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ANATOMY OF A CONSTITUTIONAL CHALLENGE TO STATE LAWS

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PREFACE:
A constitutional challenge is far more than just the academics and semantics of rights and wrongs. Questions such as what effect will voiding a law have upon society, the defendants and special groups must also be addressed. Additionally, politics, though not a subject for the court room is, nonetheless, a matter that cannot be ignored. Though the example case pertains to the constitutionality of Ohio's Carrying Concealed Weapons laws, many tactics and principles apply to other state and/or federal challenges to questions of constitutionality. The plaintiffs in the subject case do not advocate that all persons should be encouraged or allowed to carry a lethal weapon. In support of their belief in civic responsibility, they did not challenge the laws forbidding felons, children, drunks or others that fall under the disabilities laws.

Carrying instant death on one's person is a responsibility of the highest order and the decision to go armed is not to be taken lightly. Knowledge, personal persona, training and expertise are required lest innocent people become victim to the improper and possibly illegal use of a good-guy carried firearm.

In Ohio, under the challenged law, it was a felony offense to carry a concealed firearm. The only exceptions were law enforcement officers and citizens who could prove they had an "affirmative defense." The AD was, of course, indefinable.
as each police officer, judge, jury or prosecutor had a different opinion as to what constituted a sufficient reason to go armed.¹ This arbitrariness was the basis of one of two constitutional issues, i.e., the law was unconstitutional as applied. The other issue dealt with constitutionality of the law on its face.

Facially the Ohio Constitution (Article I, Section 1) acknowledges a fundamental right to self protection. In addition, Article I, Section 4, says citizens have the right to carry arms in order to enjoy and secure the inalienable rights of Article I, Section 1. The challenge the plaintiff’s team, comprised of: Bill Gustavson, Esq.; Tim Smith, Esq.; Chuck Klein, Author/Licensed Private Investigator (www.chuckklein.com); Jim Cohen, Business Owner; Pat Feely, Pizza Delivery Driver and Dave LaCourse, Second Amendment Foundation (www.saf.org). Their goal was to show that not only were the subject laws applied in an unconstitutional manner, but that Ohioans had a constitutional right to carry CONCEALED arms.

**TIME LINE:**
1853: Ohio's Constitution ratified.

1 January 1974: Ohio Revised Code, 2923.12, Carrying Concealed Weapons, becomes law.

28 September 1999: Pat Feely Arrested for violating Ohio's Carrying Concealed Weapons law, ORC 2923.12, a felony.

22 May 2000: Feely trial held before The Honorable Thomas Crush, Hamilton County (Cincinnati) Ohio Court of Common Pleas. Feely, represented by Tim Smith, was found not guilty.

17 July 2000: Original complaint for Declaratory Judgment and Injunctive Relief

¹ The law was applied and interpreted to mean that each time a citizen carried a concealed weapon, he must be able to prove he had a suitable reason in doing so. In other words, just because he was found to have an affirmative defense on the previous occasion, is no guarantee the same AD will be allowed the next time.

December 2001: Klein v. Leis trial held, Hamilton County (Cincinnati) Ohio, before The Honorable Robert Ruehlman, Presiding Judge, Court of Common Pleas.

10 January 2002: Declaration and injunction granted.

10 April 2002: Ohio First District Court of Appeals (Cincinnati) upholds the findings of the trial court in Klein v. Leis.

24 September 2003: Ohio Supreme Court ruling. Though we lost the case, we won the war.

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KLEIN & FEELY CASE DOCUMENTS: Decisions of the trial court and Complete text of the Court's findings.
OVERVIEW: History and Tactics. Though the “case,” per se, started with the arrest (in 1999) of Pat Feely, a pizza delivery driver, for a violation of Ohio's felony, Carrying Concealed Weapons laws (RC 2923.12\textsuperscript{2}), the challenge to this law was formed much earlier. Chuck Klein, lead plaintiff in the judicial challenge to the law (Klein v. Leis, OSC 02-0585 http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2003/2003-ohio-4779.pdf), actively began looking for a way to reduce the risk of arrest of law-abiding citizens in 1994.

Since 1979, while a resident of Indiana, Mr. Klein had been a licensed Private Investigator and held a state issued concealed pistol permit. Upon moving back to Ohio, Mr. Klein secured an Ohio license to practice his private detective trade. Having had the occasion to use a concealed firearm to defend himself during past investigations he realized that there were no licensing provisions in Ohio to carry a concealed firearm and he could not only be arrested if he carried a gun, but he could lose his PI license as well. Inquiries to local Ohio gun proponents brought the reality that the Ohio legislature had, for at least the past 20 years, resisted passing a permit system as most other states (such as Indiana) had done.

HOW IT ALL HAPPENED: The Ohio CCW story begins in 1972 at a cocktail party in Cincinnati when Mr. Klein, then a police officer, entered into a conversation with Ohio Senator, Stan Aronoff. The Senator was at the time facing a charge of driving under the influence and sought the advice of Mr. Klein (Stan and Chuck had know each other for years – Stan’s sister and Chuck were classmates in high school and it was Chuck’s sister who was hosting the party they were both attending). The Senator was planning on entering a plea of not-guilty to the DUI charge, but Mr. Klein strongly advised against that saying, “A NG plea was, for all intents and purposes,\textsuperscript{2} See DEFINITIONS of TERMS and WORDS in Section IV.
calling the arresting officer a liar.” Mr. Klein believed that was not a good idea for a Senator to do. Mr. Klein advised Mr. Aronoff to plead no-contest and apologize for his dangerous and improper conduct. The Senator took that advice and was saved from an embarrassing trial.

Now, it’s 1996 and at another social affair where Mr. Klein and family friend, Stan Aronoff (currently then President of the Ohio Senate), engaged in additional conversation. This time, it’s Mr. Klein who needed advice on why Ohio didn’t have a CCW permit system. Senator Aronoff explained that any concealed gun licensing bill was not going to come out of committee because GOP Governor Voinovich had put out the word he would veto any such law. Since the Ohio General Assembly was controlled by the Republicans, a veto over-ride was not something that was likely to happen while the Governor’s office was also Republican. However, Mr. Aronoff said he would investigate the matter further and invited Mr. Klein to come to his Cincinnati office the next week for further discussion.

During the meeting in the Senator's office, Mr. Klein not only asked his friend to do what he could to push the issue he put the situation on a more personal level. Explaining that being Jewish, Mr. Aronoff and his family might be at risk of harm should history repeat with anti-Semitic pogroms, such as those of pre-war Germany, were to happen in this country. The Senate President, upon returning to Columbus, ordered the bill brought to the Senate floor for a vote – for the first time. He then twisted a few arms and the bill was passed by a veto proof margin.

Immediately thereafter, Governor Voinovich went on record saying he would veto the bill if it reached his desk because it did not have the backing of the police (FOP, Ohio Association of Chiefs of Police and State Highway Patrol – the officers, not the rank and file). Knowing that even though the bill passed with enough votes to over-ride a veto, the General Assembly, which was controlled by the Republican party, was not about to embarrass a Republican governor by over-riding his veto everyone, for the first time knew where everyone else stood.

It was at this point (1996) that Mr. Klein began formulating a plan to judicially challenge the subject law on constitutional grounds. In spite of previous Ohio
Supreme Court rulings that Ohio’s concealed carry laws were constitutionally correct; Mr. Klein believed his observations, if presented correctly, would open the door to having the laws declared unconstitutional.

