW permittee, or a Sheriff’s volunteer posse or reserve member who has received approved firearms training and is approved by the Sheriff to carry concealed, in addition to other on-duty law enforcement personnel, may carry a concealed firearm in establishments that serve alcohol, UNLESS the establishment posts no firearms signs as specified by statute. However, a person in possession of a firearm may not consume alcohol in such establishments (class 3 misdemeanor). A.R.S. §§4-229, 4-244.31 & 4-246(C). Entering a liquor serving establishment for a limited time with a handgun is permissible to seek emergency aid or to determine whether there is a sign prohibiting entry with a firearm. A.R.S. §4-229(F).

#### J. Federal Gun Free School Zones

##### BACKGROUND OF THE LAW

In 1991, the U.S. Congress passed the "Gun Free School Zones Act," 18 U.S.C. § 922(q). The Act purported to regulate the carrying and discharge of firearms in federally created "school zones" (*i.e.*, within 1000 feet of elementary and secondary private and public school property). In

the case *U.S. v. Lopez*, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the U.S. Supreme Court ruled that the 1991 "Gun Free School Zones Act" was unconstitutional because Congress had exceeded its authority under the Constitution's "Commerce Clause." The *Lopez* case marked the first time since Franklin D. Roosevelt "packed" the Supreme Court with additional justices in the 1930s that the Supreme Court had limited Congress' power under the "Commerce Clause."

In the closing days of the 1996 U.S. Congress, a new "Gun Free School Zones Act" was attached to a 2,000+ page omnibus spending bill, Congress approved the bill, and, and the President signed it into law.

## WHAT THE LAW SAYS

There are two parts to the new "Gun Free School Zones Act." The first part makes it **unlawful to "knowingly possess a firearm** that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a **school zone.**" 18 U.S.C. § 922(q). There are seven **exceptions** to this prohibition:

1. possession of a firearm on private property not on school grounds;
2. if the individual is **licensed by the State in which the school zone is located to carry a firearm**, and the licensing requirements include verification that the individual is qualified under law to receive the license;
3. if the firearm is not loaded and is in a locked container or locked firearms rack on a motor vehicle;
4. if the firearm is possessed by an individual for use in a program approved by the school;
5. if the firearm is possessed by an individual with a contract with the school [e.g., school security guards];
6. if the firearm is possessed by a law enforcement officer acting in his or her official capacity; and
7. if the firearm is unloaded and possessed by an individual enroute to hunting with the permission of the school authorities.

The second part of the "Gun Free School Zones Act" **prohibits the knowing or reckless discharge or attempted discharge of a firearm** that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a **school zone**. There are four exceptions to the prohibition against discharging or attempting to discharge a firearm

in a school zone:

1. on private property that is not part of a school ground;
2. as part of a training program approved by the school;
3. by an individual under contract with the school [e.g., school security guard]; and
4. by a law enforcement officer acting in an official capacity.

For the Arizona resident, the "Gun Free School Zones Act" restricts rights under state law. Arizona law permits carrying a firearm (concealed or openly) on your person or in an automobile, but federal law now prohibits doing so in a federal "school zone," except as specifically permitted under the federal statute. **Arizona CCW permittees appear to qualify under the federal law to carry their guns in the federal school zones. However, a CCW permittee is not authorized to discharge or attempt to discharge a gun in a federal school zone, even though doing so might be justifiable under state law and viewed as a moral obligation under certain circumstances (e.g., to save innocent school children from an armed attacker).**

As explained earlier in this treatise, under Arizona law, a person may use a firearm to defend against imminent threat of death or serious bodily injury or to stop specified criminal acts (e.g., rape, robbery, kidnapping, etc.). However, it is illegal under the "Gun Free School Zones Act" to knowingly or recklessly discharge or attempt to discharge a gun in a federal school zone.

A violation of the "Gun Free School Zones Act" carries a federal penalty of fine and imprisonment for up to five years. 18 U.S.C. § 924(a)(4). Since self-defense and other Arizona "justification" laws do not apply to the "Gun Free School Zones Act," a person who knowingly discharges a firearm in a federal school zone in self-defense or to save children from an armed madman would be subject to prosecution by federal authorities and sentencing up to five years in federal prison. No doubt the members of congress who voted for the "Gun Free School Zones Act" would assert that no federal prosecutor would pursue such a case. But if no federal prosecutor should pursue such a case, why does the "Gun Free School Zones Act" make no exceptions for those who use a firearm legally under state law? The reality is that people have been prosecuted and imprisoned in the United States for unlawfully discharging a firearm while lawfully acting in justified self-defense. Therefore, one should be aware that, if one fires a gun within a federal gun free school zone to justifiably defend oneself or someone else, one risks federal

criminal prosecution.

