

## LEGAL ISSUES RELATING TO THE USE OF DEADLY FORCE

By Michael P. Anthony

(With updated 2009 legislation & *D.C. v. Heller* note)

(Version 13.0 - September, 2009)

- (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’s* 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.O.3(a) & (f),  
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.O.3, as amended effective August 11, 2005 (referred to here as the "CCW Law"), requires an applicant for a concealed-weapon permit to complete 8 hours of course instruction, approved by the Department of Public Safety ("DPS") in the following areas: (a) legal issues relating to the use of deadly force, (b) weapons care and maintenance, (c) mental conditioning for the use of deadly force, (d) safe handling and storage of weapons, (e) marksmanship, and (f) judgmental shooting. The first of these areas, legal issues relating to the use of deadly force, includes criminal and civil legal principles that will be incorporated into other areas of required training, especially (c) mental conditioning for the use of deadly force and (f) judgmental shooting. Therefore, an understanding of the legal issues relating to the use of deadly force is a necessary foundation for completing training to obtain a concealed-weapon permit.

You must understand that your instructor cannot teach you all the criminal and civil laws that affect your carrying and use of a firearm in this short course, and your instructor cannot give you legal advice about any specific case in which you might be involved. Your instructor will review the laws that are required by the CCW Law and the DPS to be taught in this short course. Your instructor will also cover additional laws that are important to know about.

First, you will examine the differences between criminal and civil law. These differing procedures mean that you have very different rights, risks and liabilities in criminal and civil cases. Next, you will examine criminal laws relating to firearms. Then, you will review civil laws relating to firearms. Next, and most important, you will study the circumstances under which you are justified in using a firearm or other deadly physical force against another person, and you will try to apply these laws to common situations you might face so that you can develop judgmental shooting skills. Finally, you will look briefly at additional laws affecting your right to carry a firearm, and you will review the legal principles that you must incorporate into judgmental shooting. Keep in mind that the criminal

and civil laws you will review are constantly changing. You can stay abreast of the most recent, significant changes by going to the DPS CCW web site, <http://www.azdps.gov/ccw/>, and downloading the latest version of this legal text.

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

If you violate a **criminal law**, the state can prosecute you, it can fine you, it can imprison you, and, in the most serious cases, it can even execute you. If you violate a **criminal law**, you may also violate a **civil law** and your victim and/or your victim's family might sue you to recover money from you or obtain a court order against you. It is possible to violate a **civil law** without violating any **criminal law** and vice versa. If you violate only a **civil law**, the person you injure and others related to that person can still sue you to recover money from you or obtain a court order against you. During this course, you will study the criminal and civil laws that apply to carrying, displaying and using a firearm. You must obey these laws when you carry a firearm, concealed or otherwise, and you must combine these laws with other considerations, such as tactics, safety, environmental considerations, type of firearm, your personal abilities with a firearm, your moral 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 your use of firearms.

You should not assume that you 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 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, you should not assume that you understand the meaning of

a criminal law by simply reading a statute and attaching your 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 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

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

#### 2. Double jeopardy - Fifth Amendment

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

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.

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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).

#### 4. Searches and seizures - Fourth Amendment

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 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 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)

We will now review examples of criminal law violations 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

If you kill someone with a firearm, without legal justification, you have violated a criminal law for which you can be imprisoned or executed. Depending on the circumstances, the criminal violation would 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: You get drunk and discharge a firearm in the city without intending to hit anyone, but you accidentally kill another.]

[Example #2: You go shooting in the desert, without checking downrange. Two people are camping or hiking downrange, and you do not see them. One of your shots 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: You enter a convenience store and see an armed man, holding a gun to the clerk's head. You correctly surmise that a robbery is in progress. You pull your gun and shoot ten times at the robber, but you miss him. Unfortunately, one or more of your 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: You come home from work to find your spouse and lover in bed together. You fly into a rage and you immediately shoot your spouse or your spouse's lover.]

or

- a. Intentionally aiding another to commit suicide;

[Example: You give your gun to someone who asks to borrow it to kill himself.]

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 your child or spouse, holds a gun to his/her head or a knife to his/her throat and demands that you shoot another person or he will kill your loved one.]

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: You are walking in the mall, when a stranger bumps into you. You pull your gun, say "thanks for making my day" and you intentionally shoot and kill 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 person knew that his/her conduct would cause death or serious bodily injury.

[Example: You are walking in the mall, when one of your friends dares you to shoot toward a crowd of shoppers. You pull your gun and fire a shot toward the crowd, not intending to shoot or kill anyone in particular, but your shot 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: You never use your CCW permit, *i.e.*, you never carry a firearm, concealed or otherwise. You learn that your cheating business partner, with whom you have been arguing with for years, is going to be alone at a desolate location, so you decide to "even the score." You take your gun and CCW permit, go to the desolate location, wait for your partner to arrive, and shoot your partner, killing him.]

or

- a. Kills someone while committing certain other crimes.

[Example #1: You meet an attractive, young woman and follow her home. You try to talk your way into her house, but she refuses to let you in. You push her inside and threaten to kill her if she does not have sex with you. After raping her, you panic and shoot her to ensure she cannot tell the police.]

[Example #2: You need money, so you decide to hold up a convenience store. You enter the store, put a gun to the clerk's head and demand all the money in the cash register. As the clerk opens the cash register, he reaches for a gun that you see under the counter, and you shoot him before he can shoot you.]

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

If you wound someone with a firearm, without legal justification, you have violated a criminal law for which you 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.

If you point a firearm at a person, without justification, you have violated a criminal law for which you 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.

If you shoot at certain structures, without justification, you have violated 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: You are celebrating your birthday by making the rounds of your favorite bars.<sup>3</sup> You decide to impress one of your buddies with your new gun, so you pull it from concealment and point it at him, 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

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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.

<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.

usually not a crime, those words, coupled with a firearm, can easily constitute illegal threatening.