**THE FEELY CASE:** Klein put the word out at gun stores and clubs to call him if someone - with no criminal history - was arrested under one of the CCW statutes. In early 1999, Pat Feely, a pizza delivery driver was arrested for CCW in Fairfax, Ohio, a suburb of Cincinnati. He called Mr. Klein and, after consulting with his family, Mr. Feely agreed to be the test case. Though the entire challenge was a team effort of which no one person's input was the greater or lesser than another's, Mr. Feely, stands out as A True American Hero. At risk of a felony conviction, jail time, heavy fines, loss of his firearm and, most important to him, loss of American citizenship rights, he agreed to forsake any and all plea bargains to make sure this matter was brought before the courts. The prosecutor must have known that they had a loser and that they had been enforcing an unconstitutional law for the past twenty plus years as they offered Mr. Feely the sweetest of deals: No jail time, misdemeanor conviction, $100.00 fine and return of his gun. With his family and every gun owner in Ohio firmly behind him, Mr. Feely rejected the deal.

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3 See feature article in Guns & Ammo magazine Sept. 2000  [G&A American Hero](#)

4 In a round-table discussion on the issue of concealed carry, hosted by *The Cincinnati Enquirer* (5 September 2000), between Mr. Klein, Mike Allen, Hamilton County Prosecutor and others, Mr. Allen stated: "There are some people that very naively convince themselves that if you have overly restrictive burdens on the right to bear arms, criminals won't have them. And I think that's just not realistic."
Before submission to the jury, the plan was for Mr. Feely to fire his attorney and then, acting pro se, and using the tactic known as Jury Nullification/Prerogative, would ask the jury to find him not guilty due to the law being unconstitutional. Everyone knew this was not a panacea and a lot could go wrong, but the parties wanted the only issue to be that of constitutionality. If the jury did not find the laws to be unconstitutional, Mr. Klein believed the chances of appeal were better than if a judge dismissed the constitutional issue through pre-trial motions. An additional tactic was employed by bringing suit challenging the laws to the Ohio Constitution only. Not only was Ohio's right to bear arms more definitive than the federal constitution's Second Amendment, but by leaving all references to federal rights out of the suit it kept the case in Ohio courts. Further, it left the door open to a challenge in federal court should the case be lost in state court.

Mr. Klein, being a published writer used his media contacts to encourage publicity believing that even if the case was lost at any level, the articles generated would help pressure the legislature to pass a concealed carry permit system.

*It is important to note that attorney Tim Smith had nothing to do with the Jury Nullification/Prerogative tactic as this would put him in jeopardy with the Bar Association.*

In a pre-trial meetings between the Judge and Mr. Smith, an agreement was worked out whereas the jury trial would be waived and the judge would allow

5 Mr. Klein had done extensive research on this tactic and believed that, contrary to what some had espoused, Jury Nullification/Prerogative was NOT the right of a juror to vote his or her conscience, but a duty of all jurors to judge a law to the only standard to which all laws are compared - a constitution. Though judges have historically reserved this power to themselves, there is no constitutional provision neither forbidding jurors this right nor reserving this power to the bench. The basic argument is found in the 6th Amendment to the U.S. Constitution, i.e., "...the accused shall enjoy ... an impartial jury...." In other words, when a judge imparts his instructions/charge to the jury, that jury is no longer impartial. For additional reading: *Dirty Little Judicial Secret*

Mr. Feely was prepared to go to jail for contempt should the trial judge resist his attempts at directly and personally asking the jury to find the CCW laws to be in violation of Ohio's Constitution.
testimony about constitutional issues at trial (as opposed to via motions which are easy to dismiss and difficult to argue on appeal - if necessary). Also, as part of the deal, the judge had to rule guilty or not guilty and could not give any reasons for his findings. This way, if Mr. Feely was found not guilty, the defendant would be able to say he was found not guilty based on trial evidence that the law was unconstitutional. This much was necessary to bring an action for a declaratory judgment in a future civil case. Why did the trial judge agree to these conditions? Though Mr. Klein wasn’t present in the Judge’s chambers, Tim Smith indicated the Judge did not want to be involved in a jury trial where the Jury Nullification/Prerogative issue could force the Judge into an awkward position.

Half way through the bench trial and after only the defendant (Feely) and the prosecuting police officer testified, the judge stopped the trial saying he had heard enough. The judge then said he was going back on his word - that he was going to give a reason. The judge said: "... an honest person in a difficult or dangerous job must subject himself to trial, like a criminal, to find out whether he could have carried a gun and then it doesn't carry forward even into the future. It's treating decent citizens like criminals. It's most unfortunate."6

**RIPENESS:** That statement was the justification - ripeness - to file a civil suit for a Declaratory Judgment (Klein v. Leis) - to have the law declared unconstitutional. (At this point, the case had generated enough publicity to attract the attention of The Second Amendment Foundation7 who agreed to fund the Declaratory Judgment case. All funds for Mr. Feely's trial had been borne by Mr. Feely and donations raised through Mr. Klein's efforts.) A declaratory judgment requires some request for relief, thus the seeking of an injunction against every police agency under the jurisdiction of the court (some 70 agencies, including, sheriff, state patrol, attorney general, etc.)8 were made defendants.

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6 Ohio v. Feely, Hamilton County Court of Common Pleas, B9907498, pg 84, (2000)

7 The Second Amendment Foundation (SAF) is a Washington state based non-profit organization dedicated to the rights of Americans to keep and bear arms ([www.saf.org](http://www.saf.org)).

8 An interesting situation occurred each time the plaintiffs won a decision. The defendants were granted (upon their request) a stay. However, the stay only applied to the power of arrest. A stay cannot be issued against a declaration that a law is unconstitutional - a law so declared is unconstitutional until another court rules otherwise. Thus, the situation was, police could arrest, but a court could not convict. This, of course,
STANDING: In the Feely case, Defendant Feely's standing was not a question as he, being under arrest, certainly had standing to challenge the law. But, after his acquittal and the filing of the Declaratory Judgment action, the issue of standing of the plaintiffs became a significant issue as none of these plaintiffs were under arrest. Prior to the depositions, a meeting was held between the plaintiffs and their attorneys where it was decided that in order to establish standing, the plaintiffs would have to admit they carried a firearm on a regular basis. In qualifying their admission, they would all present their Affirmative Defense realizing full well that the police could use this information to arrest them on sight.

This fear was not overlooked by the defendant attorneys who stated in one of their briefs that "...the city would not enforce the statutes against these plaintiffs if they had an Affirmative Defense."\(^9\) The irony and outrageousness of such a statement is that by their own (police witness) admission they couldn't define what constituted an AD.\(^10\) In other words, the city/defendants were saying they couldn't define AD, but if the plaintiffs didn't have one they would be arrested. Though the issue of standing was resolved, the plaintiffs, whose photographs had been on TV and in all local newspapers, lived in daily fear that they would be singled out for arrest. The police agencies/defendants, to their credit, did not take advantage of the situation and no plaintiff was arrested.

By admitting they (the defendant Cincinnati police) did not know the definition of Affirmative Defense, they handed the plaintiffs strong evidence that the law, as applied, was unconstitutional.

II POLITICAL EFFECT: What impact do politics have on issues of great con-
Arms, since the beginning of time, have always been carried in whatever manner the carrier deemed practical and convenient. When the Ohio Constitution was drawn in 1802\(^{11}\) (its Bill of Rights modeled after the first ten amendments to the U.S. Constitution), whether one carried his firearm openly or covered was obviously not an issue with the framers. If a fur trader of the 18th Century, flintlock pistol tucked in his belt, placed a coat over it, concealing the muzzle-loader, there is no chronicle of anyone complaining. Likewise, as the explorers and settlers, during the first half of the 19th Century, enjoyed their new freedoms there is no record of any restrictions on how one carried a weapon. If the framers of the Ohio Constitution were concerned about those exercising their rights to self defense by concealing their arms, they failed to make any reference or note to that affect when revising the Ohio Constitution in 1851.\(^{12}\)

When the westward migrating pioneers and cowboys, throughout the 19th Century, covered their "six-shooters" with a winter jacket or slicker, no one was alarmed. Riverboat gamblers and other gentlemen of the turn of the century, for fear of offending the ladies, always carried their Derringers under a suit coat.\(^{13}\)

It is a historical truth that concealed weapons were the norm at the time the Ohio Constitution was drafted, modified 49 years later, and has remained so for over 100 years thereafter. By the drafter's silence on whether "bear arms" meant open or

\(^{11}\) The original constitution, ratified 1802, confirms the intention of the founders: Article VIII, Section 20: "That the people have the right to bear arms for the defense of themselves and the state; and as standing armies in time of peace are dangerous to liberty, they shall not be kept up: and the military shall be kept under strict subordination to the civil power."

