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Note & Comments

FIREARM NOTIFICATION LAWS PUT CONCEALED CARRIERS IN LAW ENFORCEMENT'S SIGHTS

David Fournier [a1]

I. Introduction-A Brief Overview of the Evolution of Firearms Rights and Responsibilities in Ohio

PRIOR to 2004, Ohioans who wished to carry a concealed handgun for self-defense did so under a murky "Prudent Man" standard that allowed them to carry a concealed firearm only if they were engaged in lawful activities where a reasonably prudent man would find it necessary to be armed. [1] In 2004, however, Ohio implemented a formal licensing framework for citizens who wished to carry a concealed handgun, becoming the 46th state to allow the practice. [2] Though some may debate the wisdom of allowing citizens to conceal firearms about their persons, 49 of the 50 states currently have provisions allowing some form of the practice. [3]

While Ohio's legislature implemented a system under which the State was required to allow any eligible citizen to carry concealed, it also created new duties for those citizens that had not been required under the old prudent man standard. [4] Some of the duties imposed under the fledgling concealed carry ***180** system were unduly cumbersome, and as such, the concealed carry laws have been subject to several legislative refinements over the years. [5] The most recent refinement brought Ohio's concealed carry laws in line with surrounding states and removed the prohibitions against licensees carrying concealed handguns into establishments with a liquor license. [6] As of September 30, 2011, licensees are permitted to patronize such establishments armed, so long as they do not consume alcohol while doing so and the facility has not posted signs prohibiting concealed weapons. [7]

While the duties of licensees have become less onerous over the years, Ohio law still contains several problematic requirements that can otherwise subject law-abiding licensees to criminal charges. Ohio, along with several other states such as Michigan [8] and Louisiana, [9] requires that licensees, upon being stopped for a law enforcement purpose, must notify the law enforcement officer that they are licensed and armed. [10] Ohio licensees who are carrying a concealed handgun on a valid license are obligated to "promptly inform any law enforcement officer who approaches the person after the person has been stopped [for a law enforcement purpose] that the person has been issued a license . . . to carry a concealed handgun and that the person then is carrying a concealed handgun." [11]

While the requirement seems simple enough at first blush, in practice, it is less clear which events trigger this duty and which actions by the licensee satisfy it. For instance, the statute dictates that the duty to notify is not triggered unless the licensee is stopped for a law enforcement purpose [12] --however, what constitutes such a stop is not made plain. While some situations, such as traffic stops and DUI checkpoints, are obvious, others are not so clear cut. Can an off-duty officer moonlighting as security for a grocery store stop somebody for a law enforcement purpose? If a concealed carry holder is first on the scene of an accident and is rendering aid, is his duty to notify triggered upon arrival of the police, even though he has not been technically "stopped" for a law enforcement purpose? The notification issue is further complicated by the fact that some law ***181** enforcement

officials have only a fuzzy notion of what the law requires. [13] While this is understandable, considering that the average officer is required to know and apply a large body of criminal law on a daily basis, it does not help the individual licensee who may be wrongfully charged as a result of the officer's lack of expertise.

One additional, and perhaps more problematic wrinkle in Ohio's notification law is that it also imposes a duty that licensees not "knowingly disregard or fail to comply with any lawful order of any law enforcement officer given while the person is stopped." [14] Oftentimes those orders are for the subject of a stop to remain quiet as the officer attempts to maintain control of the traffic stop. [15] In a situation where a licensee has a duty to notify an officer, yet has been ordered to remain silent, the licensee is forced to choose between first-degree misdemeanor offenses--failure to notify, [16] or failure to comply with a lawful order. [17] However, if the licensee makes the wrong decision during a high-stress law enforcement encounter, a criminal charge may be the least of their worries.

This comment sets forth the reasons why the notification provision of Ohio's concealed-carry law is unconstitutional as written and enforced. Part II addresses the vague nature of law in both its wording and the amount of discretion it affords law enforcement. Part III examines the First Amendment implications of the notification requirement, and why compelling private citizens to speak should be strictly scrutinized. Part IV addresses policy considerations; namely, why it does not make sense to penalize otherwise law-abiding citizens for lapses in memory, and why the notification provision does nothing to further officer safety.

*182 II. "Prompt" Notification--When Time is of the Essence, Who Decides Whether a Notification Was Proper? Vague Statutory Guidelines and Officer Discretion in Enforcing Notification Laws

A. The Vagueness Doctrine as Currently Applied to Ohio's Notification Requirement

The Vagueness Doctrine has its roots in the due process requirements of the Fifth and Fourteenth Amendments. [18] In Grayned v. City of Rockford, the court explained the need for specificity when drafting legislation:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [19]

More succinctly put, "[e]very man should be able to know with certainty when he is committing a crime." [20] These concepts gives rise to the two elements of a vagueness analysis: adequate notice, and standards limiting officer discretion in choosing when to enforce the statute. [21] For those Ohioans who chose to lawfully carry a handgun for their defense, aspects of the law governing their right to do so make it difficult to know whether certain actions, or in this case inactions, are lawful.

In City of Chicago v. Morales, The Supreme Court held that a statute is impermissibly vague when it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or when it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." [22] In Morales, the defendant was convicted under Chicago's Gang Congregation Ordinance, which prohibited "criminal street gang members" from congregating and loitering in any public place. [23] In upholding the lower courts' findings that the ordinance was impermissibly vague, the Supreme Court found that the

ordinance failed both prongs of the vagueness test--it failed to give citizens adequate notice of what behavior was prohibited, and also "violate[d] 'the requirement that a ***183** legislature establish minimal guidelines to govern law enforcement."' [24] The Court held that the statute provided "absolute discretion to police officers to decide what activities constitute loitering." [25]

Applying the Court's reasoning in Morales to Ohio's notification provision demonstrates the law's vagueness. Not only does the law fail to provide adequate notice of what conduct may be illegal, it also gives an impermissible amount of discretion to officers in deciding when to charge someone under it. [26] At issue here is the language of Ohio Revised Code ("ORC") Section 2923.12 governing the carrying of concealed weapons, which states in part:

(B) No person who has been issued a license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code shall do any of the following:

(1) If the person is stopped for a law enforcement purpose and is carrying a concealed handgun, fail to promptly inform any law enforcement officer who approaches the person after the person has been stopped that the person has been issued a license or temporary emergency license to carry a concealed handgun and that the person then is carrying a concealed handgun; . . .. [27]

Here, the test for vagueness requires an inquiry into whether ORC Section 2923.12 gives licensees adequate notice of when, in what manner, and how swiftly they must disclose to police that they are armed. A vagueness analysis should also ascertain whether the statute gives an impermissible amount of discretion to officers to decide what constitutes a stop for a law enforcement purpose, at what point an "approach" begins, and how quickly a notification must be made in order for it to be "prompt."