[Example: You are walking in the mall, when a sleazy looking youth who appears to be a gang member starts taunting you with a string of profanity. You pull your gun and tell him "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: You get into an argument with a stranger and punch the stranger, causing his nose to bleed.]

or

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

[Example #1: You are walking in the mall, when a sleazy looking youth who appears to be a gang member starts taunting you with a string of profanity. You pull your gun and tell him "Go ahead, make my day." The youth starts crying, and begs you 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.

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

If you simply touch someone while displaying a firearm, you may be evidencing 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 give you any additional right to use your firearm and does not give you any protection from an assault charge. If you get into an argument or confrontation while you are carrying a concealed weapon, you should keep it concealed and not display or use it, except under circumstances where the threat or use of deadly force is legally justified.

[Example #1: You get into an argument with a street beggar,

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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).

decide to teach him a lesson, and slap him beside the head with your gun. Simple assault + deadly weapon = aggravated assault.]

[Example #2: You are in a heated argument that turns into shoving and punching. To make a point, you pull back your coat, revealing your gun. You put your hand on your gun and tell the other person that he had better buzz off or you 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: You decide that you will end your love affair by killing your lover and make plans accordingly. You pull your gun, pull the trigger, but the gun fails to fire ("misfires"). You have 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: You decide to kill your cheating partner by ambushing him outside his favorite bar. You get your gun, drive to the bar, and wait for hours, but your cheating partner never shows up. You have committed attempted first degree murder.]

[Example #2: You decide to pickup some needed money the easy way by robbing someone who is withdrawing money from an ATM. You stop an ATM customer, point your gun at him and suddenly decide to pull the trigger. You try to shoot, but the gun misfires, and you fall to your knees, begging forgiveness. You have committed attempted first degree murder and attempted robbery.]

[Example #3: Again, you decide to pickup some needed money the easy way by robbing and killing someone who is withdrawing money from an ATM. You tell your buddy of your plan to rob and kill an ATM customer. You stop an ATM customer, point your gun at him and change your mind. You fall to your knees, begging forgiveness. Again, you have 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: Your friend tells you of his plan to kill his boss. He asks if he can borrow your gun to commit the crime. You loan him your gun, but he does not kill his boss. You have committed attempted first degree murder.]

In simple terms, whenever you use or threaten to use a firearm against a person, without legal justification, you are violating a criminal law, and the state can prosecute you. If you have legal justification for your conduct, you are not violating a criminal law, but you might have to go through a trial to establish that your conduct was justified. If you use your firearm against another person, the final decision whether you were justified will be made by other people, such as police, prosecutors, judges and juries. There are no guarantees that others will agree with you that use of a firearm was justified. As you will learn, the critical thing for you 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. In the judgmental shooting portion of this course, you will examine situations where you should not use a firearm, even though you 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 person having lawful control asks person to leave or asks person to check his gun, e.g., someone sees your gun and asks that you leave their property or asks that you check your gun - CHECK YOUR 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, you do any of the following:
- 2) fight, make unreasonable noise, refuse to obey an order to disperse, etc. or **recklessly handle, display or discharge 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 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

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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.

<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.

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 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. §§ 13-3101.6, 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. §§ 13-3101.6, 13-3102.4, 13-3111:

- 1) Person found to constitute a danger to himself or to another pursuant to court order and whose court

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<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.

<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."

- 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, 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

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<sup>9</sup> The FBI takes 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 has been 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" is expanded from family members to include those in a romantic or sexual relationship. A.R.S. §13-3601.

- 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)

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

- a. Carrying firearm concealed on person without a permit, A.R.S. §§ 13-3102.A.1 & 13-3102.F.

Carrying "concealed" means carrying a weapon on your person 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). Unless you have a CCW permit or you are exempted from the permit requirement, you may not carry a firearm concealed. In the statute, there are two exceptions to this general rule. (1) There are **places** where you may carry your weapon concealed (§ 13-3102.B) - your dwelling, your business premises, or your real property (leased or owned); and (2) There are **weapons containers** (§ 13-3102.F) that you can use to carry your firearm so long as the container is wholly or partially visible and the container "utilized to carry the weapon reasonably would place others on notice that such person is armed." See *State v. Moerman*, 182 Ariz. 255, 895 P.2d 1018 (Dec. 13, 1994), Rev. Denied (1995), *infra*.

A.R.S. § 13-3102.F allows a person to carry a firearm without a CCW permit "in a belt holster which holster is wholly or partially visible, or carried in a scabbard or case designed for carrying weapons which scabbard or case is wholly or partially visible or carried in luggage." Notwithstanding the wording of this statute, the Arizona Court of Appeals has ruled that guns may not be carried in devices that conceal the gun from "ordinary" view, e.g., in "fanny packs," without a CCW permit, (1) if the gun is readily accessible and (2) if the container does not reasonably place others on notice that the person is armed. The highest court to rule on the fanny pack issue was Division 1 of the Arizona Court

of Appeals in a split decision, *State v. Moerman*, 182 Ariz. 255, 895 P.2d 1018 (Dec. 13, 1994), Rev. Denied (1995). By a 2-1 vote, that court ruled that carrying a gun in a fanny pack is illegal without a CCW permit, *i.e.*, it constitutes concealed carry. In May, 1995, the Arizona Supreme Court refused to review that decision. The following language by Judge Voss is taken from that case:

"We believe that the legislature intended to prohibit a person from carrying a concealed weapon [without a permit] on his or her person in a manner readily accessible for immediate use unless the conveyance utilized to carry the weapon reasonably would place others on notice that such person is armed."

More recently, the Court of Appeals defined "concealed" by relying upon the legislative "intent" that Judge Voss found in the *Moerman* case and by referring to cases from other states:

". . . Most courts hold that a weapon is concealed if it is hidden from the 'ordinary observation' or the 'ordinary sight' of another person. . . [T]he standard of 'ordinary observation,' when applied with common sense, will serve to determine whether a weapon is concealed." *State v. Adams, supra*.