\(^{12}\) Ohio Constitution, The Bill of Rights, Article I, Number 4, (ratified 1851): "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."

\(^{13}\) Guns & Ammo magazine, Volume 44, No. 9, (September 2000) (pgs 32-34). Twenty-five year columnist, Phil Spangenberger is a shooter and expert on firearms history. He is also a recognized and oft consulted firearms technical adviser to the movie industry.
concealed it is conclusive that they intended it to mean at the discretion of the people.

The Spanish America War, followed by the First World War, had not jaded the American people inasmuch as they still basically trusted each other and most criminals were of the petty class. Prohibition changed the persona of the country. The vast majority of the people, imbibers or not, were outraged that their government would make illegal a product of Biblical age and something they believed harmed no one but the drinker.

Not only did the citizens ignore the law in huge numbers, but the law enforcers in many jurisdictions winked at the violators. This escalation of corruption also impacted the criminal. Now it was big business and when large sums of illicit money is involved honor, ethics and the compassion for a fellow citizen went out the window. Police concerns, instead of having to deal with the common thief or burglar, now involved mass killings by whiskey runners and dealers. Some of these gang/turf wars were carried out by men with concealed short barreled rifles, shotguns and submachine guns. The response by the various legislatures was to enact a variety of laws. Many states passed statutes prohibiting the carrying of any concealed weapon including knives, daggers, black-jacks, brass knuckles and, of course, firearms. By the end of Prohibition, the Country was in the throes of the Great Depression. The economic hard times prevented most from buying and owning any form of firearms. Besides, with so much poverty, there wasn't much to steal. World War II brought about the end of the hard economic times and at the same time helped to restore the American spirit of fair play and honesty as everyone pulled together for the war effort. There was little need for armed citizens with so many uniformed military personnel around and a general feeling of we're-all-in-this-together-so-I-don't-need-a-concealed-weapon-for-protection. Peace and prosperity after the war kept crime rates low and again negated the need for personal weapons of the concealed type.
Then, with the coming-of-age of the baby-boomers, came the beginning of the era of social consciousness - the civil rights movement and the open resistance to the Vietnam War. This fear of riots and civil insurrection, coupled with the rapid proliferation of mind altering, recreational drugs, made the older and established generation apprehensive and a wave of states began passing concealed carry permit laws.

Ohio did not, and had not, joined this crusade. The Ohio statute (2923.01) prohibiting carrying concealed weapons prior to 1974 allowed for exceptions for those engaged in a lawful business under circumstances which would justify a prudent person in carrying a weapon. The provision worked inasmuch as business owners who made bank deposits or dealt in a cash business were not arrested for carrying a gun. However, this was unfair to persons who needed to carry a firearm for protection against bona fide threats of physical assault, death, domestic violence or other type of lethal danger. In 1974 the concealed weapons statutes were changed to allow the carrier protection from arrest if he fell under one of the affirmative defenses.

The original intent of the 1974 law was for the officer on the street, the arresting officer, to determine the reason (affirmative defense) the arrestee was carrying a gun. If the officer believed the person under arrest to be telling the truth about his reason, the officer was to let him go. If, after further investigation, the officer learned the person was not truthful - that his pro-offered affirmative defense was not in fact true - the officer would seek the person's arrest or indictment.

This method of enforcement became a good-ol'-boys law whereas if you were a white, short-hair-cut, decent, law-abiding type you would not be arrested if found CCW. As the civil rights movement gained momentum and police departments became paranoid of law suits, the discretionary provisions switched from the street officer to the courts. It was far less troublesome to just arrest everyone found carrying a concealed weapon and let the courts sort it out. Besides, it made for

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14 The writer/plaintiff Klein was a Certified Ohio Police Officer at this time and successfully passed the mandated training course introducing the 1974 revisions to the ORC.
good stats, as police officers records would reflect more felony arrests, i.e., there are no promotion points awarded for letting someone go - only for arresting them. In the subject Feely case, Fairfax Officer Vogel testified that his department's policy is to arrest everyone found carrying a concealed weapon with the only exception being other police officers.15

The civil rights movement beginning in the late 1950s necessitated the restructuring (attitude adjustment) of the country's populace. Thus, liberal leaning judges and law makers were promoted by the democrats and not objected to by the republicans. Everybody was in a hurry to appease African-Americans. These liberals did not confine their leftist decisions to racial civil rights. One would think that a person in favor of "racial civil rights" would be inclined to support ALL civil rights. Not so in America. The "civil rights" of proponents of the Second Amendment were violated on a massive scale with the passage of federal, state and local firearm restrictions and controls. Their reasoning fostered the term "political correctness." Nothing is more evident of this hemming, hawing, postulating, twisting, deferring, demurring of the constitutional right to keep and bear arms than the formation of the very anti-gun American Civil Liberties Union.16

By the 1990s, in Ohio as well as throughout the entire country, the pendulum had begun to swing from a very anti-gun/anti-individual rights society to constitutional correctness. This trend was not co-incidental to the ratio of democrats to republicans in political positions - including the judicial branch.

LAW OF POWER: Contrary to


16 The American Civil Liberties Union has devoted a full web page (www.aclu.org) to their inconsistent position of gun control. Inconsistent inasmuch as their stated goal - their reason for existing - is the protection of individual rights. The ACLU states, in no uncertain terms, they are "neutral on the issue of gun control." Yet they go on to say, "We believe that the Constitution contains no barriers to reasonable regulations of gun ownership. The question therefore is not whether to restrict arms ownership, but how much to restrict it."
The Common Pleas Judge Robert Ruehlman, assigned to the Ohio CCW case, was a gun-owning Republican as were the First District Court of Appeals judges. In contrast, at the time the case was making its way through the court system, the make-up of the Ohio Supreme Court was decidedly democrat and anti-gun. The defendant city, represented by the very able, Rick Ganulin, Esq., was, from the very first, positioning their arguments and objections on the belief that they would most likely lose in the lower courts, but once reaching the OSC they would find the sympathetic ear of the liberal democrats.

III GOALS & AGENDAS: Some of the behind the scenes problems the parties faced.

A not guilty verdict based on the affirmative defense or on a technicality would not satisfy Mr. Feely, Mr. Klein or many of their fellow Ohio gun owners. Therefore there were no challenges to the arrest and search of Mr. Feely or the seizure of his firearm.

Personality differences among the participants can and did cause tension. At the onset of the Feely case, a number of attorneys were interviewed. All seemed eager to take on the challenge until it was explained that there would be no plea bargaining, the case would include only challenges to the constitutionality of the laws and no arguments or motions were to be made without the express approval of the

17 Just ahead of the Plaintiff’s case in the Ohio courts was the City of Cincinnati’s suit against the gun makers trying to hold them responsible for death and injury caused by gunshots. Though almost every other similar suit (in many other states) had been thrown out for lack of evidence - on summary judgment - The OSC found the plaintiff’s were entitled to their day in court.