In State v. Brown, the Court of Appeals of Ohio determined that the notification law was not vague. Defendant Marvin J. Brown was stopped by a Warren, Ohio police officer for a speeding violation. [28] The officer took Brown's license with him back to the cruiser to run a check on it, at which time he was informed by the dispatcher that Brown possessed a concealed carry license. [29] When the officer returned to Brown's vehicle, he asked if there was a loaded firearm in the car. [30] Brown replied in the affirmative and told the officer that it was located in the unlocked glove compartment. [31]

***184** Brown was then charged with two counts of improperly handling firearms in a motor vehicle in violation of ORC Sections 2923.16(E)(1) and (3). [32] While the Ohio legislature has since done away with the crime of Improper Handling of a Firearm in a Motor Vehicle [33] for concealed carry licensees (at least as far as how handguns must be transported), the improper handling charge for his failure to notify the officer was based on statutory language similar to that of ORC Section 2923.12. [34]

Brown argued, inter alia, that the statute under which he had been convicted violated the Equal Protection and Due Process Clauses of the United States and Ohio Constitutions. [35] In examining this claim, the court began with the premise that "a law will survive a void-for-vagueness challenge if it is written so that a person of common intelligence is able to ascertain what conduct is prohibited, and if the law provides sufficient standards to prevent arbitrary and discriminatory enforcement." [36]

The court applied this standard to the first count (for the improper transportation of the handgun in an unlocked glove compartment), and determined that the statute was not vague because it set forth with specificity the manner in which licensees could transport a loaded handgun in a vehicle, and that it did not encourage arbitrary or discriminatory enforcement, since the licensee either was, or was not, transporting in one of the prescribed manners. [37]

When it examined the second charge stemming from Brown's failure to timely inform the officer of his concealed handgun license and firearm, the court found:

The only provision of this statute that is arguably ambiguous is the term "promptly." "To do something 'promptly' is to do it without delay and with reasonable speed." Thus, a person of common intelligence would readily understand this term, as it is used in this situation, to require the license holder to inform the officer about the weapon as soon as possible. Certainly, the notification should occur during the initial encounter with the officer. [38]

The court's analysis of what meets the definition of "promptly" is fairly cursory, and it does not take into account other problematic language in the statute. Perhaps inadvertently, the language utilized in the court's decision tends to show the inherent difficulty in requiring that a notification be prompt--though the court defines "promptly" to mean "as soon as possible," [39] that interpretation ***185** raises further questions. "As soon as possible" is in and of itself a murky standard when viewed in the light of high-stress felony stops--should licensees tell officers that they have a gun while being held at gun- or Taser-point? While notification would certainly be possible, it seems unlikely that the court would call for such a dangerous course of action.

Additionally, conspicuously absent from the court's discussion of the notification requirement is an analysis of the second prong of the test for vagueness--whether the statute provides sufficient standards to prevent arbitrary or discriminatory enforcement by officers. [40] This is unfortunate, considering that this element of the vagueness analysis is considered the weightier of the two. [41]

The court's superficial examination of the statute for vagueness is likely due to the fact that Brown's case did not require a more searching inquiry. His failure to notify was egregious and did not present a close question of law. [42] In fact, it is not clear whether Brown would have attempted to notify at all had the officer not asked about his concealed carry license. However, subsequent incidents tend to show the practical difficulties that have arisen from the day-to-day enforcement of ORC Section 2926.12, and how officers, as well as citizens have to make judgment calls regarding when the duty to notify is both triggered and satisfied. [43] In light of these difficulties, Ohio courts need to revisit the vagueness analysis.

B. Why Brown's Vagueness Analysis Is Problematic

When deciding whether they are required to notify during any particular encounter, Ohio licensees must first decide: (1) if they have been stopped, (2) by a law enforcement officer, (3) for a law enforcement purpose. [44] If the licensee is convinced that those three elements have been satisfied and their duty to notify has been triggered, they must then decide how to notify the officer, the time frame in which to do so, and whether doing so is a good idea under the circumstances. [45] This, of course, is completely dependent on whether the officer ***186** affords them an opportunity to do so. [46] If the licensee fails to correctly categorize or identify any one of these elements in the same manner as the officer on the other end of the encounter, they may be subject to criminal charges. [47]

Take, for example, the case of Bryan Ledford. On March 17, 2009, Ledford found himself embroiled in a loud, but civil, argument with his girlfriend. [48] Unbeknownst to him, a friend that was in the apartment became concerned about the exchange and called in a report to the police. [49] Ledford left his girlfriend's apartment when asked to do so, but he did not get far. [50] Before he was able to back his car out of its parking spot, an officer, apparently on foot, yelled at Ledford to exit his vehicle. [51]

Ledford complied, and immediately noticed what he thought was a gun pointing at him (though it later turned out to be a Taser). [52] He was ordered to put his hands on the roof of his car. [53] The officer began questioning Ledford before Ledford had a chance to notify the officer that he had his concealed carry license and two loaded handguns legally stored in his vehicle. [54]

Once the dust settled, Ledford did manage to notify, but not until a second officer had arrived on scene and began patting him down. [55]

While Ledford waited in the back of the cruiser, the dash camera on one of the cruisers captured the officers' discussion of the incident. [56] Apparently the officers were perturbed that Ledford had not one, but two loaded (but legally stored) firearms in his vehicle, and referred to him in their talks by derogatory epithets. [57] Since a search of Ledford's vehicle had not turned up any chargeable contraband, the officers discussed what they could charge Ledford with for almost 30 minutes. [58] After much musing (apparently all caught on the dash camera's microphone), the officers decided that Ledford's notification had not been prompt enough and that he could be charged for failure to promptly inform them of the firearms in his vehicle. [59]

***187** The criminal complaint alleged that Ledford had failed to notify officers of his license and firearms within 51 seconds of being stopped. [60] Ledford's online account of the incident goes on to detail the secondary effects of his arrest and criminal charge, including detainment in a holding cell, financial difficulties after posting his bond, the stigma of having to inform his employer of the pending charges, and the need to obtain legal counsel. [61]

Ledford's law enforcement encounter is consistent with a Supreme Court observation:
Those generally implicated by the imprecise terms of [an] ordinance [are] poor people, nonconformists, dissenters, [or] idlers . . .. Where . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." [62]

The lack of statutory limits on what constitutes prompt notification allowed the officers to punish Ledford for engaging in behavior (carrying firearms) that they deemed unusual or improper, despite being legal. [63]

Financially strapped, Ledford was able to solicit the aid of an organization called Ohioans for Concealed Carry in order to fund his legal defense. [64] He hired attorney Timothy Bellew to represent him, and they decided to demand a jury trial. [65] The trial lasted two days. [66] The jury deliberated for 90 minutes before coming back deadlocked. [67] After some encouragement and clarification from the judge, another 90 minutes of deliberation produced a not-guilty verdict. [68]

While the case was resolved in Ledford's favor, he should have never been forced to go through the process simply because the Beachwood police disliked the fact that he was legally carrying multiple firearms. The dash-cam audio of the officers' discussion of how to charge Ledford demonstrates the vast discretion that officers have under ORC Section 2923.12 in deciding what ***188** constitutes "promptly." [69] The Court has criticized such boundless discretion before. [70]

In Kolender v. Lawson, plaintiff Edward Lawson brought suit alleging that a California ordinance requiring "persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify" a Terry stop [71] was unconstitutional. [72] Lawson sued because he had been detained or arrested under the law's provisions a whopping 15 times "between March 1975 and January 1977." [73]