The *Moerman* and *Adams* cases actually concerned A.R.S. § 13-3102(A)(2)<sup>12</sup> (transporting firearms in vehicles), but their reasoning has been applied to A.R.S. § 13-3102(A)(1) ("carrying" concealed). *Moerman* and *Adams* seem to require that, unless a person has a CCW permit, a person cannot use any case, pack, gun case, range bag, etc. that conceals a gun "readily accessible for immediate use" from view, unless the case, pack, etc. is labeled to "reasonably . . . place others on notice that such person is armed." Carried to its logical extreme, this court decision might require a gun case containing a gun to be boldly labeled "FIREARM" or to be locked to satisfy Judge Voss' definition of a case in which a firearm may be carried without a concealed carry permit. Such a labeling process would encourage thefts of firearms from autos, etc. and would be contrary to federal statutes

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<sup>12</sup> See discussion *infra* regarding A.R.S. § 13-3102(A)(2), as amended by HB 2076, effective September 21, 2006, which may affect *Moerman* and *Adams*.

concerning transporting firearms on aircraft in unmarked cases.<sup>13</sup> Requiring that all such cases be locked (so that the gun is not “readily accessible”), unless the person using it has a CCW permit, is tantamount to rewriting the plain language of A.R.S. §§ 13-3102(A)(1) & (2) and 13-3102.F. Nonetheless, that is the current law in Arizona.

In *State v. McDermott*, 208 Ariz. 332, 93 P.3d 532 (App. Div. 1, 2004), the Court of Appeals declared that carrying a gun in a fanny pack in a car without a CCW permit did not constitute permissible carry in “luggage” under A.R.S. §13-3102.A.2. *McDermott* cited *Moerman* to mean that a fanny pack did not qualify as a “case” for “carrying” a gun under A.R.S. §13-3102.A.1 (ignoring that *Moerman* was carrying a gun in his car under §13-3102.A.2). Then, *McDermott* ruled that a fanny pack did not qualify as “luggage” for purposes of “carrying” a gun in a means of transportation (A.R.S. §13-3102.A.2).

- b. Carrying firearm concealed and within immediate control in or on a means of transportation without a permit, A.R.S. §§ 13-3102.A.2 & 13-3102.F.

Unless you have a CCW permit, it is unlawful to carry a deadly weapon concealed within your immediate control in or on a means of transportation (A.R.S. § 13-3102.A.2). When transporting a firearm in or on a means of transportation without a CCW permit, the firearm must be wholly or partially visible, or in a case, holster, scabbard, pack or luggage within a storage compartment, map pocket, trunk or glove compartment (A.R.S. § 13-3102.F). In view of the *Moerman*, *Adams* and *McDermott* cases, discussed above, and the subsequent 2006 amendment<sup>14</sup> to the statute, if a gun is “readily accessible” and not readily observable while in its case, holster, scabbard, pack or luggage, then the case, etc., containing the gun would have to be either (1) open to view and boldly labeled to put persons on notice that it

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<sup>13</sup> “. . . . No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.” 18 U.S.C. §922(e), as amended in Pub.L. 103-159, § 302(a) in 1993.

<sup>14</sup> See HB 2076, Forty-seventh Legislature, Second Regular Session, effective Sep. 21, 2006.

contains a gun, or (2) stored within a storage compartment, map pocket, trunk or glove compartment. It must be emphasized that if one occupant of a vehicle has a concealed-weapon permit, that concealed-weapon permit does not protect another occupant of the vehicle from being charged with carrying or transporting a concealed weapon within that person's immediate control. A.R.S. § 13-3102.A.2 and 13-3102.F.

A person can avoid the problems and pitfalls of carrying and transporting firearms in Arizona by possessing an Arizona CCW permit whenever carrying or transporting a firearm, concealed or otherwise, in Arizona. Remember that anyone carrying a concealed weapon in Arizona is obligated also to have a CCW permit. Anyone carrying a concealed weapon in Arizona is obligated to show a valid CCW permit to law enforcement officers upon request.

If a person does not have a CCW permit when carrying concealed, that person can be charged for illegally carrying a weapon concealed (A.R.S. § 13-3102.A.1 or § 13-3102.A.2)<sup>15</sup> or (if that person is a CCW permittee) illegally failing to present a CCW permit ("petty offense" - A.R.S. § 13-3112.D). The CCW permit can be suspended, and the weapon can be seized. In such a circumstance, the CCW permittee can get the CCW permit restored by taking it to the law enforcement agency that charged the permittee or to the court (A.R.S. § 13-3112.B). Effective September 19, 2007, the law provides that a permittee charged with failing to present the permit "shall not be convicted" upon presentation to the court of a legible copy of the permit. If the charge is dismissed, the weapon should be returned to its owner (A.R.S. § 13-3105 permits the court to order forfeiture of the weapon only upon **conviction** for carrying or transporting a concealed weapon without a permit, or using the weapon in the commission of certain felonies, or upon being **adjudged incompetent** after committing an offense in which the weapon is used, displayed or unlawfully possessed).

Carrying a deadly weapon concealed on one's person or in or on a means of transportation without a permit is a class 1

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<sup>15</sup> Upon subsequent presentation of your permit to the appropriate judge or law enforcement agency, the charge of illegally carrying your weapon concealed would probably be dismissed.

misdemeanor. While many people question the legality of such a statute in view of the Arizona Constitution's guarantee of the right to bear arms, the Arizona court's have upheld this statute as constitutional in *Dano v. Collins*, 166 Ariz. 322, 803 P.2d 1021 (App. 1990), rev. granted, rev. dismissed, 167 Ariz. 535, 809 P.2d 960. Therefore, the only legally secure way to carry a concealed weapon in Arizona is with a CCW permit.

- c. Other “misconduct with weapons,” A.R.S. § 12-3102.A.3 - A.R.S. § 12-3102.A.14

**Misconduct with weapons also prohibits:** manufacturing, possessing, transporting, selling or transferring a prohibited weapon;<sup>16</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>17</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>18</sup> **entering an election polling place with a deadly weapon on election day;**<sup>19</sup> **possessing a deadly**

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

<sup>17</sup> See A.R.S. § 13-3102.C & D for exceptions to this law.