18 The plaintiff/author Klein found common ground with Rick Ganulin in that both were of the same faith. This commonality allowed for many philosophical discussions during breaks in the various hearings. Though Mr. Ganulin, on a personal basis, was very anti-gun, believing that all guns should be banned from civilian ownership, he could not answer the question posed by the author: “If all guns were banned, how will the aged, weak and physically impaired defend themselves against thugs with clubs?” In other discussions, Mr. Ganulin indicated he was primarily counting on the liberal OSC to overturn what he knew was inevitable in the lower courts.
plaintiff. A total of six attorneys were interviewed, four flat out refused to accept the terms and two took the case only to back out before trial. One attorney stated, he believed it was his duty to act in what he thought was in the best interest of his client regardless of what the plaintiff expressly wished.

No one likes to be told their business, especially by one they feel has an inferior education, i.e., some of these interviewed and unacceptable attorneys clearly did not understand the Ohio Constitution (not taught in law school). On the same token, these pompous attorneys, regardless of the fact that they had never studied the Ohio Constitution (as the plaintiffs had) thought that just because they were licensed to practice law, only their opinion counted.

The plaintiffs finally settled on Tim Smith and Bill Gustavson, but even with all the cards on the table the team was not without some serious disagreements. When persons of strong convictions are forced to work together egos sometimes got in the way even to the point of requiring mediation by the representative of the Second Amendment Foundation (who was now funding the case).

Any time there are multiple parties to a suit of any kind, there will always be conflict. Attorneys tend to want to win for any reason while plaintiffs might be happy with a settlement. In the instant case additional factors were present in the form of a funding agency and certain pro-gun committees. To the Second Amendment Foundation, win or lose, they won in the form of publicity attracted. If the plaintiffs won, SAF, of course, could rightly claim they were instrumental in the victory. If the plaintiffs lost, the SAF could still claim how they fought hard for the rights of gun owners. The pro-gun groups might have had more impact had they not insisted in joining the case as co-plaintiffs. As such, when the case reached the Ohio Supreme Court they were precluded from filing friend-of-the-court briefs which might have had a positive impact.

From the onset the Feely/Klein cases, in the eyes of the plaintiffs, the primary goal was the have the subject laws declared unconstitutional on its face. A secondary goal was to have the laws declared unconstitutional as applied. Winning on a technically or by a very narrow re-defining of a previous case was not an option - it
was all or nothing. This led to some heated discussions as the legal advisors were worried of breaking new ground. This is not to say they were against bringing these new issues to the attention of the court, but that they wanted to lend more space/time to disputing the other side’s touting of previous case law.

As the declaratory judgment case (Klein v. Leis) advanced to each level of appeal, it was clear the defendants were expending all of their allotted space (number of pages they were limited to) to rehashing old case law while almost totally ignoring the plaintiff’s new points of contention. This might have been a ploy on their part to entice the plaintiff’s lawyers to do the same. This also resulted in many heated discussions.

At the same time as the case was making its way through the courts, one of the pro-gun groups (also a plaintiff) was pushing the legislature to pass a concealed carry permit law. The entire concept was against the wishes of the three main plaintiffs (Klein, Cohen, Feely - the only ones to testify) because they contended that if they won the case, there would be no need for a permit to do something they (all Ohioans) would then have the right to do. In addition, the permit language that had been declared unconstitutional by the trial judge. It was clear that this pro-gun group's agenda was to be able to secure a permit to carry a gun, regardless of how repressive or unconstitutional the permit law might be. There was a possibility that should the legislature pass such a law, the Supreme Court could rule the subject case to be moot, forcing the plaintiffs to start all over again with a new action. When the pro-gun group refused to back down, the three main plaintiffs got word to their legislators that if any permit law was enacted, an injunction would immediately be sought which could prove embarrassing to the backers of the law. The new bill passed the house, but never got out of the Senate Committee – thanks again to influence by Stan Aronoff.

In the beginning, Klein, Cohen and Feely tried to reason with the pro-gun groups to not only not push the issue of a licensing law, but also not to include any unconstitutional language in such a bill. For unknown reasons, one group refused to back down on their immediate want of a licensing scheme even though it contained
provisions that, under the Ohio Constitution, were clearly outside the realm of the power of the legislature. For example: The bill touted by the one pro-gun group contained provisions making it a crime for one to carry a firearm into a place of worship. This was in conflict on two counts: 1) There is no provision in the Ohio Constitution empowering the legislature to enact such a law effecting private property, and 2) If the good citizens of Ohio had the right to bear arms for their defense and security (as decided by the trial judge in Klein v. Leis), they had this right everywhere.

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Justice Louis Brandeis, 1927."

IV CONSTITUTIONALITY: Are Ohio Revised Code 2923.12, 2923.16 and 4749.10 in violation of the Ohio Constitution's Article I, Numbers 1 and 4, facially and/or as applied?

It has often been said "We are a nation of laws." Nothing could be further from the truth. We are a nation of constitutions - laws, statutes, court orders, executive decrees, etc., are subservient to state and the Federal Constitution.

Henry Hyde, in his eloquent address to the House of Representatives, based his entire justification for impeaching the 42nd President of the United States on the rule of law:

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19 H.B. 274 of the Ohio 124th General Assembly.

20 The quotation is believed to be steeped in American jurisprudence, though no reference to the quote could be found in, Bartlett's Familiar Quotations, John Bartlerr, 16th ed. Little, Brown and Company (1992).
The phrase 'rule of law' is no pious aspiration from a civics textbook. The rule of law is what stands between all of us and the arbitrary exercise of power by the state. The rule of law is the safeguard of our liberties.²¹

What rule of law could he be referring to other than the mother of all made-in-the-USA laws, the Constitution? It is in this sacred document where we find the rules of all laws. Here is the foundation guaranteeing freedoms and requiring compliance. The law Mr. Hyde referred to in the impeachment matter is the obligation of the House of Representatives to bring articles of impeachment against a sitting president if there is probable cause to believe the accused is guilty of treason, bribery, or other high crimes and misdemeanors.²² Though some members of the House voted to ignore this constitutional mandate, the rule of law prevailed and Mr. Clinton was impeached. Mr. Hyde's rule of law, the U.S. Constitution, is no different than the rule of law that applies to all Ohioans; the Constitution of the State of Ohio. To enforce a statute that is in violation of any of the Ohio Constitutional Articles is to breach the rule of law.

Throughout history there have been many tests on a commitment to a rule of law. Possibly the earliest comes from the Talmud, the Hebrew interpretation of the Torah (the first five books of the Bible). There is a story told by noted author, Herman Wouk, of a young Jewish boy who uses the "meat" dishtowel on the "milk" utensils. When chastised for this transgression, he questions a Rabbi about the seriousness of mixing the Kosher towels. The answer from the wizened student of the Talmud: "Once you compromise, the whole thing will break down. You have to stick to the rules."²³ This simple answer is the reason the Jewish people have survived - for 5000 years - pestilence, war, famine, a Holocaust, The Inquisition and even assimi-

²¹ Clinton Impeachment Trial. Congressional Record, 105th Congress, 19 Dec. 98.
²² Ibid, Clinton Impeachment Trial.
²³ Inside, Outside, Little, Brown and Company, 1985, ch 39
lation. The United States, at only slightly over 200 years, regularly struggles with this lesson.

America's strongest modern test of the rule of law was probably when President Kennedy faced down Alabama Governor George Wallace over the admission of two black students to the University of Alabama. In June of 1963 the Governor defied a Federal Court order by claiming the sovereignty of his state to conduct its business without the interference of the Federal Government. The President could have sent in Federal troops, but he chose, instead, to federalize the Alabama National Guard. Now the true test of the rule of law was laid on the Commander of these troops, Brigadier General Henry V. Graham. The General could have resisted the proclamation and we might have had to fight the Civil War all over again. He didn't and the rule of law was preserved. The Federalized General, on the steps to the Admissions Building, challenged his, under normal times - Commander-in-Chief and fellow southerner. It was at this point that Governor Wallace, saluted General Graham, and capitulated.

Here, in the Hamilton County, Ohio, Court House, once destroyed by those who ignored the rule of law, the court was confronted with a rule of law question. If it is "...compromise[d], the whole thing will break down. [We] have to stick to the rules."