The Court examined the statute and found that "as . . . drafted and construed by the state courts, [the law] contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." [74] The lack of legislative guidance was so sparse that "the statute vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute." [75] Furthermore, the defendant admitted in oral arguments that "a suspect violates [the statute] unless 'the officer [is] satisfied that the identification is reliable.'" [76] Because the legislation

"necessarily entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on his beat," [77] the Court invalidated the statute as unconstitutionally vague. [78]

The lack of guidance in ORC Section 2923.12 bears a strong resemblance to the problem addressed by the court in Kolender. Ohio's notification requirement seems to "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" [79] Just as the terms "credible and reliable" provided too little guidance to law enforcement in Kolender, so do the terms in Ohio's law, such as "promptly" and "notify," fail to adequately curb expansive officer discretion. The problems articulated in Kolender are glaringly obvious in Bryan Ledford's case. Ohio's notification provision "furnishe[d] a convenient tool for 'harsh and discriminatory enforcement . . . against particular groups deemed to merit . . . displeasure.'" [80]

***189** The officers took exception to Ledford and were able to punish him because ORC Section 2923.12 granted them the discretion to decide that 51 seconds was not "prompt" enough. [81]

A more recent--and well-publicized--example that highlights just how difficult it is to accurately make these determinations was caught on the dash-camera of a Canton Police Department officer. [82] While on patrol during the early morning hours of June 8, 2011, Officer Daniel Harless and his partner happened upon the vehicle of William Bartlett, which was pulled over on the side of the road in a seedier part of town. [83] The officers turned on their overhead lights and initiated a traffic stop. [84] Bartlett had a valid concealed carry license and was armed, but for reasons unknown, dispatch did not advise the officers of Bartlett's license, [85] despite the fact that Ohio concealed carry licenses are linked to their owners' vehicle registration information. [86]

From the moment that the stop was initiated, until the stop's unfortunate end, Bartlett was forced to make difficult and potentially dangerous choices. Unlike the simple speeding stop at issue in Brown, Bartlett was not approached by the officers for over six minutes, despite the fact that he was the driver of the vehicle. [87] So while it was apparent that he had been stopped by law enforcement officials for a law enforcement purpose, [88] it was left to him to determine the manner in which to promptly and safely inform the officers as required. At one point prior to engaging Bartlett, Officer Harless' partner, Officer Diels, began a search of Bartlett's back seat. Seeing his opportunity, Bartlett attempted to notify, but was stymied by the officer's immediate order to "shut up." [89]

When Harless finally approached Bartlett's driver side window almost six minutes into the stop, Bartlett again attempted to notify that he possessed a license and a firearm. [90] As before, he failed in the face of Harless' attempts to aggressively control the stop by speaking over Bartlett and ordering him to remain silent. [91] Bartlett then attempted to notify without words by trying to physically hand Harless his concealed carry license. [92]

***190** When it finally dawned on Harless that Bartlett had a firearm on his person, Bartlett was patted down, his firearm confiscated, and he was roughly handcuffed and detained in the back of the cruiser. [93] As the stop concluded, it became apparent that there were no other offenses with which the officers could charge Bartlett. [94] So despite their representations to Bartlett that he would be charged with a felony, the best that the officers could drum up was a first degree misdemeanor for carrying a concealed weapon in violation of ORC Section 2923.12(B)(1), or failure to notify, and a traffic charge of stopping in a roadway. [95]

Scenarios like Bartlett's highlight the uncertainties that plague persons who carry concealed firearms. The obvious question is at which point during the stop was Bartlett "approached" by an officer--was it the moment that Harless activated his lights and initiated the stop, or did it begin six minutes later when Bartlett was first addressed by the officers? Did "prompt" notification require that Bartlett yell at the officer while he stood behind Bartlett's vehicle? While the Court in Brown said that the notification should occur "as soon as possible," and that "certainly, the notification should occur during the initial encounter with the officer," [96] it is unclear how that instruction clarified how Bartlett should have proceeded during his stop.

What is abundantly clear from the video is that Bartlett made an effort to notify as required and was prevented from doing so by the officers At the point where Harless realized this, it was left entirely to his discretion to decide whether Bartlett's efforts had satisfied his duty to notify. Unfortunately for Bartlett, Harless decided that they had not, and he elected to issue the citation. [97]

Bartlett took the charge to trial. [98] His attorney, Timothy Bellew, argued that Bartlett was not technically approached (for purposes of triggering his duty to notify) until addressed by Officer Harless at his driver's-side window, and that he attempted to verbally notify and was prevented from doing so by Harless. [99] During his cross-examination of State's witness Diels (Harless' partner on the evening in question), Bellew asked if Diels believed that verbal notification was necessary, or whether written notice or handing over an individual's concealed carry license would suffice. [100] Diels stated that he did not know what the law required, but that he believed that verbal notification was required. [101] At one ***191** point during the cross-examination of Diels, Bellew yelled, "I've got a gun!" [102] Upon being asked whether that should be how concealed carry licensees should be required to notify inattentive officers, Diels admitted that it could be perceived as a threat. [103] Diels had no good answer when asked how licensees should have notified in Bartlett's situation. [104]

At the conclusion of the prosecution's case, Bellew moved for dismissal of the charge, contending that the prosecution had failed to prove all of the necessary elements. [105] Judge Belden agreed and granted the motion. [106] He found that Bartlett had not been approached until Officer Harless came to the driver's-side window and directly questioned him. [107] He further found that Bartlett had attempted to give Harless his concealed carry license almost immediately, and that he verbally notified as soon as he was given a chance "to get a word in edge-wise." [108]

Bartlett's case was the result of a perfect storm of awkward circumstance and aggressive application of officer discretion that the Vagueness Doctrine is intended to prevent. It is clear from this example that the law does not give adequate notice of what conduct is prohibited, nor clear guidelines of what must be done to satisfy it. It leaves the definitions of words such as "prompt," "approached," "law enforcement purpose," and even what constitutes "notification," completely to officer discretion, and therefore susceptible to abuse. As written, ORC Section 2923.12 certainly seems to "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [109]

The vague manner in which the notification statue is written implicates other constitutional rights as well. While ORC Section 2923.12 does not explicitly require that a licensee speak in order to fulfill their duty to notify, Officer Diels's testimony demonstrates that it is not clear (to law enforcement, let alone civilian licensees) whether simply handing one's license to an officer is sufficient to successfully discharge that duty. [110] As such, many concealed carry instructors, including this author, [111] teach concealed carry students to err on the side of caution and verbally notify as soon as possible. This is problematic, since "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms,' . . .. Uncertain ***192** meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [112]

III. First Amendment Implications--Notification Requirements and State-Compelled Speech

A. The Nature of the Beast: Classifying Compelled Notification

Though ORC Section 2923.12 is silent as to whether verbal notification is required, [113] the Ohio Attorney General has opined that it is a necessity. Ohio law requires that concealed carry instructors provide students with a copy of a publication as part of the state-mandated training requirements [114] in which the attorney general advises:

If you are pulled over while carrying a concealed handgun, you should remember the following:
• Before the officer approaches, roll down your window and place your hands in plain view on the steering wheel.