<sup>18</sup> See A.R.S. § 13-3102.C & G for exceptions to this law. Effective Sep. 21, 2006, this statute was clarified to require “temporary and secure storage pursuant to section 13-3102.01.” 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.” 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.J & 13-3102.01.

<sup>19</sup> See A.R.S. § 13-3102.C for exceptions to this law.

**weapon on school grounds;**<sup>20</sup> carrying a deadly weapon into a nuclear or hydroelectric generating station;<sup>21</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>22</sup>
- 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,
- 4) Not suffering from mental illness and not adjudicated mentally incompetent or committed to a mental institution,

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<sup>20</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>21</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>22</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 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

- 5) Not unlawfully present in U.S.,
- 6) Has completed DPS approved firearms safety training (effective September 26, 2008 - within 5 years of application) program; or is an active duty Arizona peace officer standards and training board certified or federally credentialed peace officer or an active duty county detention officer who has been weapons certified by the officer's employing agency; or is an honorably retired federal, state or local peace officer with ten years or more of service.<sup>23</sup>
- 7) Has completed DPS application form, with fingerprints,<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.L & M; *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.*);
- f. A CCW permit does not affect laws against manufacturing; possessing; transporting, selling or transferring a prohibited

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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.X.

<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.

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; National Parks; 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 firearms are allowed). This argument is based on A.R.S. § 13-3102.C.4, which says that prohibitions against carrying

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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).

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)).**

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

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 in April, 2000, which is effective July 18, 2000. A.R.S. § 13-3108(A) now provides that **"Except as provided in subsection C of this section, a political subdivision of this state shall not enact any ordinance, rule or tax relating to the transportation, possession, carrying, sale or use of firearms or ammunition or any firearm or ammunition components in this**

**state.**” Subsection B bars political subdivisions from requiring the licensing or registration of firearms or ammunition or their components and from prohibiting the ownership, purchase, sale or transfer of firearms or ammunition or their components.

Subsection C of A.R.S. § 13-3108 permits political subdivisions to enact rules, ordinances, etc. “pursuant to state law, . . . or relating to any of the following:” (1) sales taxes like those applied to other goods, (2) land use, such as zoning, like that applied to other commercial businesses, (3) regulating their own employees and contractors on the job, (4) prohibiting the open carry of firearms in parks,<sup>28</sup> (5) prohibiting a minor (less than 18 years old) from possessing or transporting a firearm,<sup>29</sup> (6) limiting or prohibiting the

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<sup>28</sup> A.R.S. § 13-3108.C.5 requires local governments that prohibit open carry of firearms in parks of one square mile or less to conspicuously post the parks as follows: “Carrying a firearm in this park is limited to persons who possess a permit issued pursuant to section 13-3112.” In parks or preserves that are more than one square mile in area, local governments may designate only the developed or improved areas as areas where open carry of firearms is prohibited by conspicuously posting those areas as follows: “Carrying a firearm in this developed or improved area is limited to persons with a permit issued pursuant to section 13-3112.” Developed or improved areas are limited to areas developed for public recreation or family activity, including picnic areas, concessions, playgrounds, amphitheaters, racquet courts, swimming areas, golf course, zoos, horseback riding facilities and boat landing and docking facilities. Developed or improved areas do not include campgrounds, trails, paths or roadways, except those trails, paths or roadways adjacent to designated developed areas.

Political subdivisions may not prohibit a person from firearms possession in parks or reserves

(1) when the person is engaged in a permitted firearms or hunters safety course conducted by a certified instructor;

(2) when the person is at a shooting range (A.R.S. § 13-3107), shooting event, permitted firearms show or permitted hunting area;

(3) when the person is legally transporting, carrying, etc. a firearm in a vehicle;

(4) when going directly to or from hunting, marksmanship practice or recreational shooting;

(5) when traversing a trailhead area to gain access to areas where possession of firearms is not limited;

(6) when using trails, paths or roadways to go directly to or from an area where possession of firearms is not limited and there is no reasonable alternative access.

<sup>29</sup>However, political subdivisions may not prohibit minors from possessing guns

(1) when accompanied by a parent, grandparent or guardian or certified hunter

discharge of firearms in parks and preserves.<sup>30</sup>

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

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

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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 between the hours of 5:00 a.m. and 10:00 p.m. for purposes 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>30</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."

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, 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>31</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

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<sup>31</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.

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 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>32</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

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<sup>32</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.

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.*, 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>33</sup> In Arizona, the same legal

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<sup>33</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.

“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 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

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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.

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. 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>34</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

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<sup>34</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.

(1963); *Macias v. State*, 36 Ariz. 140, 238 P. 711 (1929); A.R.S. § 13-411.

THE POLICE HAVE NO DUTY TO PROTECT YOU. 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" (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. **You would be justified in threatening or using physical force against another person when and to the extent a reasonable person in your position would believe that physical force is immediately necessary to protect yourself against the other person's use or attempted use of unlawful physical force. (A.R.S. § 13-404) . You would be justified in using deadly physical force when a reasonable person in your position would believe that deadly physical force is immediately necessary to protect yourself against the other person's use or attempted use of unlawful deadly physical force. (A.R.S. § 13-405).**

**It is important that you understand that the law permits a *measured* self-defense. Generally, you can only**

use the force necessary to resist the unlawful force. You can **resist unlawful physical force with physical force**. You 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 you are 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 your hand on a firearm that is contained in a pocket, purse or other means of containment or transport. You may not use the defensive display justification if you provoked the fight or altercation, and you may not use the defensive display justification if you are 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.

**You cannot use self-defense physical force in response to mere words, no matter how offensive. Similarly, YOU 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 you may use as a confrontation evolves from mere words to physical force to deadly force. In general, you cannot be the aggressor. In reality, you should avoid any confrontation, unless circumstances require you to defend yourself or another.