**DEFINITIONS OF TERMS AND WORDS:**
Ohio Revised Code (ORC) 2923.12, The challenged law: A) No person shall knowingly carry or have, concealed on his or her person or concealed ready at hand, any deadly weapon or dangerous ordnance.

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B) This section does not apply to officers, agents, or employees of this or any other state or the United States, or to law enforcement officers, authorized to carry concealed weapons or dangerous ordnance, and acting within the scope of their duties.

C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply: 1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed.

2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor or a member of the actor's family, or upon the actor's home, such as would justify a prudent person in going armed.

3) The weapon was carried or kept ready at hand by the actor for any lawful purpose and while in the actor's own home.

4) The weapon was being transported in a motor vehicle for any lawful purpose, and was not on the actor's person, and, if the weapon was a firearm, was carried in compliance with the applicable requirements of division (C) of section 2923.16 of the Revised Code.

D) Whoever violates this section is guilty of carrying concealed weapons, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section or of any offense of violence, if the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at
hand, or if the weapon involved is dangerous ordnance, carrying concealed weapons is a felony of the fourth degree. If the weapon involved is a firearm and the violation of this section is committed at premises for which a D permit has been issued under Chapter 4303. of the Revised Code or if the offense is committed aboard an aircraft, or with purpose to carry a concealed weapon aboard an aircraft, regardless of the weapon involved, carrying concealed weapons is a felony of the third degree.

[Note: ORC 2923.16, Improperly Handling Firearms in a Motor Vehicle, was also challenged. This law references firearms in a motor vehicle and, for purposes of this treatise, is not substantially different from the wording of ORC 2923.12 and therefore, for sake of space, is not detailed herewith.]

Article I, Number 1, The Ohio Constitution, Bill of Rights (annotations in parenthesis):

All men (every citizen) are, by nature (intrinsically empowered), free (unhindered to do and go as they please) and independent (not dependent upon government), and have certain inalienable (cannot be taken away or revoked) rights (privileges, something that belongs to a person by nature), among which are (these following rights are not the only rights, but are among others) those of enjoying (taking pleasure) and defending (protecting, guarding from attack or assault) life (an individual's animate existence) and liberty (to live free of restrictions and confinement), acquiring (seeking, working to own or possess), possessing (owning, exerting control over), and protecting (resisting attack or assault) property (goods, chattels real estate), and seeking (looking, attempting to attain) and obtaining (possessing, holding on to) happiness (a mental state of contentment, being free of fear) and safety (being prepared to resist danger, injury or damage).

In very simple words, as Article I, Number 1 relates to this case, everyone in Ohio has the right to self-protection and the right to be prepared to defend their life and property.
Article I, Section 4, The relevant sections of the Ohio Constitution, Bill of Rights (annotations in parenthesis):

**The People** (Ohio citizens) **have the right** (this is an acknowledgement - not the granting of the right) **to bear** (to move while holding up and supporting; to be equipped or furnished with; to carry, transport, possess) **arms** (a means [as a weapon] of offense or defense; esp: FIREARM - plural - more than one) **for their** (Ohio citizens) **defense** (The act or action of defending as in warding off a physical assault; or method of defending or protecting oneself) **and security** (the quality or state of being secure: as in freedom from danger; safety; freedom from fear or anxiety).

**ISSUES PLACED BEFORE THE TRIAL COURT:**

1) It is a well established American principle of law that legislatures do not make redundant laws. Each clause or word has a separate meaning. In Section 4, it says the right to bear arms is for DEFENSE and SECURITY - two separate and distinct rights.26

One has the right to BEAR ARMS to defend oneself, one's family and property. Defense is the physical act of repelling an attack. Arms carried for DEFENSE means carrying a gun openly, or in-hand, such as during an actual attack or assault.

One also has the right to BEAR ARMS for SECURITY, as defined by Webster's New World Dictionary, 3rd College Edition, 1988, to be "free from fear, care,

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26 The argument or revelation that defense and security were two separate and distinct terms had never been presented to an Ohio court before. It was a key to the case. The defense did not counter this point in oral arguments or in any of their briefs. They were unable to dispute this simple fact - that the framers of the Ohio Constitution meant for citizens to be free to bear arms exposed as well as concealed. The point was ignored by the OSC.
doubt or anxiety...free from danger; not exposed to damage, attack, etc.; safe." One cannot fit any of these definitions if in constant fear while carrying an unconcealed firearm. An exposed arm is subject to snatch-and-grab thieves where the wearer or anyone near is in danger while the wearer wrestles for control of the arm. Whereas, concealed, the arm is "secure".

The Ohio Constitution, in contrast to the Second Amendment of the United States Constitution, is very restrictive. There is no OHIO right to "bear arms" for hunting or target shooting. However, there is a constitutional right to "bear arms" for the express and only purposes of "DEFENSE and SECURITY".

In 1836, fifteen years before the creation of the revised Ohio Constitution, Samuel Colt ushered in the modern era of combat handgunery with the multi-shot revolver. It should be obvious that the framers of this foundation of Ohio law recognized the need for self protection. The Ohio Constitution, under Article 1, Number 4, guarantees Ohioans that they shall be permitted to:

a) Move while holding up and supporting - to be equipped with;
b) More than one firearm;
c) For the express reasons of defense and;
d) To be free of danger, fear and anxiety.

2) The very words of a recent Ohio Supreme Court decision where they interpreted the meaning of the "inalienable rights" referred to in Article I, Section 1, i.e., State versus Williams (88 Ohio St. 3d, 2000, page 513): 28

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27 A History of The Colt Revolver, Charles T. Haven & Frank A. Belden (1940), Bonanza Books edition. Samuel Colt's first commercial multi-shot revolver, the Model 1836 Paterson, made from 1836 to 1841, was produced at the Paterson, New Jersey factory. Type: Percussion Revolver, Number of shots: 5, Caliber: .40, Type of Action: Single, Loading: Cylinder front.

28 The Defendants, in their motion for Summary Judgment (24 Oct 01, A-10107121) made reference to Williams - out of context. They quoted Williams as saying: inalienable rights of Article I, Section 1 are mere aspirations. The Plaintiff's attorney took the reference to Williams at face value and thus considered it a serious problem. It was only after Plaintiff Klein researched the Williams case that it was learned the quote
"The question posited is whether the words of Section 1, Article I are so broad as to be aspirational ideals that require enabling legislation to be practically applied, or whether the language is sufficiently definite to make Section 1, Article I self-executing." "...[I]t requires other provisions of the Ohio Constitution or legislative definition to give it practical effect."

Reading the chronological order of the Ohio Constitution we see that the people of Ohio have the Article 1, #1 inalienable right to protect life and property and the Article I #4 right to use a firearm to exercise these rights.

Of course, just having this right to protect oneself is moot unless a means of enforcing this guarantee is provided for. The framers of the Ohio Constitution did not ignore this provision. They devised and made part of the Ohio Constitution the self-executing provisions of Article I, Number 1’s inalienable right to defend life, liberty and property in Section 4, Article I:

The people have the right to bear arms for their defense and security....

All persons have the God given right to defend their own life from an illegal and unwarranted, lethal assault. What Ohio's Constitution acknowledges is the right to not only use a firearm for this defensive tactic, but to keep this arm at hand AND CONCEALED for the purpose of being prepared in case of an illegal and unwarranted, lethal assault.