• Calmly tell the officer that you have a license to carry a concealed handgun and that you have a handgun with you. Ask if the officer has particular instructions concerning the handgun. [115]

As a result of the vague statutory language, and the Attorney General's interpretation thereof, most Ohioans who carry concealed firearms understand proper notification to require some form of verbal expression from them to the officer. [116] For all intents and purposes, Ohio law effectively compels private persons to speak during certain law enforcement encounters. [117]

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech." [118] The Supreme Court has held that laws which compel private actors to speak constitute an abridgment of First Amendment rights. [119] Furthermore, the constitutional harm does not hinge on ***193** whether the compelled speech contains ideological content; rather, the harm is being forced to speak instead of being allowed to remain silent. [120] "In order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is 'regulatory, proscriptive, or compulsory in nature.'" [121] A charge for failure to notify under ORC Section 2923.12 is a first degree misdemeanor [122] --a fairly strict criminal sanction which imposes maximums of $1000 and/or six months in jail for those convicted of the crime. [123] Additionally, a conviction for failure to notify mandates that the licensee's license be suspended, [124] thereby prohibiting him from exercising his Second Amendment rights until the license may be reinstated. [125] As such, Ohio law compels licensees to speak by threatening harsh criminal sanctions and deprivation of rights for failure to do so. [126]

The immediate question is whether Ohio's notification requirement should be considered a content-based or a content-neutral regulation, since courts will analyze the burden that ORC Section 2923.12 places upon First Amendment rights accordingly. [127] Regulations are generally considered content-based if they "suppress, disadvantage, or impose different burdens upon speech on the basis of its content." [128] Content-neutral regulations, however, are so-called "time-place-manner" restrictions that are intended to regulate undesirable secondary effects of certain types of speech. [129]

When reviewing content-based regulations that impinge upon freedom of speech, the Court has traditionally applied strict scrutiny. [130] Strict scrutiny requires that the regulation in question be narrowly tailored to promote a compelling government interest. [131] It must also be the least restrictive means of advancing that interest. [132] Content-neutral regulations are afforded more judicial leeway, and subjected only to intermediate scrutiny. [133] Intermediate scrutiny requires that the regulation "further[] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free ***194** expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." [134]

While suits alleging unconstitutional compulsion of speech are rarer than those complaining of improper suppression of speech, the Court has made clear that the full spectrum of First Amendment protections apply to the right to refrain from speaking. [135] The Court addressed the issue of compelled-speech in Axson-Flynn v. Johnson. [136] In 1998, Christina Axson-Flynn, a Mormon, enrolled in the University of Utah's Actor Training Program. [137] While pursuing her studies there, Christina refused to say the word "fuck," or to utter God's name in vain. [138] When faculty members made it clear that she would be forced out if she did

not "get over" her hesitation to use those words, Christina filed a suit in which she alleged that requiring her to use profanity while performing constituted compelled speech. [139]

The district court held that First Amendment proscription of forced speech did not apply to Axson-Flynn's case because she had not been required to "espouse an ideological point of view on behalf of the State." [140] However, on appeal, the Supreme Court rejected this line of reasoning and held:

> In general, First Amendment protection does not hinge on the ideological nature of the speech involved. Likewise, the First Amendment's proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry. The constitutional harm--and what the First Amendment prohibits--is being forced to speak rather than to remain silent. This harm occurs regardless of whether the speech is ideological. [141]

In resolving the issue, the Court applied intermediate scrutiny to Axson-Flynn's claim. [142] However, their choice to do so was due to the unique nature of educational requirements and pedagogical concerns. [143]

***195** According to the reasoning in Axson-Flynn, concealed carry notification requirements such as Ohio's infringe upon First Amendment rights, despite the fact that they may not compel ideological speech. The question is how to apply that reasoning to infringements outside of the classroom. In Tepeyac v. Montgomery County, a Limited Service Pregnancy Resource Center (LSPRC) brought suit challenging the validity of a resolution that required LSPRCs to make certain disclaimers. [144] The resolution required that LSPRC's post signs in their waiting rooms which read: "(1) 'the Center does not have a licensed medical professional on staff;' and (2) 'the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider."' [145] Plaintiff presented several First Amendment-related arguments, all of which the court boiled down to a general claim that the resolution unconstitutionally compelled speech. [146]

In deciding which level of scrutiny to apply to the resolution, the court held that "[b]ecause '[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech,' laws that compel speech are ordinarily deemed 'content-based regulation[s] of speech' subject to strict scrutiny." [147] However, the court went on to note that there were exceptions to this general rule. [148] Those exceptions include commercial speech, compelled campaign finance disclosures, and laws that compel speech for reasons "entirely unrelated" to the content of the speech. [149]

The district court's inclusion of the latter category, under which concealed carry notification requirements would seem to fall, was based upon the plurality decision in Turner Broadcasting System v. FCC. [150] In Turner, cable companies contested the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992 and asserted that by mandating them to devote a portion of their channels to local broadcast television stations, the Act abridged their freedom of speech. [151]

The plurality held that the regulation was content-neutral since, inter alia, it did not "force cable operators to alter their own messages to respond to the broadcast programming they [were] required to carry." [152] The Tepeyac court distinguished Turner from the resolution at issue and found that, unlike Turner, ***196** the instant case involved "the government itself . . . prescribing the content of the compelled message." [153] In Tepevac, the court emphasized that "the fact that particular content is compelled by the Resolution necessarily renders it content-based." [154]

While it does not contain a scripted message for licensees to utter, ORC Section 2923.12 does require that licensees disclose two specific things: that they have a license, and that they are currently carrying a handgun. [155] And unlike Turner, where cable companies were not forced to alter their own message in order to comply with the Act, concealed carry licensees are compelled

to utter speech that they may not ordinarily make, necessarily altering the content of that utterance. [156] As a final matter, "[a] potentially vague law that interferes with First Amendment rights deserves greater scrutiny 'because of its obvious chilling effect on free speech.'" [157] Due to the vague nature of ORC Section 2923.12, [158] as well as its content-based categorization, compelled notification legislation should be subjected to strict scrutiny.

B. Applying Strict Scrutiny to Revised Code 2923.12

The Supreme Court has held that "'[s]trict scrutiny is not strict in theory, but fatal in fact.'" [159] Therefore, further analysis of ORC Section 2923.12 is warranted to determine whether it does, in fact, meet the stringent requirements of strict judicial scrutiny. Condensed into its two basic requirements, strict scrutiny requires that the legislation in question be "'1) narrowly tailored to 2) promote a compelling government interest.'" [160]

The ostensible government interest here is officer safety during traffic stops. [161] When analyzing whether a statute meets the requirement that it be narrowly tailored to that interest, three separate analyses are employed. [162] The first requirement is that any infringements of protected rights be necessary to achieving the government's compelling interest. [163] Ohio law contains a number of effective safeguards to ensure that only eligible citizens may obtain concealed carry licenses, and it also contains provisions by which officers may ascertain ***197** who has a license during traffic stops without also requiring verbal notification. [164] With those safeguards in place, verbal notification is unnecessary to protect officers from law-abiding licensees.