EXAMPLE: You are walking through a shopping mall with your spouse, child or date, and three, young, males, wearing gang "colors," are walking toward you. As the three, young males walk past you, one of them bumps your shoulder. He immediately turns, flashes a gang sign, "flips you the bird," and starts yelling at you. He uses more profanity than you have ever heard before, and he directs it at you and your spouse, child or date. You ignore him and start to walk away, but he and the other two, young, males follow. Now, they are all yelling at you and cursing you. They walk circles around you as you walk down the mall. They dare you to "step outside," and they graphically describe how they are going to "cut" you and your spouse, child or date. No one comes forward to help, and there are no security personnel or police in view. You are carrying a loaded pistol under your jacket. One of the young males approaches within two inches of your face and screams that he is going to kill you.

KEEP YOUR COOL! If you pull your gun and shoot, you will not be justified. Until you are threatened with imminent death or serious physical injury, you cannot use deadly force. Displaying your gun might be a justified “defensive display.” Telling the youths that you are 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 you, keep your cool and your balance! Rather than letting the anger build, start planning "what if." Plan what you 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.

Think it through and look for tactical advantage. What escape routes are available? What cover is available? Which of the youths is closest? Keep a clear view of all three youths! Maximize your distance from the youths. Do you see 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 are you going to keep your spouse, child or date out of the line of fire if deadly force becomes justified and necessary? Can you use deadly force without hitting someone else; if so, how do you need to improve your position; if not, can you move into a position where use of deadly force and risk of harm to bystanders is minimized? In short, think, plan and stay cool, but remember that mere words never justify the use of deadly force.

- c. There are important **limitations on self-defense**. You cannot use force against a police officer, even if you believe you are being illegally arrested, unless the physical force used by the police officer exceeds that allowed by law. **You cannot provoke a fight and then act in self-defense, unless (a) you first withdraw from the fight or clearly communicate your intent to withdraw, but you believe you cannot safely withdraw, and (b) the other person nevertheless continues or attempts to use unlawful physical or deadly force against you. A.R.S. § 13-404(B)(3)(a) & (b).**

- d. Examples of self-defense cases:

Let's discuss examples of when use of deadly force or threatened use of deadly force in self-defense are and are not justified. You must apply the foregoing legal principles to the examples. Keep in mind that these examples are drawn from **real cases** involving real people. The results may seem unfair in some cases. You must recognize that juries can differ on what constitutes a "reasonable" belief that self-defense is required. You must recognize that the clearer the need for self-defense, the stronger the likelihood self-defense will prevail in a criminal or civil trial.

**EXAMPLE:** You are driving to work when a bearded, filthy-looking man in a VW microbus starts honking at you. The man violently shakes his fist at you. His eyes are red. He follows you through heavy traffic, and runs a red light to

keep "on your tail." Suddenly, you find yourself caught in heavy traffic behind a red light. There are cars on your left and cars on your right. You cannot drive forward, to the left, to the right, or to the rear. The man in the VW jumps from his vehicle and runs up to your car door. He begins beating on the driver's window and windshield with his fists. You pull your gun and display it or point it at him!

Such a use of your firearm may qualify as a justified "defensive display." But do not lose your cool. You did not look to see if the man had a club, knife, or any weapon. You were watching his dirty, bearded, terribly contorted face, instead of scanning for weapons? By producing your gun before you had the right to shoot, you risked escalating the situation, and you lost the tactical advantage of surprise. However, you made the gun more accessible and ready to use. You should keep an eye on the man's hands, scan for weapons, have your gun at the ready and prepare to speed away when traffic began to move.

The police arrive on the scene, but you are lucky. They do not charge you, and they tell you to drive away NOW! Do it!

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

Your spouse speeds up and maneuvers through the freeway traffic. The madman is following closely, and each chance he gets, he pulls up beside your car and starts yelling and shaking his fist again. Your spouse drives off the freeway onto an access road, and the madman follows. You re-enter the freeway, and the madman follows, honking his horn and shaking his fist all the way.

As the madman pulls up next to you again on the freeway, you decide to let him know that you are armed. You hold up your pistol to the window, being careful not to point it at the madman. He sees your pistol and takes the next freeway exit.

A few minutes later, a police car pulls up behind you and your spouse and the policeman indicates you should pull off the freeway. Your spouse complies, and you are arrested for aggravated assault. The jury rejects your

“defensive display” defense. You are sentenced to a minimum of 3 1/2 years in prison.

This all really happened, but fortunately not to you. Although this freeway dispute occurred between occupants of moving vehicles, you were never threatened with deadly physical force. You were not legally justified to threaten the use of deadly physical force, but displaying your gun under these circumstances constituted such a threat. Moreover, you did not use good tactical judgment. You revealed you were armed, thereby losing a tactical advantage and risking escalation of the conflict. Moreover, even if the madman had been shooting at you, 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! You 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 you might find help. Under a worse case scenario, you need to improve your tactical advantage, *i.e.*, seek cover and a stable position from which you can safely defend yourself.

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

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

Late one night during the first week at the safe house, you hear a loud pounding at the door and the yelling of your daughter's husband. You go to your 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 you until you are semi-conscious. You stumble outside into the parking lot. He pursues you into the parking lot. You head for your vehicle, where you have a Walther 9mm pistol, and you retrieve your pistol. He is still coming after you with his gun in his hand, pointed at the ground. You shoot him several times, killing him.

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

Months go by, and you repeatedly call the Phoenix homicide detective who investigated your case. His assurances become stronger, but you never receive any official notification that no charges are being filed against you. Finally, nine months after the shooting, the police investigator tells you that the district attorney is not going to charge you with a crime, but you will receive no official notification. Six months later, with the aid of your attorney, you recover your pistol from the Phoenix police department. You have been involved in the "justified" use of deadly force, but you will never receive any official ruling or notification. You will never receive any explanations or communications from the district attorney's office. You cannot deduct your modest legal expenses from your income for tax purposes. Yet, you were 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 your 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.

EXAMPLE: You come under attack by several gang members in a parking lot outside a Phoenix mall. None of the five gang members is visibly armed, but they have nearly surrounded you. There is a path of escape, but you are unsure whether you can outrun the gang.