FINDINGS OF THE TRIAL COURT: AS APPLIED TO THE PLAINTIFFS.

was out of context. The full quote continued on to say that these aspirations are such UNLESS supported by enabling articles or statutes - which is exactly what Article I, Section 4 is. This point was also ignored by the Ohio Supreme Court.
THE PRESIDING HAMILTON COUNTY COMMON PLEAS JUDGE, ROBERT REUHLMAN, AFTER A TRIAL SPREAD OUT OVER 5 NON-CONSECUTIVE DAYS, ALSO AGREED THE SUBJECT LAWS ARE UNCONSTITUTIONAL AS EVIDENCED BY THE FOLLOWING:

1) An Ohio State Highway Patrol Major, testifying that he represents the Superintendent, said each trooper has his own standard of what constitutes a violation of the CCW statutes and that the laws are enforced by the OSHP arbitrarily.\(^{29}\)

2) Lt. Col Jenke, a 23 year veteran of the Cincinnati Police Division, testified that if he was confronted by a person CCW, he would have to contact a prosecutor to learn if that person's Affirmative Defense was valid. In other words, the seasoned high ranking officer doesn't know what constitutes an AD.\(^ {30}\)

3) Officer Vogel, in the Feely trail, testified that his department's policy is to arrest everyone found carrying a concealed weapon with the only exception being other police officers.\(^ {31}\) This officer doesn't know what the AD means and doesn't care. His orders are to arrest everyone with a gun and let the court sort it out. Therefore, if one is found to be bearing UNconcealed arms - such as walking down the street with a holstered gun or carried in hand one will most likely be arrested for inducing panic or disorderly conduct. Thus, there is no conditions one can exercise their Ohio constitutional right to carry arms - concealed or unconcealed.

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\(^{29}\) Trial transcript: Testimony of Major Allen, pg 343.

\(^{30}\) Trial transcript: Testimony of Lt. Col. Jenke, pgs 467-472. Judge Reuhlman, a former Hamilton County Prosecutor, found this to be incredulous.

\(^{31}\) Ibid, Ohio v. Feely, Pg 27:

(Plaintiff's attorney) "Q. Well, if you find someone who is carrying a concealed weapon, do you always arrest?"

(LEO Vogel) "A. No, sir."

"Q. When do you not arrest?"

"A. When? If it's a police officer."

"Q. Any other circumstance?"

"A. None that I can recall."
4) The uncontested testimony of Plaintiff Klein of his telephone conversation with Defendant, Amberley Village Chief of Police, Jack Monahan. Klein asked the Chief about security at the many synagogues in his village. He was concerned because he attends services at one of them and this was at a time when a fire bombing incident had occurred at one of the synagogues. Monahan told Klein the police department regularly receives notices from the FBI on threats to Jews and their places of worship. Klein then asked the Chief:

"If you found a man in your bailiwick, probable cause aside, who was CCW and this man told you he was CCW because he was Jewish, feared for his personal safety, was in route to synagogue in your village and was in fear of an attack upon himself, his family and his congregation. Would you arrest him for CCW?"\(^{32}\)

The Chief’s answer: "Yes." The Amberley Chief KNOWS what the law says - to him it says that one does not have the right to exercise his 2nd Amendment rights to defend his 1st Amendment rights.

It was clear to the courts that the application of ORC 2923.12 was applied in such an arbitrary and questionable manner as to preclude the ordinary citizen a means of knowing, in advance, when he or she might be in compliance or violation of the statute.

**RELEVANT COURT CASES:**
In the recent Ohio v. Feely case before Judge Thomas Crush, the court found defendant Feely not guilty of carrying a concealed weapon and went on to say, "...an honest person in a difficult or dangerous job must subject himself to trial, like a criminal, to find out whether he could have carried a gun and then it doesn't' carry forward even into the future. It's treating decent citizens like criminals. It's most unfortunate."\(^{33}\)

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\(^{32}\) Trial transcript of witness Klein, page 201, et seq.

\(^{33}\) Ibid, Ohio v. Feely, page 84.
The testimony heard in his court room from the arresting officer is what prompted the judge to issue such a scathing rebuke of Ohio's CCW statute. Under oath, the arresting officer stated he would arrest anyone, except another police officer, found carrying a concealed weapon.

Because there is no method of determining - in advance - whether one's affirmative defense is allowed, anyone found exercising his Ohio Constitutional rights of self protection by CCW will be arrested. Therefore, Ohio Revised Code 2923.12 places such restrictions on the carrying of firearms that, in reality, completely destroys a citizen's practical and de facto Ohio Constitutional right to protect himself or his property AND places the arresting officer in the position of enforcing a prima facie unconstitutional law.

It is well established in law that police do not have a duty, per se, to protect the individual (Riss v. City of New York, 34 Henderson v. City of St. Petersburg, 35 et. al.). This begs the question: By what right do the police and the government have to hinder an otherwise law-abiding citizen from self protection with a personal defense weapon? Ergo, if the police fail to come to your aid and the courts refuse redress against them (the police/government), then how can the Courts in concert with the police deny you the right to remain prepared? The police carry the power, in the form of their person handgun, to protect you and themselves. In Ohio citizens are denied the power to assure their own security while the police refuse to be liable for their individual protection.

In RISS, the court created the rule, referring to the police, that "Because we owe a


35 247 So. 2d #5 23 (Fla.Dist.Ct.App.1971)
duty to everybody, we owe it to nobody."\(^{36}\) This callous and self-serving doctrine assumes that since public police officials are accountable to supervisors, political representatives and ultimately the public they are not, per se, liable to individuals. Negligent acts and deeds of non-feasance by police are, in many cases only punishable by disciplinary methods, not in civilian courts. In other words, if a cop refuses or neglects to assist you, you have no recourse other than to seek to have his superiors discipline him. Big deal. You're dead and he's fired.

In the St. Petersburg case, Plaintiff Henderson asked for specific police protection while making deliveries in a secluded and dark section of the city. The plaintiff had been previously attacked while engaged in similar activities. Henderson, following instructions and relying on the promise that the police would be on the scene, was, nonetheless, shot by assailants. The court, citing legal precedent, dismissed the civil case against the police.

For civil redress from a police department, "There must be two prerequisites of a special duty. First, there must be direct contact or some other form of privities between the victim and the police department so that the victim becomes a reasonably foreseeable plaintiff. Second, there must be specific assurances of police services that create justifiable reliance by the victim. Without both of these elements, the duty to provide police services remains a general, non-actionable duty to the public at large."\(^{37}\) Yeah, sure. If you can't produce a signed contract saying the police are going to give you personal protection you'll be up the proverbial creek - and unarmed at that!

One of the rare cases that found against the defendant police agency follows the thinking of the above case. This case originated during a civil disturbance in 1968. Here Plaintiff Bloom, a store owner, ready, willing and able to protect his premise was restrained by the police who assured him that proper police protection would be provided.\(^{38}\) Bloom suffered injury. Bloom's successful litigation brings up an

\(^{36}\) Ibid, Riss v. City of New York.


\(^{38}\) 78 Misc. 2d 1077, 357 N.Y.S 2d 979 (1974).
interesting point: If one were "restrained" from protecting oneself by carrying a concealed firearm and were subsequently injured because the police were not there at a time of an assault, to whom does the injured party seek redress? The trend in this country has been to give the benefit of doubt to the criminal and the power to the police leaving the private citizen, regardless of training or competence, at their mercy.

V POLICE CONCERNS: What dangers to police officers, if any, are presented when citizens are permitted to carry concealed firearms?

Surely, the Ohio General Assembly can legislate means to protect the citizens of its state including special groups such as the police, per se. However, when the method of protection of some, leave others unprotected, a dilemma is presented, i.e., a violation of the Equal Protection clause of the 14th Amendment to the U.S. constitution. Law-abiding citizens, with or without a concealed arm, by the very definition of "law-abiding" do not present any threat to police officers during routine interactments. Criminals, by their very nature, are not any more intimidated by concealed carry laws than they are by any other law - that's why they are criminals. "[It is a] fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen."\(^{39}\) If the police are under no duty, per se, to tender protection, then surely they have no standing to object to a law abiding citizen exercising his pragmatic necessity of self preservation.