The second requirement is an underinclusiveness inquiry, which seeks to establish whether a statute "fails to regulate activities that pose substantially the same threats to the government's purportedly compelling interest as the conduct that the government prohibits." [165] Applying this to the case at hand, Ohio law prohibits licensees from failing to notify law enforcement officers that they have a loaded handgun. [166] The law, however, does not compel unlicensed individuals to do the same. [167] Therefore, ORC Section 2923.12 is underinclusive in that it fails to protect officers from the same theoretical harm (not having knowledge of a loaded handgun in the vicinity) at the hands of unlicensed individuals. [168]

The third element of the narrow tailoring analysis is an overinclusiveness inquiry. [169] This requires that regulations encroaching on protected rights be the least restrictive of available alternatives. [170] Here, since ORC Section 2923.12 is likely unconstitutionally vague, [171] there is a heightened possibility that the statute could reach more protected speech than is strictly necessary to achieve the government's goals. Every time a licensee opts to err of the side of caution and notifies a law enforcement officer that they are carrying a concealed firearm when they are not required to--for example, while a licensee is rendering aid at an accident site, or just-in-case notification to an off-duty officer--the statue has compelled more speech than is strictly necessary.

While ensuring the safety of law enforcement officials is almost certainly a compelling state interest, ORC Section 2923.12 is not narrowly tailored to achieve that interest. [172] Because the legislation unnecessarily infringes upon licensees' right not to speak, fails to regulate behaviors that pose the exact threat it was implemented to prevent, and because it compels more speech than is necessary to achieve its purpose, Ohio's notification requirement fails strict scrutiny and should be invalidated.

IV. Good Intentions Gone Awry: How Notification Laws Put Police and Licensees in Danger

A. Why It's Not OK to Say "Gun" to a Cop

One of the most frequently asserted rationales for requiring licensees to promptly divulge that they are lawfully armed is that it somehow makes law ***198** enforcement encounters safer for officers. [173] However, upon closer examination, this argument is not compelling and is simply incorrect. In Brown, Judge Grendell wrote:

[T]he real risk to law enforcement officers is not drivers with concealed-carry permits, who, as in this case, can be readily identified by an officer through a simple computer check. The real risk to law enforcement officers is the criminal element, who do not bother with such matters as permits, visible holsters, or closed glove compartments. [174]

Ironically, in Ohio, there is no law requiring that those who are unlawfully carrying a concealed firearm divulge that fact to law enforcement. [175] Perhaps this is because the legislature realizes a basic truth: laws only constrain the behaviors of the law-abiding.

Based on protections imposed by law, police officers have nothing to fear from law-abiding individuals. [176] Common sense dictates that officers have more to fear from those individuals who conceal firearms illegally; either because they cannot obtain a license legally, or because they do not respect the law enough to care whether their actions are legal or not. Police should be protected from these individuals, rather than from the citizens who have proven themselves willing to abide by the law by going through a rigorous licensing process. After all, the percentage of concealed carry license holders who commit crimes is significantly lower than that of the general populace. [177]

Indeed, one may argue that compelled notification may lull officers into a false sense of security. If officers come to expect licensees to announce the presence of a weapon during a stop, they may become complacent over time. One may only speculate, but it seems rare that criminals would announce their intentions to shoot officers prior to an attempt to do so. Therefore, officers who become accustomed to being alerted when weapons are present may miss warning signs of impending danger that a more vigilant officer might pick up on.

***199** Additionally, licensees invest a significant amount of time and money into obtaining their licenses in the first place. [178] Ohio has some of the most stringent pre-licensing requirements in the nation. [179] The state requires that aspiring concealed carry licensees complete a 12-hour gun-safety education course that consists of ten hours of classroom training and two hours of shooting at a range, [180] whereas some states have no education requirement at all, and others have “Constitutional Carry” systems where no license is required to carry a concealed weapon. [181] In addition to the time commitment, the licensing process requires a monetary commitment as well. [182] Licensees stand to lose quite a bit if their actions result in the revocation of their license.

Ohio's concealed carry law contains further safeguards that make affirmative notification unnecessary. First, concealed carry licensees are subjected to background checks and screened for certain disqualifying offenses. [183] This automatically screens out applicants who are fugitives, convicted felons, domestic abusers, violent misdemeanants, mentally defective or incompetent, or are subject to protection orders. [184] These protections apply after a license has been issued as well. [185] A licensee's right to carry is automatically suspended if they become subject to any of the disqualifiers or are charged with disqualifying crimes. [186] This assures law enforcement officers that persons carrying legally have a track-record of compliant behavior and are not the ones likely to employ their weapons because of a traffic citation.

Ohio law also provides that licensees' concealed carry license information be linked to their vehicle registration and driver's license through the LEADS database. [187] Upon initiating a traffic stop, officers can plainly see whether a vehicle's owner has a concealed carry license prior to making their approach. [188] Of course, licensees may sometimes drive cars not registered in their names. When this is the case, Ohio law compels licensees to keep their hands in plain sight until allowed by the officer

to do otherwise. [189] Failure to do so, or to comply with the officer's lawful commands, may result in independent criminal charges should the officer so desire. [190]

***200** With so many safeguards already in place, requiring licensees to actively notify officers is unnecessary. In fact, certain circumstances may render the duty to do so dangerous. In William Bartlett's case, for example, a decision to speak over Officer Harless' commands could have been perceived as a threat, especially if Bartlett had mentioned the word "gun." [191] Officer Diels admitted as much when cross-examined in court. [192] In the case of Brian Ledford, any mention of firearms could have gotten him Tazed, or worse. [193] Far from making stops safer, the duty to notify has the potential to turn routine stops into dangerous ones.

B. A Balancing Act--Protecting Police and Licensees' Rights

As a preliminary issue in the context of a routine traffic stop, licensees would likely be wise to inform officers of their firearms if there is a chance that the officer will discover it as they rummage about for their driver's license or registration. It may comfort officers to know that they are dealing with an individual who has passed a background check and may save the licensee from the uncomfortable possibility of being held at gunpoint while the officer ascertains the legality of the firearm. However, there is no reason to criminalize a licensee's failure to so notify. Instead, notification should become merely a matter of courtesy.

Ohio already requires licensees to undergo a 12-hour course prior to obtaining their licenses. [194] The legislature has mandated that certain topics be covered in the class [195] and that instructors distribute the Ohio Attorney General's concealed carry publication. [196] It would be a simple matter to revise the Attorney General's publication to add a more comprehensive discussion of how police encounters ought to be handled and to also require that "getting along with law enforcement" (or something to that effect) be discussed during the required training.

Finally, if formal education and informal encouragement are not sufficient, Ohio should at the very least absolve licensees of the duty to affirmatively notify. Instead, the onus should fall on the officer to inquire as to whether there are any weapons in the car or on the licensee--a question that is routinely uttered by law enforcement officers anyways. While "prompted notification" may not pass constitutional muster either (it's likely that the First and Fifth Amendments would still be implicated), at the very least, it would solve much of the ambiguity ***201** that exists under the current system and prevent future incidents similar to the cases of William Bartlett and Bryan Ledford. When prompted by a question, the licensee knows exactly at which point during the encounter to notify the officer of their license and concealed firearm, and the officer will not be able to claim that a licensee failed to notify unless the question was asked and went unanswered.