You have a tough choice. Since you are in a place where you have a right to be, you are not legally obligated to run, and you may defend yourself with deadly force in order to avoid great bodily harm. *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 your 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). **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). However, like Mr. D \_\_\_\_\_, who lawfully defended himself with a gun, but hit a bystander in the neck and another in the shoulder, immediately after he had been set upon and beaten (punched and kicked) by several (about 10), adult men, and in an effort to escape the attack (shots were fired at Mr. D \_\_\_\_\_ while he was fleeing the gang), you could be arrested, held in jail, charged, lose your job, spend several thousand dollars to hire an attorney (Mr. D \_\_\_\_\_ paid \$12,500 and got a bargain), never recover your expenses, or even receive an apology (charges of six counts of aggravated assault, later reduced to four counts, were finally dismissed with prejudice in Mr. D \_\_\_\_\_'s case), and live in constant fear that one of the bystanders you accidentally shot will sue you. You will not even be able to deduct your legal expenses from your income taxes.

What if you are justified to use deadly physical force, but you succeed in escaping, by running back to the mall.

After waiting ten minutes, you go back to your car in the parking lot. As you are nearing your car, you see the same gang standing nearby. Even if you had the right to use self-defense under the circumstances that existed ten minutes earlier, you no longer have that right, unless the gang members again attack you. In other words, even though you might feel that the gang will attack you, until the attack begins or is reasonably imminent, you are not justified to use physical force or deadly physical force. *State v. Buggs, supra*. The moral - do not go back to the fight from which you have escaped.

- e. **Duress** is often confused with self-defense, but it is different. If someone puts a gun to your head and threatens to kill you unless you do as you are told, you are being asked to act under duress. Although duress is a defense to committing many crimes, **duress is never a defense to shooting someone**. Even if someone is threatening you or a loved one with death, the law does not permit you to shoot an innocent third person to avoid that threat.

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

Tough choice! Legally, you cannot shoot the unarmed thug who is standing outside your house. You would not be justified because the unarmed thug is not an immediate threat to you or your spouse, and he is no longer in the process of committing burglary or some other offense that might justify use of deadly force. If you shoot the unarmed thug, you cannot defend yourself by claiming that you were coerced by the thug who threatened to kill your

spouse. Will you shoot the unarmed thug without (legal) justification (and without a guaranty that the armed thug will leave you and your spouse unharmed), or refuse to follow the armed thug's instructions and face a greater risk that your spouse (and perhaps you) will be killed, or take the even greater risk that you can shoot and disable the armed thug with buckshot without hitting your spouse and before he can shoot you or your spouse?

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. **You 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 you, 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 your intervention is immediately necessary to protect the third person.**

b. **EXAMPLE:** As you approach an ATM late at night to withdraw some cash, you stumble onto a drug arrest. The area around the ATM is deserted, except for a uniformed police officer, the suspect and you. You are close enough to clearly overhear the officer warning the suspect of his rights and notifying him that he is being arrested for sale of cocaine. You personally recognize the officer from an occasion when he testified in court when you served as a juror. You "stand by" as the lone police officer is handcuffing the suspect. You have a loaded Colt Government model 45 ACP (a semi-automatic pistol) in "condition 1" (cocked with a round in the chamber and the safety on) in a holster under your jacket, and you know how to use it (you have taken several pistol courses and practice regularly).

Suddenly, the suspect spins around and seizes the officer's pistol, stands back, points the pistol at the officer's head and snarls "You're a dead mother f---er!" You have a clear, unobstructed, profile view of the officer and the suspect who are 15 feet from you. 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.

You may legally shoot the drug suspect! The officer would be justified to shoot the suspect in self-defense, and your immediate intervention appears reasonably necessary to save the officer.

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

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

a. You 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 your property (**real property or human lodging**, e.g., trailer, camper, etc.) or property in your lawful possession or control. (A.R.S. § 13-407.A)

1) You 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)

2) **EXAMPLE:** You are throwing a New Year's party at your home. Your living room is crowded with guests. A party crasher walks into your house. You do not know him, and none of your guests knows him. You ask the party crasher to leave, and he says "Kiss my a--!" You again ask him to leave, and he moves his face within two inches of your face and snarls "Go f--k yourself!" You have a Sig Sauer model 226 (a 9mm semi-automatic pistol) in a drawer near the living room telephone. Can you retrieve your pistol, point it at the party crasher, and demand that he leave?

You can 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, you will see that the law

permitting you to threaten deadly force to evict a trespasser is meaningless in most urban situations. Let's practice "what if."

You point your Sig Sauer at the party crasher, three inches from his face, and say, "Get out of my house or I'm gonna blow your head off!" He 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 do you do. You only have justification to threaten deadly force to evict a trespasser. You are not justified in using deadly force to evict a mere trespasser.

Moreover, your living room is filled with your guests. Imagine the dire possibilities if you and the party crasher get into a fight for control of your pistol. By using the legal excuse of threatening deadly force to evict a trespasser, you have put yourself and your guests into a potentially deadly situation. Now, what do you do?

Despite your legal right to do so, you should have exercised judgment. Under the circumstances of this "what if" example, you were stupid to go for your gun and threaten deadly force to evict a trespasser. There were several, better tactics to handle the situation. Next time call 911 and stay near your gun in case the party crasher himself threatens deadly force with some weapon. Leave it to the police to evict the trespasser.

- b. You may use physical force against another when and to the extent that 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 your possession or control** (A.R.S. § 13-408), and you 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 your property should be tempered by judgment and tactical considerations. Let's play "what if."

You are sitting at home in your living room in front of

a large window watching TV during the evening. You suddenly see the motion activated flood light above your front door illuminate a figure that is using a wire coat hanger to open your locked Porsche automobile, parked on the street in front of your house. Can you legally go outside and physically stop the theft of your prized car from in front of your house - sure. But should you? Think tactics and judgment. Let's continue the "what if" game.