#### K. Indian Reservations

Because each tribal council makes the rules that apply on its reservation, the firearms rules on Indian reservations vary greatly. For the most part, non-Indians are prohibited from carrying guns on the reservations, except with the permission of the tribal council. Therefore, a CCW permit probably has no meaning on most Indian reservations. However, so long as one remains on state or federal highways that pass through the reservations, a CCW permit will likely be honored in Arizona. If Arizona CCW permits are acceptable in another state, the same rule would likely apply when traveling on state or federal highways across Indian reservations in that state.

#### L. Military Reservations

Most military reservations are clearly posted to prohibit the carrying of firearms without the consent of the post or base commander. As with Indian reservations, so long as one remains on state or federal highways that pass through military reservations, a CCW permit will likely be honored in Arizona. If Arizona CCW permits are acceptable in another state, the same rule would likely apply if you travel on state or federal highways across military reservations in that state.

#### M. Airports

Unless otherwise indicated, persons may possess weapons in an airport except at or beyond security checkpoints. Because airports have been conspicuously posted for many years, most people are aware that they **may not carry a firearm past the security check point in U.S. airports. One must check one's firearm, unloaded, with one's luggage.** A CCW permit does not permit one to carry a firearm through the security check point.

### VIII. MAINTAIN CONTROL OF YOUR GUN!

The greatest liability exposure you face when carrying a firearm for self-defense is the prospect that you will get used to carrying it. As you become accustomed to carrying a firearm, you risk becoming complacent about safeguarding it. Police officers know how complacency can lead to losing control of a gun - it is quiet common. The results can be devastating.

**Never, never leave your firearm accessible to others.** If you carry it in a purse, briefcase or other carrying case, never leave it unattended for even a moment. Keep it in your possession at all times. If you are unwilling to accept this responsibility, you should not carry your firearm. Strange as it may seem, even police officers have been known to lay down firearms during breaks, rest room visits, lunches, physical activities, etc. and forget, leaving firearms to be found by others. It can happen to anyone, so beware, think and assume the responsibility that goes with carrying a firearm.

The Arizona legislature has been unwilling to pass criminal statutes to penalize those who leave their guns accessible to children and other "incompetents." However, the Arizona courts have expressed their willingness to extend civil liability to such situations. If you provide a gun to a juvenile, a drunk, a mentally defective person, etc., accidentally or intentionally, and it is used by that person in a shooting, you risk serious civil law liability exposure.

In one case, *Petolicchio v. Santa Cruz County Fair*, 177 Ariz. 256, 866 P.2d 1342 (Ariz. Sup. 1994), the Arizona Supreme Court was called upon to examine the liability of an organization that supplied alcoholic beverages to juveniles. In the course of its analysis, the Supreme Court said the following at page 262:

"Furnishing firearms is another area in which courts frequently impose a duty of care. Even though a third person's criminal act directly caused the injury, if a person or business negligently provided or allowed access to a gun, there could still be liability to the injured party."

In other words, if you negligently provide or allow an incompetent person (juvenile, drunk, mental patient, etc.) access to your gun, and that person shoots someone with your gun, the injured victim can sue you!

In *Crown v. Raymond*, 159 Ariz. App. 87, 764 P.2d 1146 (Ariz. App. 1988), the Arizona Court of Appeals reviewed a case in which a gun shop owner supplied a handgun to a 17 year old minor who used the gun to kill himself. The Court ruled that statutes forbidding the sale of handguns to minors did not create absolute liability on the gun shop owner, but the sale of the gun to a minor who used it to commit suicide was negligence per se. In other words, if you unlawfully provide a juvenile a gun and an injury results, your act was negligent. You can be held liable for civil damages if it is proved that providing the gun to the minor was the proximate cause of death or injury.

In *Petolicchio*, described above, the Arizona Supreme Court cited a Washington case with approval - *Bernethy v. Walt Failor's, Inc.*, 97 Wash. 2d. 929 (Wash. Sup. 1982). In the *Bernethy* case, a gun shop sold a gun to an



intoxicated man who used the gun to kill his wife. Relying upon the Restatement (second) of Torts, Section 390 (1965),<sup>41</sup> the court ruled that one who supplies directly or through a third person a gun or other weapon for the use of another whom the supplier knows or has reason to know to be likely, because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them. It will be left to the jury to decide whether the injury, *i.e.*, the intoxicated husband's subsequent shooting of his wife, fell within the ambit of that duty.