A significant concern of the police community is the amount of training, or rather the lack there of, for citizens who carry weapons. Police, who must undergo long and rigorous training procedures, who do not have this level of instruction and danger to society and to the police themselves.

This concern is, however, unfounded by any study or evidence to this effect produced at trial. One state, Vermont, not only

\(^{39}\) Ibid, Warren v. District of Columbia. Also see Riss v. City of N.Y.
has no training provisions for those who carry concealed arms, but does not require any form of permit to do so. Ohio's closest neighbor to the south, Kentucky, requires only two eight-hour classes, including live-fire range time, to qualify for a shall-issue permit. Indiana, which has had a permit system in effect for over 25 years, does not require any training what-so-ever. The other 40 +/- states that allow for concealed carry have a variety of permit requirements - none of which come close to equaling the level of training expected of police officers. Probably the strongest evidence of the pseudo need for civilians to undergo extensive training before carrying a concealed weapon is the common knowledge that many Ohioans, on a daily basis, already carry concealed firearms. Waitresses working late at night, pizza delivery persons and anyone with what they believe to be a bona fide affirmative defense carry guns for their protection every day. The lack of any evidence indicating that the streets are running red with blood or police officers being shot by these law-abiding citizens is obvious.

In all of the states with carry permit systems in operation there are no reports of this being any detriment to police officers. There are no accounts of licensed citizens shooting cops to be found in either the main stream news media or the police journals such as Law & Order, The Firearms Instructor, or The Law En-

40 VERMONT CONSTITUTION: Chapter I. A Declaration of the Rights of the Inhabitants of the State of Vermont. Article 1. "That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety;...." Vermont has no statutes prohibiting the carrying of concealed firearms.

41 KSR 237.110 License to Carry Concealed Deadly Weapons.

42 IC 35-47-2 Regulation of Handguns.

43 Ibid Ohio v. Feely. Here a pizza/commissary delivery driver who carried large sums of money was arrested under ORC 2923.12 and forced to undergo a trial. The Honorable Thomas H. Crush, Hamilton County Court of Common Pleas, not only found Feely not guilty under the affirmative defense, but went on to say (pg 84), "And I think it's a shame that Ohio does not have a law that permits someone who is law abiding and has at his job or one could subject him to armed robbery not to know in advance that he can carry a gun. "In other words, an honest person in a difficult or dangerous job must subject himself to trial, like a criminal, to find out whether he could have carried a gun and then it doesn't carry forward even into the future. It's treating decent citizens like criminals.

"I think 41 states have licensing laws or permit carrying concealed weapons and everywhere carrying concealed weapons is allowed crime seems to go down."
In a recent (May 2000) search of incidents where police were shot at by persons with concealed carry permits, it was found: "...those who believe allowing private citizens to carry concealed weapons will endanger the lives of law enforcement officials do not even have anecdotal evidence to support them. To date there are no examples of law-abiding citizens with concealed weapons permits assaulting police officers." Responsible citizens don't shoot police officers - in fact there have been some stories relating how armed citizens have saved an officer's life.

Though Ohio police officers are supplied with state-of-the-art defensive arms, body armor, two-way radios for back-up and the color of law, they are not so special as to allow them to be the only citizens with the right to carry a concealed firearms for personal protection.

In the case of the interest of the police it would be perfect if there were no guns anywhere except in their possession. We, of course, do not live in a perfect world and there will always be guns. Even the island nation of Great Britain, where a virtual ban on the ownership and possession of any type of firearm has recently

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44 Part of writer/plaintiff Klein's tenure as Contributing Editor for *Guns & Weapons for Law Enforcement* (1992-1999) was to interview randomly selected police agencies about their weapons, tactics and regulations. The interviewees were almost always of the rank of sergeant or above. One question asked of agencies in states with civilian concealed weapons permit systems was: "What problems, if any, did they have with CCW permit holders?" Without exception all related they or their departments had not had any problems with licensed civilians carrying concealed firearms. A Captain with the Sebring, Florida Police Department stated, during his interview, "[Florida’s 1987 CCW law is] the greatest thing to happen for individual citizen safety." (May 1996, pg 44)

45 *The Impact of Gun Laws on Police Deaths*, May 2000, (pg 17) by David B. Mustard, Assistant Professor, Terry College of Business, University of Georgia. Professor Mustard is also the author of many books and papers. His bio is available on line: www.terry.uga.edu/~dmustard/dbmcv.htm.

46 According to *The Mesa Tribune* on March 30, 1999, LEO Lyn Butcher, who had been shot in the arm by a man she had stopped for a traffic incident, was saved by passer-by, Francisco Diaz-Sedilla, who engaged the suspects with his licensed, concealed .357 Magnum.
become prohibited, is now experiencing a significant rise in violent crime - including shootings.\(^{47}\)

**VI STATE'S INTEREST:** Does the state have the right to place reasonable restrictions on firearm possession and do openly carried arms pose a lesser or greater risk to society?

**PURDEN OF PROOF:** Laws, statutes, ordinances are presumed to meet constitutional muster. Under this well-established doctrine it is assumed the enacting body would not pass a law they knew or believed to be unconstitutional. Therefore, the burden of proving any law to be in contravention to a constitution is on the claimant - the government is not obligated to prove a law is constitutional.

However, and this is a very significant, however: Under the strict scrutiny doctrine,\(^{48}\) a law that infringes upon a fundamental (inalienable) right is presumptively unconstitutional unless a compelling governmental interest justifies it. Where a fundamental constitutional right is impaired, strict scrutiny is the test. In such a case, the statute is unconstitutional unless the government establishes a compelling state interest for the enactment. Now, though it is the government who must prove a compelling state interest, the challenger is also obligated to prove either the interest is not compelling or that the law is unconstitutional for other reasons. The test, under this doctrine, is two-fold: 1) does the statute bear a real and substantial relation to public health, safety, morals or general welfare of the public, and, if so, 2) is it unreasonable or arbitrary?

\(^{47}\) According to a report released 18 July 2000 from the Associate Press (published in *The New Gun Week*, 20 Aug 00): Great Britain has experienced a 26% rise in robberies and a 12% increase in crimes endangering victims' lives since passage of additional gun ban laws.


REASONABLENESS.\textsuperscript{49} Though Ohio citizens have a right to carry firearms for their defense and security, some citizens might not be comfortable carrying a gun or being around those who do. In addition, allowing certain citizens (criminals, children, etc.) to CCW could be a detriment to the safety of all.

Contrary to what some overzealous pro-gunners want to believe, the antis are correct inasmuch as the RKBA is not an absolute. If it was, we would have to allow little children and prison inmates to keep and bear arms. Therefore, some limits must be acceptable. But limits do not mean anything the legislature/courts want it to be. Bearing arms is not an absolute right under all conditions anymore than free speech allows one to yell fire in a crowded building when there is no fire. The constitutional right to bear arms does have limits, but these confines are only limited to two factors: Citizenship and Other's Rights.

At the time of the Constitution's inception the framers, all "men" in a "man's world," clearly gave little thought to anyone other than the man as the defender of family, property or country. Whereas in Eighteenth-Century England, only the landed rich, were empowered to defend honor and country. This concept of all men being full "citizens" and having the right, empowerment and obligation to self preservation was unique to America.

A citizen, circa 1785, was considered to be any white, American, male over the age of 21 and not a felon. The idea of civilian gun controls was unconscionable. It is also inconceivable that a Thomas Jefferson or a James Madison would refuse to take a musket away from a drunk, a child or someone conspicuously deranged. Had one been able to ask these learned, most-sacred-document framers of the conflict of such a restrictive action; they most likely would have replied with words to the effect that the drunk or mental incompetent were, at least temporarily, not citizens. A child was, of course, not a man and a felon had forsaken his citizenship.