You tuck your Beretta model 92F (a 9mm semi-automatic pistol) into your waistband, put on a jacket to conceal the gun, and go out to confront the jerk who is stooped over your beautiful Porsche. You know that you can use physical force to stop him, so you approach and shout "Hey, what the hell are you doing?" You plan to deck this jerk when he turns around. Then . . . the jerk turns and stands erect as you approach. My God! He is at least six foot seven and his shoulders completely block the entire Porsche from your view!

At this point you say to yourself, "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 your New Year's party). I cannot use deadly force because my life is not in imminent danger. I'm screwed!"

Under this scenario, you are really going to feel stupid just standing there as this guy drives away in your Porsche, but you did not take time to call the police. Do you recall the amount of the deductible on your insurance? Wait, let's continue "what if."

Undeterred by the obvious superior physical abilities of the guy who will soon be driving your Porsche, you stupidly say "Leave my car alone, or I'll kick your a--." (Ah! It is so satisfying to use your right to threaten physical force to stop the theft of your 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 you. (Now, aren't you glad that you tucked your Beretta into your waistband?)

At this point, you will be justified to threaten or use deadly force in self-defense, and you do so. Unfortunately, this guy is so BIG that he doesn't drop his knife and cease being a threat to you until you have used 14 of the 15

rounds in your Beretta, and guess what? Your Porsche acted as the bullet stop for at least 10 of those rounds. Aren't you glad that you decided to stop this guy yourself. Now, how much deductible did you have on your Porsche insurance?

Obviously, you should have called the police before going outside to save your precious Porsche. You would have been wise to wait to let the police handle the situation. Under this scenario, you proceed at your own risk when you exercise your right to use physical force to stop a theft. Is 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>35</sup> burglary in the second or first degree,<sup>36</sup> kidnapping, manslaughter, second or**

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<sup>35</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 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 your 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>36</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.

**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.

**You have 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 distance between you and your target and minimizing your exposure, and (b) evidence that you tried to avoid having to use deadly force will aid in your justification defense.

EXAMPLE: You drive up to your house after work, and are looking forward to seeing your spouse and kids. They are waiting in the house to go to dinner and the movies with you.

First Scenario - You see a man preparing to throw a “Molotov Cocktail” (fire bomb) through the front window of your house. You yell “Stop,” but he lights the rag fuse and moves to throw the Molotov Cocktail into your house. You may threaten or use deadly force to stop him.

Second Scenario - As you enter your house, you hear your children screaming. You walk into the living room, see that the back door has been shattered inward, and a large, filthy man is trying to drag your youngest child out of the house. You yell “Stop,” but he ignores you. You may

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336, 942 P.2d 1168 (App. 1997). In other words, you may defend against a burglary of your 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 may assert justification under A.R.S. § 13-411.

threaten or use deadly force to stop him.

Third Scenario - After dinner, a movie, and a quiet drive home, your family falls asleep quickly. You hear the sound of shattering glass, and see a dark hulk climbing through your bedroom window. You yell "Stop," but the hulk steps through the broken window and steps toward your bed. You may threaten or use deadly force to stop him. You need not turn on a light to first check and see if the hulk is armed. But, be sure of your target! You would not want to shoot your teenage son who was out late, got drunk and lost his keys.

EXAMPLE: You drive up to the gas pump at a convenience store where you often buy gas. You enter 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. You offer \$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."

You go back to your car to fill up, but stop midway because you've got a funny feeling that something is wrong. You turn back toward the convenience store and see 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 you see it - the man behind the counter is holding a gun in his right hand.

You quickly walk to your car, retrieve your S&W model 66 (a double action revolver), and go to the pay phone to your right on the front of the convenience store. As you dial 911, the man you saw with the gun starts to exit the store, sees you and turns toward you as he raises his gun. You can use deadly force in self-defense, but the robbery is over! You could have used your gun earlier to stop the robbery, but tactical and safety considerations would make such an effort very risky.

#### 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 you have examined.
2. Although Arizona has a strong policy that justification can be used in criminal and civil cases, you must remember that it is far easier to "prove" a civil case than a criminal case. If you use or threaten the use of deadly force, and the county prosecutor decides there is no criminal case or you are acquitted, the victim or the victim's

family can still sue you 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 you are required to use deadly force, you face the potential of a civil lawsuit. Your responsibilities and potential liabilities for carrying a concealed weapon are great, so do not take them lightly. **NEVER USE A GUN IF YOU CAN AVOID IT, CONSIDERING YOUR SAFETY AND THE SAFETY OF THOSE AROUND YOU.**

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: You observe 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. You can assist the officer with deadly force, if necessary. It does not matter whether the officer was acting legally, so long as you reasonably thought the officer was acting legally.

NOTE: Your 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: Police officer is beside road, with red lights flashing

and a car pulled over in front of the police car. The police officer is exchanging gunfire with the person driving the unmarked car. Would you be justified in firing at the driver of the unmarked car? Probably, but what if the person from the unmarked car is actually an FBI agent trying to arrest the police officer? Not likely, but the point is that if your assumptions are wrong, you proceed at your own risk. Even if you justifiably intervene, if you **recklessly** shoot someone else in the process, you would not be justified in shooting that third person.

2. Maintaining order (A.R.S. § 13-403)
  - a. If you are responsible for the maintenance of order in a place where others are assembled or on a common motor carrier of passengers, or you are acting under the direction of someone with that responsibility, you may use physical force to the extent that a reasonable person would believe it necessary to maintain order, but you 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. You 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) **you make known the purpose** of the arrest or detention or believe 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 you 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, you should avoid injecting yourself into such situations.
  - b. You 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 you will have an uphill battle to establish justification under this statute, unless you are 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 you 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. You 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. Your potential liability for arrests and detentions which do not involve your house or property are too great for you to get involved, unless another justification is present. If the life of the police officer or yourself does not appear in jeopardy, do not even think about using or displaying your firearm to capture an escapee or assist in an arrest (unless asked by the officer - see below).