Although the foregoing cases should alert you to your responsibility to maintain control of your gun, an Arizona legal article has urged even greater responsibility for safeguarding firearms. In the legal article entitled Note, Strict Products Liability: Application to Gun Dealers Who Sell to Incompetent Purchasers, ARIZONA LAW REVIEW, Vol. 26, No. 4, 1994, the writer urged Arizona courts to apply "strict liability" to sellers or suppliers of guns to minors for injuries to third persons. In other words, the legal article urged that whenever someone is injured or killed by a minor with a gun, the victim could recover civil damages from the person who supplied the gun to the minor, even where no negligence was involved. This is not the law in Arizona, but you should be aware that some people have urged adoption of such extreme laws.

A civil case demonstrating the extent of your responsibility to keep your gun out of the hands of incompetents is *Walker v. McClanahan*, 16 Ariz. App. 525, 494 P.2d 725 (Ariz. App. 1972). In that case, the defendant and plaintiff had been drinking; the defendant handed the plaintiff a loaded handgun; the plaintiff took the gun into the back yard of the defendant's Scottsdale, Arizona residence and fired three rounds into the ground; the defendant asked the plaintiff to stop; the defendant returned inside the house and laid the gun on the kitchen countertop; and the gun discharged and the bullet struck the plaintiff in the face. Neither the plaintiff nor the defendant had any idea how the gun discharged or how the bullet struck plaintiff in face. The Court ruled that the case was controlled by the legal principal *res ipsa loquitur*. Under this principal, the plaintiff did not need to show specific facts to establish that defendant's negligence led to the plaintiff's injury. Since (1) the plaintiff did not have control of the gun at the time of injury; and (2) a firearm is a dangerous instrumentality which imposes a duty to exercise extraordinary care or utmost care; (3) *res ipsa loquitur* creates an inference of negligence which can be accepted or rejected by

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<sup>41</sup> The "Restatement" is a collection of legal principals prepared by legal experts. Although the Restatement is not a statute, parts of the Restatement have been adopted by the Arizona courts as law in Arizona.

the jury.

Some limits on extending liability for supplying a firearm used to commit a crime are discussed in *Bloxham v. Glock Inc.*, 203 Ariz. 271, 53 P.3d 196 (App. 2002). In that case, the Court of Appeals held that Manufacturers and sellers of firearms have no duty to a third party killed by the purchaser of a handgun. Significantly, the Court ruled that “foreseeability” alone does not dictate duty.

## IX. GENERAL RULES

- A. **When carrying concealed, do not "advertise" that you are doing so.** Carrying a concealed firearm is not a macho game - it is a precious right and a grave responsibility. There are many people who detest or fear firearms. If someone with a rabid hatred of firearms sees you displaying your firearm, you can bet that you will be subjected to everything from spiteful stares and harassment to criminal complaints. **Keep your firearm out of sight, and respectfully decline requests to show it to others in any public setting.** The wisdom of this rule is highlighted by the law in states like Florida and Texas (not Arizona) and some foreign countries to the effect that displaying a lawfully concealed weapon is a criminal offense. In addition, concealment of your firearm gives you an important tactical edge if you are confronted with a life threatening situation. The average assailant does not expect his next victim to be carrying a firearm. The tactical advantage of surprise and the important one or two seconds that the surprise might buy you will be lost if your assailant knows you are armed.
- B. As noted earlier, generally an Arizona concealed-weapon permit does not grant you any right to carry a firearm, concealed or otherwise, in any other state. However, new CCW reciprocity laws may make your CCW permit good in another state. If you use your CCW permit to carry a concealed gun in another state that recognizes your permit, you will be responsible for following that state's laws regarding the carrying and use of firearms! Arizona law does not follow you to other states!
- C. Do not freely show your concealed firearm to friends and associates upon request. You risk accidental shootings, accidentally alarming or offending bystanders, accidentally committing assault or reckless endangerment, and a variety of other problems. Your instructor can give you examples.
- D. Remember, the success or failure of Arizona's concealed carry law depends, in large part, upon how you exercise this valuable right.