Under the inherent stress of a traffic stop, many people find it difficult to remember and parse the many required statutory elements that the notification law requires. Additionally, persons who infrequently carry a concealed firearm may not immediately remember that they have it nearby when they are stopped. There is no cause to impose harsh criminal sanctions on those who are simply forgetful or fail to notify for non-malicious reasons. By requiring officers to ask whether a person is armed, the forgetful would be reminded, and the current ambiguities and inappropriate amount officer discretion would effectively be solved.

V. Conclusion

It took a lot of effort and compromise to pass concealed carry legislation in Ohio back in 2004. [197] Part of that compromise included a number of restrictions that were thought to be appropriate safeguards at the time, but have subsequently proven to be unnecessary. [198] Active notification is one of those unnecessary requirements. Considering the provision is more likely to

harm licensees than it is to save an officer, ORC Section 2923.12's notification requirement should go the way of labyrinthine firearms transportation requirements and the prohibition against carrying into restaurants that serve alcohol--away. [199]

Gun control groups and opponents of concealed carry legislation argued loudly that blood would run in the streets if people were allowed to pack heat during their day-to-day business. [200] However, as laws governing the concealed carry of firearms have become more relaxed in recent years, crime rates nation-wide have generally declined. [201] It is time to put to rest the argument that law-abiding citizens will cease to obey the law the moment they strap a firearm to their waist. Common sense and years of experience have proven that it simply is not true.

Because ORC Section 2923.12 is unconstitutionally vague and needlessly infringes upon Ohio licensees' right to refrain from speaking, [202] it should be invalidated. Until that happens, Ohioans who choose to exercise their right to ***202** carry a concealed handgun will do so with no bright legal lines to guide their actions, and subject to the approval of the police officers they encounter in their day-to-day activities. [203]

Footnotes

a1 J.D. candidate 2013, University of Toledo College of Law. I would like to acknowledge Professor Jelani Exum for her guidance and excellent feedback, and also Esther and David Fournier for their patience and understanding during the writing process. Thanks for not firing me.

1 See State v. Hall, 216 N.E.2d 635, 635-36 (Ohio Ct. App. 1964) ("Defendant-appellant's only significant claim of error is that he was justified under the provisions of Section 2945.76, Revised Code, in carrying a concealed weapon. That section provides as follows: 'Upon the trial of an indictment or information for carrying a concealed weapon, the jury shall acquit the defendant if it appears that he was at the time engaged in a lawful business, calling, or employment, and that the circumstances in which he was placed justified a prudent man in carrying such weapon for the defense of his person, property, or family.'"). See also Ohio Rev. Code Ann. § 2945.76 (West 2010) (repealed 2007) (providing circumstances for acquittal of a carrying concealed weapon charge).

2 3 Lewis R. Katz et al., Baldwin's Ohio Practice: Criminal Law § 106:2 (2009).

3 U.S. State Pages, Handgunlaw.us, http://www.handgunlaw.us (last updated June 8, 2012) (displaying a map indicating each state's status regarding concealed weapon permits).

4 Ohio implemented what is known as a "shall-issue" licensing scheme, as opposed to some states' "may-issue" schemes which grant local authorities broad discretion in deciding who should and should not be permitted to carry a concealed handgun. See, e.g., How to Get Your License: Concealed Pistol License, Wash. State Dep't Licensing, http:// www.dol.wa.gov/business/firearms/faconcealreq.html (last visited June 11, 2012) (providing licensing information for the State of Washington, which merely requires an application at a local county sheriff's office, the city or town police department, or another law enforcement agency).

5 For example, the law originally required licensees transporting a handgun in a motor vehicle to keep their firearm in plain sight. This created issues for those carrying their pistols in holsters and lead to the practice that came to be known as the "Buckeye-Tuck," or tucking one's shirttail behind the gun and holster while driving, until the provision was repealed in 2007. See Daniel White, Last Day For Buckeye Tuck!, Ohioans for Concealed Carry (Mar. 13, 2007), http://www.ohioccw.org/200703133837/last-day-for-buckeye-tuck.html.

6 Ohio Rev. Code Ann. § 2923.121 (West 2010).

7 Id.

8 Mich. Comp. Laws Ann. § 28.425f(3) (West 2010).

9 La. Rev. Stat. Ann. § 40:1379.3(I)(2) (West 2010).

10 Ohio Rev. Code Ann. § 2923.12(B)(1) (West 2010).

11 Id.

12 Id. ("If the person is stopped for a law enforcement purpose ....").

13 See, e.g., Randalf999, Dayton Cop Flunks Test, YouTube (Sept. 12, 2011), http://www.youtube.com/watch?v=qWLxPC6YKlA (Dayton police officer insists that a licensee has a duty to notify even when unarmed).

14 Ohio Rev. Code Ann. § 2923.12 (West 2010).

15 See Fed. Law Enforcement Training Ctr., Arrest and Search Techniques Study Guide 8 (2010), available at http://resources.learningforlife.org/exploring/lawenforcement/study/arrest.pdf ("The goals of verbal communication for the law enforcement officer are to direct, to control, and to gather information.").

16 Ohio Rev. Code Ann. § 2923.12(F)(3) (West 2010) ("[C]arrying concealed weapons in violation of division (B)(1) of this section is a misdemeanor of the first degree ....").

17 Id. § 2923.12(F)(4) ("Carrying concealed weapons in violation of division (B)(2) or (4) of this section is a misdemeanor of the first degree or, if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(2) or (4) of this section, a felony of the fifth degree.").

18 Andrew E. Goldsmith, The Void-for-Vagueness Doctrine in the Supreme Court, Revisited, 30 Am. J. Crim. L. 279, 286 (2003).

19 Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1971) (footnotes omitted).

20 United States v. Reese, 92 U.S. 214, 220 (1875).

21 Goldsmith, supra note 18, at 284-85.

22 City of Chicago v. Morales, 527 U.S. 41, 56 (1998).

23 Id. at 45-46.

24 Id. at 60 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

25 Id. at 61.

26 See Ohio Rev. Code Ann. § 2923.12 (West 2010).

27 Id.

28 State v. Brown, 859 N.E.2d 1017, 1018 (2006).

29 Id.

30 Id.

31 Id.

32 Id.

33 New Rules for Vehicle Carry: The Other Half of SB17, Ohioans for Concealed Carry (June 30, 2011), http://www.ohioccw.org/201106304942/new-rules-for-vehicle-carry-the-other-half-of-sb17.html.

34 Ohio Rev. Code Ann. § 2923.16(E)(1) (West 2010).

35 Brown, 859 N.E.2d at 1020-21.

36 Id. at 1021 (citing Klein v. Leis, 795 N.E.2d 633 (2003)).

37 Brown, 859 N.E.2d at 1021.

38 State v. Brown, 859 N.E.2d 1017, 1021 (2006) (citing Black's Law Dictionary 1214 (6th rev. ed. 1991)).

39 Id.

40 Id.

41 Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) ("Although the [[vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement."' (citations omitted)).

42 Brown, 859 N.E.2d at 1018-19. Brown's notification did not occur until his second interaction with the officer, and only because the officer asked whether he had a handgun in the vehicle. Id. at 1019.

