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Good News From Ohio

There is good news from the Ohio Court of Appeals. With a little effort, Ohio can either become a non-discretionary concealed weapon license state--or, if the state legislature takes no action at all, join Vermont in the unique category of having no laws regulating concealed carrying of handguns.

American states can be divided into several different groups with respect to laws regulating the concealed carrying of handguns: completely prohibited; discretionary issuance; non-discretionary issuance; and unregulated. Some states completely prohibit the concealed carrying of a handgun, except by police officers and a few other government officials. One example is Missouri, which completely prohibits concealed carrying of handguns, with exceptions for policemen, judges, and those serving certain types of legal paperwork.[1] This absence of permits creates some serious problems, because even the most antigun police chiefs and sheriffs admit that there are civilians who need to carry a gun. Sometimes this is because the civilian who needs a gun is in grave danger; more often, the civilian is a politician or large campaign contributor. In such states, it is rumored that police chiefs issue police identification to these favored civilians as a way around the law.

Another category of states have discretionary concealed weapon licenses. The sheriff, police chief, or a judge, depending on the state, has nearly unlimited discretion in whether to issue a permit. These laws are leftovers from a time when white people

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[1] Missouri Revised Statutes § 571.030; available at http://www.moga.state.mo.us/statutes/C500-599/5710030.HTM.

routinely received licenses; blacks were subject to considerably greater scrutiny. As Florida Supreme Court Justice Buford explained in 1941, "[T]he Act was passed for the purpose of disarming the Negro laborers ... and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied."[2] While Florida no longer has a discretionary license law, many of the most ferociously antigun states, like New York and California, have kept those racist laws.

Over time, police became more sensitive to the need to enforce laws in a color-blind way, and the way that licenses were issued changed. But instead of treating blacks like whites, and making licenses readily available to every law-abiding adult, government officials started treating whites like blacks, and permits became almost impossible to get in big cities. Eventually, this abuse of the process became so severe that in state after state--with a little encouragement and assistance from gun rights activists--the legislatures changed their laws so that there is little or no discretion as to who gets a license. Rather than give unlimited authority to the police chief or a judge to decide whether you have a good reason or not, the law now carefully defines who has good reason--and nearly all law-abiding adults can get a license.[3] Most American states are now in this category.

There is only one state in the last category: Vermont, which has no laws regulating the concealed carrying of handguns. As long as you can lawfully possess a handgun, you can carry it concealed, and no license is required.

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[2] *Watson* v. *Stone*, 4 So.2d 700, 703 (Fla. 1941).

In its own weird little category, until April 10, was Ohio. Ohio's law completely prohibited concealed carrying of a handgun except by police officers, and there was no license available. Ohio, however, had one strange little exception in its law that made it "an affirmative defense" to have a gun with you while engaged in a l

as would justify a prudent person in going armed" or for protection of yourself or family "such as would justify a prudent person in going armed."[4] What is an "affirmative defense" and how do you use it? You might still be arrested, and you would still be put on trial, but if you could convince the judge or the jury that carrying a gun under those circumstances was something that a "prudent person" would do, the court was supposed to find you innocent.

What circumstances qualified? It was all terribly vague, and for that reason, gun rights activists have been trying to many years to get a non-discretionary concealed handgun license law passed. In 1995, the National Rifle Association flew me out to Ohio to testify before a legislative subcommittee about the history of concealed handgun licensing. While it was an interesting experience, and confirmed what Bismarck had to say about the process ("Those who respect law and enjoy sausage should never watch either being made"), Ohio didn't change their law.

Now, they may not have any choice. The uncertainties in Ohio's law brought about a lawsuit, *Klein* v. *Leis*. The goal of the lawsuit was to overturn the existing law as a violation of the Ohio Constitution's right to keep and bear arms provision.

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[3] Clayton E. Cramer and David P. Kopel, "`Shall Issue': The New Wave of Concealed Handgun Permit Laws," *Tennessee Law Review* 62:3 [Spring, 1995] 679-757; available at http://www.claytoncramer.com/shall-issue.html. The list of states in this article is now out of date.

[4] Ohio Revised Code § 2923.12, available at http://onlinedocs.andersonpublishing.com/revisedcode/ .

The first judge to hear the case was named Ruehlman. Ruehlman ruled in our favor, claiming that Ohio's ban on concealed carry was unconstitutionally vague. It was therefore hard for a person of average intelligence to understand and obey. Ruehlman also heard the evidence presented by Professor David B. Mustard (a former graduate student of Dr. John Lott) that non-discretionary concealed handgun licensing laws have been a net gain for public safety.