**If you believe it is appropriate to aid a police officer, but you are unsure, follow this procedure if the circumstances permit: (1) inform the officer that you are**

armed, (2) ask the officer if he wants you to assist him, (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 you should exercise such a right only under the most dire circumstances. Even under dire circumstances, you are 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 new 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

You are hosting a party at your home. A party crasher enters your house. He is drunk and belligerent. You ask him to leave, but he refuses. You start to push him out the door, but he turns and swings at you. You strike him, and he pulls a knife.

You get into an argument with a stranger while walking in the mall. You lose your temper and punch or push him. He punches or pushes you back. You realize that you are acting like a fool, so you apologize and walk away. The stranger comes after you, teasing and taunting. The stranger steps in front of you and pulls a knife.

You get into an argument with a stranger who has taken your parking space at a crowded parking lot. You exchange heated words. You lose control and strike the stranger. He pulls a knife.

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

Your instructor will lead a discussion of possible scenarios, and you will be asked to create your own scenario and analyze it. You will be asked to explain the legal principals and the tactical/safety considerations.

## 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 you have a CCW permit, you must answer and produce your CCW permit if you are carrying a concealed weapon. If the officer asks if you have a firearm, answer truthfully, and describe the firearm, its location and its status (unloaded, loaded, unchambered, chambered, "condition 1," "condition 2," etc.).<sup>37</sup> The law does not require that you **volunteer** to law enforcement officers that you have a CCW permit and firearm, but you might consider doing so, depending upon the circumstances (e.g., if the presence of a firearm is likely to become a safety concern).

#### 2. Conduct with law enforcement personnel during volatile situations

In volatile situations when you come into contact with law enforcement personnel, you should assess the situation quickly. Unless you can immediately leave the area, generally you should make it clear to law enforcement personnel that you have a CCW permit and a firearm. This is common sense and safety, but not a steadfast rule. You do not want to alarm an officer or interfere with an officer. You want to protect against surprise or concern under circumstances where an officer might discover that you are armed and mistake your intentions. Such disclosure is not required by law. You 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. You want to avoid becoming a threat or target simply because you are armed.

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<sup>37</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 Colt 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."

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 your firearm upon request of law enforcement

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.** 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 the new federal law, a misdemeanor crime of domestic violence includes any misdemeanor involving the use, attempted use or threatened use<sup>38</sup> of physical force or threatened

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<sup>38</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

use of a deadly weapon<sup>39</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. The new 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 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.

#### 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 yourself 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

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Arizona, the threatened use of physical force against a spouse, etc. would be included as a "domestic violence" crime.

<sup>39</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).

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 are in no condition to give them 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>40</sup> Police officers are always taken from the scene of a 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**

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<sup>40</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 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).

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 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 you to leave with your firearm.

A common misunderstanding is that if you are on private property open to the public, A.R.S. § 13-3102.A.10 limits the authority of the owner of the property from asking you to leave because you have a gun, unless the owner first offers to store your gun for you. 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 you are told to leave private property because you have a firearm, you must do so or you can be charged with criminal trespass (A.R.S. § 13-1501 - 13-1505).

D. Local Government buildings; Public places and public events

If you go to a “public establishment” or “public event,” and the operator or sponsor asks you to remove your weapon and place it in the custody of the operator or sponsor, you 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.

E. Federal facilities

You may not take a firearm into federal offices, courts, etc., but you cannot be prosecuted for doing so unless the facility is posted. You 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 your 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 no longer keeps track of those state which unilaterally recognizes Arizona CCW permits. The status of reciprocity states according to the DPS web site in January, 2008 is listed below:

Reciprocity States with written agreements with Arizona:

Alaska, Arkansas, Idaho, Ohio, South Dakota, Texas, West Virginia, Pennsylvania

States Recognizing Arizona Permits in 2009:

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

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:

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) Not a resident of Arizona.
  - (b) Legally present in Arizona.
  - (c) Not legally prohibited from possessing a firearm in Arizona.

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 held by a nonresident AND the permit is valid throughout the state of issue. AZ residents MUST carry concealed using an AZ permit - no other permits will be legal, even if there was a previously signed reciprocal agreement. The DPS will enter into new written agreements with states that require a written agreement. Bottom line: AZ residents cannot use another state's permit to carry concealed in AZ.

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

While you can carry firearms in national forests, by statute you may not carry any loaded firearm into a national park (except for specifically authorized hunts), and by rule you cannot carry any firearm into a national park.<sup>41</sup> If you plan to travel to a national park, you should plan where to store your firearm before entering the national park, or leave your firearm

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<sup>41</sup> New rules became effective in 2009 to permit carry with a CCW in national parks where such carry was permitted by state statute. A federal judge barred implementation of these rules. In early 2010, a new law is scheduled to change the rules for carrying a gun in national parks to permit CCW carry, but it remains unknown whether this law will become effective.

at home. If your travels with a firearm require you to enter a national park, unload your firearm, store the ammunition separately from the firearm, "break down" the firearm if possible so that it is not readily operable, and lock it away from access while you are driving.

Although it is permissible to carry 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 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, you 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 an "unconcealed" loaded firearm 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, you should be aware that, if you fire your gun within a federal school zone to justifiably defend yourself or someone else, you risk 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, your CCW permit probably has no meaning on most Indian reservations. However, so long as you remain on state or federal highways that pass through the reservations, your 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 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 you remain on state or federal highways that pass through military reservations, your 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. You must check your firearm, unloaded, with your luggage.** A CCW permit does not permit you to carry your 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>42</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 the jury.

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<sup>42</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.

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>43</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>43</sup> Michael Anthony is a trial 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 33 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; and provides expert and consulting services regarding firearms issues.

*Heller* left unresolved.<sup>44</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>45</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. The Court has set the stage for application of the *Heller* "inherent right of self-defense" test to all gun control statutes.

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<sup>44</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. However, the application of *Heller* to the States and to other gun control laws remains for future resolution. This article does not attempt to examine those issues.

<sup>45</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).

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 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.

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