43 See Canton PD Notification Arrest & Officer Conduct, Ohioans for Concealed Carry (July 20, 2011, 8:53 PM), http://ohioccw.org/201107214955/cantonpd.html. See also Bryan Ledford, CCW Violation: My Experience and Trial in a Court of Law, ohio.liberty (July 19, 2009, 1:05 A.M.), http://ohioliberty.blogspot.com/2009/07/ccw-violation-my-experience-and-trial.html.

44 Ohio Rev. Code Ann. § 2923.12 (West 2010).

45 Ledford, supra note 43. As the blog does not have page numbers, this article's narrative will mostly follow Ledford's online account of his incident.

46 Ohio Rev. Code Ann. § 2921.331 (West 2010) (failure to comply with order or signal of police officer).

47 Id. ("A violation of division (A) of this section is a misdemeanor of the first degree.").

48 Ledford, supra note 43.

49 Id.

50 Id.

51 Id.

52 Id.

53 Id.

54 Id.

55 Id.

56 Id. ("The police can be overheard in the dash cam tape describing me in less than favorable terms. I was called a 'loser' and they were audibly upset that I was had 2 firearms in my vehicle.").

57 Id.

58 Id.

59 Id.

60 See Criminal Complaint form, Shaker Heights Municipal Court, Shaker Heights, Ohio, available at http://2.bp.blogspot.com/_ xF8CY4STYx8/SmJ7uSxkspI/AAAAAAAAAEA/K-M-Sht6cMU/s1600-h/blog_complaint.jpg (depicting redacted image of the actual criminal complaint).

61 Ledford, supra note 43.

62 Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

63 See supra Part II.A.

64 Ledford, supra note 43.

65 Traffic/Criminal Case Summary of Bryan Ledford, Shaker Heights Municipal Court Docket 09CRB00293, available at http://www.shakerheightscourt.org/search/Shaker_TrafficCriminal_CaseSummary.asp? CaseId=698500&PageId=1.

66 Ledford, supra note 43.

67 Id.

68 Id.

69 At least according to Ledford's discussion of the dash-cam audio, as the author was not able to obtain a copy. See id.

70 See Kolender v. Lawson, 461 U.S. 352, 360 (1983).

71 See Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that police officers may briefly detain and search the clothing of a person who they reasonably suspect is involved in criminal activity--also known as a “stop and frisk”).

72 Kolender, 461 U.S. at 353.

73 Id. at 354.

74 Id. at 358.

75 Id.

76 Id. at 360.

77 Id. (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)) (internal quotation marks omitted).

78 Id. at 360-62.

79 Id. at 358 (alteration in original) (quoting Smith, 415 U.S. at 575).

80 Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

81 See supra text accompanying notes 48-69.

82 See OFCC News, Canton PD Notification Arrest & Officer Conduct, Ohioans for Concealed Carry (July 21, 2011, 1:53 AM), http://ohioccw.org/201107214955/cantonpd.html (providing dash-cam video from which the narrative of Bartlett's entire encounter was taken).

83 Id.

84 Id.

85 Id.

86 Do the Police Know I'm Carrying by Running my License Tag or Driver's License?, Ohioans for Concealed Carry, http:// demo.ohioccw.org/knowledgebase/Law-Enforcement-Interactions/Do-the-police-know-I-m-carrying-by-running-my-license-tag-or-driver-s-license.html?format=pdf. See also Ohio Rev. Code Ann. § 2923.125(H) (West 2010).

87 See OFCC News, supra note 82.

88 Id.

89 Id.

90 Id.

91 Id.

92 Id.

93 Id.

94 Id.

95 See Online Case Dockets, Canton Municipal Court, Nos. 2011TRD04307 & 2011CRB02068, available at http://www.cantoncourt.org [[hereinafter Canton Online Case Docket] (follow "Online Case Docket" hyperlink; select "Criminal & Traffic" hyperlink; then enter search criteria for William Bartlett as directed).

96 State v. Brown, 859 N.E.2d 1017, 1021 (Ohio Ct. App. 2006).

97 Canton Online Case Docket, supra note 95.

98 Canton Online Case Docket No. 2011CRB02068, supra note 95.

99 Opening Argument of Respondent at 12:09:07, Canton v. Bartlett, No. 2011CRB02068 (Canton Mun. Ct. Nov. 10, 2011) (copy of audio tapes on file with University of Toledo Law Review).

100 Cross-examination of Officer Diels at 2:21:00, Bartlett (No. 2011CRB02068).

101 Id. at 2:22:00.

102 Id. at 2:34:27.

103 Id. at 2:34:37.

104 Id.

105 Move to Dismiss by Respondent at 2:57:47, Canton v. Bartlett (No. 2011CRB02068) (Canton Mun. Ct. Nov. 10, 2011).

106 Order of Judge Stephan Belden at 3:22:20-3:25:56, Canton v. Bartlett (No. 2011CRB02068) (Canton Mun. Ct. Nov. 10, 2011).

107 Id. at 3:23:06.

108 Id. at 3:23:25.

109 Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnote omitted).

110 Cross-examination of Officer Diels, supra note 100, at 2:20:59.

111 The author is an NRA-certified instructor who teaches Basic Pistol and Ohio Concealed Carry courses to those wishing to obtain a license to carry concealed handguns.

112 3 Katz et al., supra note 2, § 83:2 (quoting Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (citations omitted)).

113 Ohio Rev. Code Ann. § 2923.12 (West 2010).

114 Ohio Rev. Code Ann. § 2923.125(G)(1) (West 2010) ("Each course, class, or program described in division (B)(3)(a), (b), (c), or (e) of this section shall provide to each person who takes the course, class, or program the web site address at which the pamphlet prepared by the Ohio peace officer training commission pursuant to section 109.731 of the Revised Code that reviews firearms, dispute resolution, and use of deadly force matters may be found.").

115 Mike DeWine, Ohio's Concealed Carry Laws and License Application 15 (Sept. 30, 2011), available at http:// www.ohioattorneygeneral.gov/files/Publications/Publications-for-Law-Enforcement/Concealed-Carry-Publications/2009-Concealed-Carry-Laws-Booklet.aspx.

116 Id.

117 Id.

118 U.S. Const. amend. I.

119 16A Am. Jur. 2d Constitutional Law § 483 (2009) ("The First Amendment protects persons from being compelled to express adherence to an ideological point of view which they find unacceptable.") (footnote omitted).

120 Axson-Flynn v. Johnson, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004).

121 Id. at 1290 (citing Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1247 (10th Cir. 2000)).

122 Ohio Rev. Code Ann. § 2923.12(F)(3) (West 2010).

123 Ohio Rev. Code Ann. § 2929.21 (West 2010).

124 Ohio Rev. Code Ann. § 2923.12(F)(3).

125 Persons carrying concealed firearms without a license are guilty of carrying a concealed weapon under Ohio Rev. Code Ann. 2923.12, a felony of the fourth degree.

126 See generally Ohio Rev. Code Ann. § 2923.12 (West 2010).

127 16A Am. Jur. 2d, supra note 119, § 480.

128 Id.

129 Id.

130 United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

131 Id.

132 Id. (citing Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997)).

133 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661-62 (1994).

134 United States v. O'Brien, 391 U.S. 367, 377 (1968).

135 Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

136 Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004).