The gun control groups were outraged, and insisted that Ruehlman was biased in our favor because in 1989, Ruehlman's wife and infant daughter "were abducted at gunpoint." They appealed to the Ohio Court of Appeals, insisting that Judge Ruehlman had let his personal feelings about guns influence his decision. (It is rather amusing to hear gun control groups claim that because members of his family were *victims* of gun violence, this biased the judge in our favor.)

The Ohio Court of Appeals issued its ruling on April 10, and it was amazing. All three judges were in agreement: Ohio's ban on concealed carrying of handguns was unconstitutionally vague, and cannot be enforced.

While they refused to address the question of whether the Second Amendment might apply to this case, they didn't need it.[5] Ohio's Constitution has a right to keep and bear arms provision, and the judges ruled that while Ohio's legislature can pass laws that regulate the carrying of guns, the ban on concealed carry was not a regulation: "it does not simply regulate, but effectively prohibits, law-abiding citizens from bearing weapons."[6]

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[5] *Klein* v. *Leis*, 2002-Ohio-1634, para. 5. At least as of April 13, 2002, this decision can be found at http://www.sconet.state.oh.us/rod/documents/1/2002/2002-ohio-1634.doc .

[6] *Klein* v. *Leis*, 2002-Ohio-1634, para. 9.

The judges were not impressed with the "affirmative defense" provision. "The practical effect of this statute is that any person carrying a concealed weapon is subject to arrest, incarceration, and indictment *before* being able to establish the legality of his or her actions. Thus, a legal action subjects an innocent person to prosecution for a felony. It is only later, at the peril of a trial, that innocence may be established."[7]

Because the right to self-defense is a fundamental human right, the Court of Appeals ruled that "strict scrutiny" must be applied in deciding whether the concealed weapon law was constitutional or not. What is "strict scrutiny"? Laws that restrict a fundamental human right are presumed to be unconstitutional. This means that before a court upholds such a law, the government must prove that it is both necessary, and that the law does no more damage to that right than is necessary. In practice, few laws survive the strict scrutiny test, and Ohio concealed weapon law didn't pass.[8]

There was some serious question as to whether "strict scrutiny" was the appropriate test, or whether the much more lax "reasonableness" standard was appropriate, but it law. The Court ruled, "The record in this case demonstrates that the statute is unreasonable. It passes *no* level of judicial scrutiny."[9]

The remainder of the decision is filled with wonderful and amazing statements--the sort of remarks that will warm the hearts of gun rights activists across America. "The exercise of no other fundamental right subjects a citizen to arrest. Should a citizen first go to jail for voting, and be required to prove innocence of multiple voting?"[10] "We hold today that R.C. 2923.12 is not fair, proper, moderate, or suitable under the circumstances,

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[7] *Klein* v. *Leis*, 2002-Ohio-1634, para. 10.
[8] *Klein* v. *Leis*, 2002-Ohio-1634, para. 15.
[9] *Klein* v. *Leis*, 2002-Ohio-1634, para. 17.

and that it is indeed excessive. It acts to deprive law-abiding citizens of the right to bear *any* arms and, in so doing, thwarts a fundamental right that was granted by our forebears and the drafters of our Ohio Constitution."[11]

After discussing that there was no agreement between law enforcement agencies as to the proper use of the "affirmative defense" provision of the law, "If a senior law enforcement official cannot properly apply the affirmative defenses to a given situation, the average citizen of ordinary intelligence could be expected to fare no better. We consider ourselves persons of average intelligence, and we cannot tell what is legal and what is not."[12]

As I mentioned earlier, gun control groups had accused the first judge to hear this case, Judge Ruehlman, of being biased because his wife and daughter were kidnapped at gunpoint. The Court of Appeals rather pointedly sided with Judge Ruehlman. "Declaring an unconstitutional statute unconstitutional is not judicial bias--it is judicial duty. Based on the law and the record before him, the trial judge had no choice but to rule as he did."[13] "All judges bring the sum total of life's experiences to their courtrooms. While we strive to be free of bias or prejudice, we should not disregard our knowledge of humanity--our experiences in the ways of the world."[14]

As I write this column, three days have passed since the Ohio Court of Appeals struck down this law. I expect that there will an appeal to the Ohio Supreme Court. If past history is any indication, there is a good chance that they will make a similar ruling,

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[10] *Klein* v. *Leis*, 2002-Ohio-1634, para. 21.
[11] *Klein* v. *Leis*, 2002-Ohio-1634, para. 22.
[12] *Klein* v. *Leis*, 2002-Ohio-1634, para. 30.
[13] *Klein* v. *Leis*, 2002-Ohio-1634, para. 38.
[14] *Klein* v. *Leis*, 2002-Ohio-1634, para. 39.

simply because the problems with Ohio's concealed weapon law are so severe. It is important for Ohioans to let their legislature know that they either need to pass a non-discretionary concealed weapon license law, such as many other states have--or face the prospect of joining Vermont in the "unregulated" category.

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