## X. OTHER SOURCES FOR LAWS AFFECTING CONCEALED CARRY

For more information on the laws you have reviewed and other laws affecting your right to bear arms, read and study the book, "The Arizona Gun Owner's Guide" by Alan Korwin, 21<sup>st</sup> edition (Bloomfield Press, Phoenix). Because of the importance of this book, it is used as a text for most CCW courses. It is available in most book stores and from licensed firearms dealers. You should read this book, reread it and take the self-tests it contains. Mr. Korwin and Michael Anthony, the author of this treatise, have also compiled the federal gun laws in one book, entitled "Gun Laws of America," also available from Bloomfield Press.

## XI. REVIEW OF LEGAL PRINCIPLES AND POSSIBLE TEST QUESTIONS

### XII. *District of Columbia v. Heller's* Second Amendment Right of Self-Defense

***District of Columbia et al. V. Heller, 554 U.S. \_\_\_\_\_ (2008), a new standard for constitutional gun control laws, by Michael P. Anthony, Esq.***<sup>42</sup>

In the landmark *Heller* decision, the U.S. Supreme Court addressed directly the meaning of the "Second Amendment" to the U.S. Constitution. The Court declared that the Second Amendment's promise that "the right of the people to keep and bear arms, shall not be infringed" guarantees individual citizens of the United States the right to keep and bear arms. Countless articles have been and will be written about *Heller's* meaning and implications. Most of those articles focus on discrete legal principles, the meanings of specific words and phrases in the Second Amendment, and the issues that

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<sup>42</sup> This *Heller* analysis was originally written for publication in articles and book published by Bloomfield Press. Michael Anthony is a trial and appellate lawyer with the Phoenix firm of Carson Messinger Elliott Laughlin & Ragan, P.L.L.C. (established 1924), where he concentrates on complex civil litigation and appellate cases. He is licensed to practice before the United States Supreme Court, the Ninth Circuit Court of Appeals, the U.S. Court of Military Appeals, the Arizona District Court, and the supreme courts of Texas and Arizona. He has 34 years of experience in criminal law, civil law and military law, plus prior experience in law enforcement and civil rights investigations. He is co-author of Gun Laws of America (a compilation and explanation of all federal guns laws); contributes to other gun law publications; has authored various published treatises on gun laws and civil practice; teaches the "Legal/Judgmental Shooting" section of the Department of Public Safety's concealed weapons instructor certification course; authors the "Legal/Judgmental Shooting" text distributed by the Department of Public Safety and used by concealed weapons instructors in Arizona; has sat for many years on the Phoenix Police Department's Use of Force Review Board and Disciplinary Review Board and served as a panel member for its Oral Examinations boards for recruits; serves on the Department of Public Safety's Concealed Weapons Training Advisory Committee; completed the Phoenix Police Department's Civilian Police Academy; consults with various elected and appointed State officials regarding firearms laws; is a DPS and NRA certified firearms instructor; has received certifications for training in personal protection, home defense, basic pistol, pistol II, and shotgun; began firearms training in Air Force in 1968 (M16, S&W .38 & "riot gun"); and provides expert and consulting services regarding firearms issues.

*Heller* left unresolved.<sup>43</sup> However, it is vitally important that everyone understand that *Heller* specifically recognized the **right of self-defense as part of the Second Amendment**.

*Heller* discusses the meaning the Second Amendment at great length. But, *Heller* looked to the **purpose** of the Second Amendment to determine whether the District of Columbia's gun control laws are constitutional. *Heller* expressly acknowledged a larger, "**core,**" "**inherent**" "**right of self-defense**" as a central purpose for the Second Amendment:

"[T]he **inherent right of self-defense** has been central to the Second Amendment right. The [D.C.] handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation [handguns] to 'keep' and use for protection of one's home and family,' *Parker v. District of Columbia*, 478 F.3d 370, 400 (2007), would fail constitutional muster." *Heller* majority at slip opinion pg. 56, citing D.C. Court of Appeals decision in *Heller*, emphasis added.

In its discussion, the Supreme Court elevates this central, Second Amendment purpose (*i.e.*, self-defense) into a test for determining whether a gun control law is constitutional.

*Heller* declared unconstitutional the District of Columbia's ban on operable handguns in the home **because such a ban "makes it impossible for citizens to use them [handguns] for the core lawful purpose of self-defense . . . ."**<sup>44</sup> *Heller*, pg. 58. The Court's pronouncement that the D.C. cannot constitutionally ban this "core lawful purpose of self-defense" is clear and penetrating. *Heller* set the stage for application of the "inherent right of self-defense" test to all gun control statutes.