137 Id. at 1280.

138 Id.

139 Id.

140 Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1335 (D. Utah 2001), rev'd, 356 F.3d 1277 (10th Cir. 2004) ("The difference between that case and the present is that the ATP faculty are not requiring Plaintiff to espouse an ideological position at all; they merely asked her to read some lines which she finds offensive.").

141 Axson-Flynn, 356 F.3d at 1284 n.4 (citations omitted).

142 Id. at 1292 ("The school's methodology may not be necessary to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be 'reasonably related' to pedagogical concerns.").

143 Id. ("A more stringent standard would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day. This we decline to do.").

144 Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 458-60 (D. Md. 2011).

145 Id. at 459.

146 Id. at 461 ("At this point, it is unnecessary to address each of the individual allegations; it is enough to say that the complaint states a claim that the Resolution unconstitutionally compels speech.").

147 Id. at 462 (citing Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

148 Id. ("There are situations--exceptions to the general rule--when strict scrutiny will not apply.").

149 Id.

150 Id. (citing Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994)).

151 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 626 (1994).

152 Id. at 655.

153 Tepeyac, 779 F. Supp. 2d at 462 n.5.

154 Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 462 n.5 (D. Md. 2011).

155 Ohio Rev. Code Ann. § 2923.12(B)(1) (West 2010).

156 See infra Part III.A.

157 Tepeyac, 779 F. Supp. 2d at 470 (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871-72 (1997)).

158 See supra Part II.A-B.

159 Tepeyac, 779 F. Supp. 2d at 468 (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

160 Id. (quoting PSINet, Inc. v. Chapman, 362 F.3d 227, 233 (4th Cir. 2004)).

161 See Ian Redmond, Ohio's Concealed Carry Law: Practical Applications and Possible Revisions, 17 J. on Firearms & Pub. Pol'y 145, 149 (2005), available at http://www.saf.org/journal/17/Ohio.pdf ("Ohio's General Assembly chose to limit the individual's right to bear concealed firearms by balancing a concern for law enforcement safety against the individual's right to defend herself when traveling in a car with a loaded firearm.").

162 Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1326 (2007).

163 Id.

164 See infra Part IV.

165 Fallon, Jr., supra note 162, at 1327.

166 Ohio Rev. Code Ann. § 2923.12(B)(1) (West 2010).

167 Id.

168 See Redmond, supra note 161, at 149 (indicating "a concern for law enforcement safety").

169 Fallon, Jr., supra note 162, at 1328.

170 Id.

171 See supra Part II.A-B.

172 See supra Part III.B.

173 See Redmond, supra note 161, at 149. See also Press Release, Ohio Governor's Office, Taft Releases Statement on House Bill 12 (Jan. 7, 2004), available at http://sports.groups.yahoo.com/group/GunsOhio/message/3364 ("The bill also includes other safeguards we supported ... [such as] inclusion of permit holder data into the law enforcement LEADS database; and provisions that encourage safe weapon storage.").

174 State v. Brown, 859 N.E.2d 1017, 1022 (2006) (Grendell, J., concurring in part and dissenting in part).

175 See generally Ohio Rev. Code Ann. § 2923.12 (West 2010).

176 Since the law only punishes those who break the law, it is unnecessary to impose additional laws on those who abide by the law. See, e.g., Ohio Rev. Code Ann. §§ 2903.02, .11, .13 (West 2010) (providing legal protection from murder, felonious assault and assault).

177 Howard Nemerov, Mich. Coal. for Responsible Gun Owners, Michigan Concealed Carry Study 4 (2008), available at http://www.mcrgo.org/mcrgo/doc_ pdf/michiganconcealedcarrystudy.pdf. See also id. at 3 ("Comparing the entire 5-year data sample shows that for FBI major crimes, the violation rate for the [concealed pistol license] population is 60.41 per 100,000 population, while the violation rate for the non-[concealed pistol license] population is 3,765.29. This means that for the years 2001-2006, the non-[concealed pistol license] population committed about 75 major crimes for every one committed by a [concealed pistol license holder].").

178 Ohio Rev. Code Ann. § 2923.125 (West 2010).

179 Rick Schmitt, Carrying Concealed Weapons Just Keeps Getting Easier, iWatch News (Nov. 22, 2011), http://www.iwatchnews.org/2011/11/15/7396/carrying-concealed-weapons-just-keeps-getting-easier.

180 Ohio Rev. Code Ann. § 2923.125(G)(1)-(2).

181 See Schmitt, supra note 179.

182 Classes may cost up to several hundred dollars, and Ohio Revised Code Section 2923.125 imposes a minimum application fee of $67. This is in addition, of course, to the cost of the gun itself and a holster in which to conceal it.

183 Ohio Rev. Code Ann. § 2923.125(C) (West 2010).

184 Id. § 2923.125(D)(1)(b)-(j).

185 Ohio Rev. Code Ann. § 2923.128 (West 2010).

186 Id. § 2923.128(A)(1)(a)-(b).

187 Ohio Rev. Code Ann. § 2923.125(H).

188 Id.

189 Ohio Rev. Code Ann. § 2923.12(B)(2) (West 2010).

190 Ohio Rev. Code Ann. § 2923.12 (F) (West 2010).

191 Cross-examination of Officer Diels, supra note 100, at 2:37:27.

192 Id.

193 See Personal Defense TV, Tips When Stopped By Police, Guns & Ammo (May 27, 2011), http://www.gunsandammo.com/2011/05/27/tips-when-stopped-by-police/.

194 Ohio Rev. Code Ann. § 2923.125(G)(1)-(2) (West 2010).

195 Id. § 2923.125(G)(1) ("(i) The ability to name, explain, and demonstrate the rules for safe handling of a handgun and proper storage practices for handguns and ammunition; (ii) [t]he ability to demonstrate and explain how to handle ammunition in a safe manner; (iii) [t]he ability to demonstrate the knowledge, skills, and attitude necessary to shoot a handgun in a safe manner; (iv)[g]un handling training.").

196 Id.

197 See Schmitt, supra note 179.

198 See id.

199 See Letter from Ohioans for Concealed Carry, Inc. (Aug. 8, 2011), available at http://www.ohioccw.org/files/SB17-educational-letter-v4.pdf.

200 See, e.g., Brady Campaign to Prevent Gun Violence, Packing Heat on Your Street: Concealed Carry Killers (Sept. 2011), available at http:// www.bradycampaign.org/xshare/pdf/reports/Packing-Heat-Report.pdf.

201 See Schmitt, supra note 179.

202 See supra Parts II.B, III.A-B.

203 At the time this article was submitted, a new bill had just been introduced in Ohio to address the very issue discussed at length in this comment. House Bill 422 seeks "[t]o amend Sections 2923.12, 2923.124, 2923.126, 2923.128, and 2923.16 of the Revised Code to repeal requirements that a concealed carry licensee inform an approaching law enforcement officer that the licensee is a licensee and is carrying a concealed handgun and keep the licensee's hands in plain sight after the officer begins approaching and until the officer leaves; to remove from a general requirement that a licensee stopped for a law enforcement purpose comply with lawful orders of a law enforcement officer a reference to orders to keep the licensee's hands in sight ...." H.B. 422, 129th Gen. Assemb., Reg. Sess. (Ohio 2012), available at http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_422. The author expects vigorous opposition from Ohio's law enforcement agencies.

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