On June 28, 2010, the Supreme Court ruled that *Heller* and the Second

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<sup>43</sup> *Heller* decided conclusively that the District of Columbia may not ban the possession by one who is not a "prohibited possessor" of an operable handgun in the home for self defense. *Heller* hints strongly that its reasoning applies to the States and creates constitutional limitations on legislation beyond the D.C. gun ban. On June 28, 2010, the Supreme Court applied *Heller* to the States in *McDonald v. Chicago*, 561 U.S. \_\_\_\_ (2010).

<sup>44</sup> *Heller* is not the first case in which the U.S. Supreme Court has spoken of this "right" of self-defense. For other cases where this right is mentioned, see Kopel, Halbrook and Korwin, SUPREME COURT GUN CASES (Bloomfield Press 2004).

Amendment applies to the States and their local governments (through the Fourteenth Amendment's Due Process Clause) just as it applies to the federal government. *McDonald v. Chicago*, 561 U.S. \_\_\_\_ (2010).<sup>45</sup> In *McDonald*, the Court highlighted *Heller's* conclusion that "individual self-defense is 'the *central component*' of the Second Amendment right and that "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense'." *McDonald* slip opinion, pgs. 19-20.

In its simplest terms, the *Heller* case will require a court in any Second Amendment case to ask the question, does this gun control law deny people their core, inherent, lawful right of self-defense? A law that denies that right should be unconstitutional under *Heller*.

Going forward, the question should be how much can the government regulate this core, inherent, lawful right of self-defense? This will require legislators, judges and a future Supreme Court to determine the meaning of "infringe." If that word is given its **Second Amendment plain meaning** (a rational approach and something the *Heller* decision seems to support), the government's ability to regulate the core, inherent, lawful right of self-defense should be limited to regulations that do not amount to an infringement of the right of self-defense. The discussion in *Heller* includes *dicta* (language that is not part of the actual resolution of the case or the reasoning supporting that resolution) that approves of the existing, wide-ranging, gun purchase background check laws and concealed carry laws that are common across the U.S. But, *Heller* does not attempt to list permissible and impermissible gun laws.

Under *Heller*, our government has a constitutional duty to recognize and protect our inherent, core rights of self-defense by limiting gun regulations to measures that do not infringe upon that right. In view of the vast array of gun control laws<sup>46</sup> that have been adopted over decades without constitutional restraint, *Heller* will be the parent of many offspring. Hopefully, those offspring will consistently apply the test laid down in *Heller* to protect the right of self-defense underlying the Second Amendment from unconstitutional infringement.

In *Nordyke v. County of Alameda*, \_\_\_\_ F.3d \_\_\_\_ (9<sup>th</sup> Circuit, no. 07-15763, 4/20/2009) *Heller* and the Second Amendment were applied to the States and local

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<sup>45</sup> A fundamental rift within the Supreme Court regarding how to interpret the Constitution is discussed in *McDonald*. While the dissenting "anti-gun" justices looked to the law of other countries, the majority specifically looked to *American* history to interpret the Constitution: "[W]e must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan*, 391 U. S., at 149, or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition,' *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997) (internal quotation marks omitted)." *McDonald* slip opinion, pg. 19. . *McDonald* traces the origins of U.S. gun control laws, primarily aimed at disarming freed slaves after the Civil War, and points out that the Fourteenth Amendment was enacted, in part, to overcome those freed slave disarmament laws.

<sup>46</sup> See, e.g., Korwin and Anthony, *GUN LAWS OF AMERICA*, Bloomfield Press 2005.

governments through the 14<sup>th</sup> Amendment. However, the 9<sup>th</sup> Circuit upheld a gun ban on Alameda County property as not violating the *Heller* right to have an operational gun in one's home for self-defense. The *McDonald v. Chicago* case similarly applied *Heller* to the States, but applied much broader reasoning than the 9<sup>th</sup> Circuit in *Nordyke*.

### XIII. Tenth Amendment applicability to firearms?

The "Firearms Freedom Act," HB 2307, effective July 29, 2010, proclaims that firearms manufactured and sold in Arizona that remain in Arizona are not subject to federal regulation. Whether the courts will uphold this statute or declare it preempted by federal law remains an open question. Although this law does concern when and where firearms may be carried and used, this reference is included because this is a potentially significant firearms law.