\textsuperscript{49} See Guns & Ammo Magazine article THE FALLACY OF “REASONABLE” GUN CONTROL LAWS (April 2003) \url{http://www.chuckkleinauthor.com/reasonableness_defined.html}
With the ratification of the 13th, 14th and 19th Amendments all of-age Americans were recognized as full, ruling-class citizens. Arms possession was, AND STILL IS, the signature of being a citizen - not a subject to some monarchy and most assuredly not mentally inept, a child, a felon, or a substance abuser.

Violating the rights of others is cause to restrict gun rights. Allowing certain persons, such as children, felons, drunks, etc., to possess firearms most assuredly creates a substantial risk of loss of someone's life or liberty - just as permitting suburbanites to mass weapons of mass destruction such as bombs and missiles. However, restricting the RIGHT of a law-abiding, bona fide citizen from carrying a firearm that is concealed from public view where it cannot induce panic or be available to a snatch-and-grab thief, does not present a substantial risk of damage to anyone.

Constitutional rights are only such when they don't infringe on the constitutional rights of others. One's right to swing his fist ends where the other person's nose begins. Of course, if one keeps his fist concealed in his pocket he is violating no one’s rights. On the same token, if a law-abiding citizen goes about his legal business with a firearm concealed in his pocket he is no more infringing the rights of any other person than the theater-goer who keeps the word "fire" concealed in his mouth.

Some citizens might wish to exercise their right to the "pursuit of happiness" by not wanting to be in the presence of guns. On their own property, not accessible to the public, they can do as they please. However, where public property is involved such as court houses, police stations and legislatures guns can be restricted by instituting the use of metal detectors and storage boxes that the carrier can store his/her gun until he/she leaves that secure area.

But what about the reasonableness factor? Unlike other Articles and Amendments there is no such provision for "reasonableness" in Article I, Sections 1 and 4 of the Ohio Constitution. Discretion is not part of the right to bear arms in Ohio. In other
portions of Article I of the Ohio Constitution we see the following discretionary wording:

Section 8: "The privilege of the writ of habeas corpus...unless...the public safety require it."

Section 9: "Excessive bail....nor excessive fines...nor cruel and unusual punishments inflicted."

Section 13: "No soldier shall...except in the manner prescribed by law."

Section 14: "The right of the people to be secure...against unreasonable searches and seizures. . . ."

If the framers of the Ohio Constitution had intended for the bearing of arms to be anything other than what it says, they would have included in Article I, Sections 1 and 4 subjective words or terms such as "reasonable," "excessive," "prescribed-by-law," "upon-probable cause," "unusual," or "unless the public safety require it". Reading discretionary or reasonableness provisions into Section 4 of the Ohio Bill of Rights is no different than reading the First Amendment to the U.S. Constitution to say: "Congress shall make no UNREASONABLE law respecting an establishment of religion. . . ." If the legislature or the courts are permitted to insert reasonableness into Section 4, what's to prevent them from restricting church attendance to Tuesdays only?

The right to bear arms is not an absolute. But restrictive conveyances can only be based on citizenship and the rule of other's rights. In other words, if one is not precluded from owning a gun and the exercising of this right does not infringe on anyone else's right, one can bear any type of arm anywhere one wishes. This is not
to say that one can possess cannons, missiles or bombs as these weapons of mass destruction substantially pose the risk of violating the rights of innocent bystanders should these weapons be used for purposes of personal defense or security. The right to "bear" arms applies to arms that can be carried - concealed.

**OPEN OR CONCEALED CARRY:** It is far more prudent for those who wish to exercise their rights to self-protection to carry concealed than to carry open. Carrying a loaded firearm in the open is most assuredly a greater and imminent danger to the carrier as well as society at large, to wit:

1) Officer Vogel in the Feely trial stated he would stop anyone found carrying a loaded weapon openly while walking on a public street. Carry-open and in-hand could most certainly bring a charge of Inducing Panic if another person was alarmed at seeing a gun carried openly. Walking into a retail store or bank with a gun in hand or even in an exposed holster would surely cause many people that do allow concealed carry make as part of their permit, a requirement that the permit can be revoked, or criminal charges filed, if the carrier is caught carrying UNconcealed.

2) Many private investigation agencies which allow their agents to be armed permit only concealed carry.

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50 Ibid, Ohio v. Feely, page 45.
51 ORC 2927.31. Inducing Panic. It is not even a stretch of the imagination that a violation of this law would occur should a citizen, gun in hand, appear in a public arena. Anyone who does not take cover or flee the area under such circumstance would most likely not be deemed a prudent person.
52 Florida Statute 790.053 Open Carrying of Weapons: "Except as otherwise provided by law, it shall be unlawful for any person to openly carry on or about his person any firearm...misdemeanor of the second degree....." This statute precedes the License to Carry a Concealed Weapon or Firearm (FS 970.06).
3) Police officers, as noted in the testimony of Patrolman Tim Vogel in the Feely Case, carry their off-duty firearm concealed so as not to alarm the public.\(^{54}\)

4) An openly carried firearm could be deemed an attractive nuisance whereas the temptation to a snatch-and-grab thief would be very powerful. Should a fight ensue for the control of the exposed weapon - hand carried or in a holster - the carrier or a member of the public at large, especially in a crowded area, could be injured.

5) Society would be safer every time a crime is thwarted by the action of a gun carrying, law abiding citizen interacting during a criminal encounter.\(^{55}\)

6) There are two myths that seem to circulate every time a state considers enacting concealed carry permit systems. The first espouses that the streets will run red with blood as shoot-outs will occur over traffic accidents, parking spaces, sporting events, etc. The truth is it just doesn't happen and hasn't happened in any state that switched to a CCW permit system. It didn't happen in Kentucky when they set up their system as recent as the mid 90s nor did it happen in Indiana when they established their program in the mid 70s. The second myth is that "everyone" will be carrying a gun - 50K to a Reds or Bengals game. Ohio citizens are not any different than other Americans and the number of citizens who seek a permit in the states that allow gun permits run to around 6-8% of the population. Of these not all will be in public at the same time and not all will carry all the time.

_{except in their own home, for target practice on a proper range, for storage in a locked container in the AGENCY office or in defense of imminent death or great bodily harm." (3.3, a, 3).}_

\(^{54}\) Ibid, Ohio v. Feely, Pages 39, 43-46.

\(^{55}\) The National Rifle Association's member magazine, _The American Rifleman_, has for at least the past 70 years published a monthly record of incidents of crimes that have been thwarted by someone with a firearm. Under the heading of, The Armed Citizen, this column accounts only for recorded events reported to them. It does not take into account the estimated thousands of times per week the mere presence of a firearm - without any shots being fired - calms an explosive situation. The NRA, in 1989, published a book of some of these "saved by a gun" occasions: _The Armed Citizen_, William F. Parkerson, III, Editor, (ISBN: 0-935998-56-X, Library of Congress Catalog Card Number: 89-061009).
VII CITIZEN'S REGARD: What is in the best interest for the individual citizens who feel they have a need to carry concealed firearms in public?

We are living in very dangerous times with ever increasing drug dealing shootouts, gang warfare battles, disgruntled murderous employees, psychotic killers, stalkers and robbers with no feelings for human life, and politically motivated fanatics venting their rage with lethal force on a daily basis. Adding to this escalating violence is the multiplicity of super-predators or just plain bad guys that are now carrying guns. The proliferation of firearms in our social makeup has made being proficient at hand-to-hand defensive techniques academic. Without addressing the life imitating art or vice versa controversy, consider that over 30 years ago the classic movies such as West Side Story and Blackboard Jungle depicted punks with fists and knives - no guns. Today though, guns are the rule.

Even the police have also recognized the need to escalate the fire power race. Almost without exception every law enforcement agency has converted from the formerly ubiquitous six shot revolver to the high capacity semi-auto handgun. Gone also are public and private sector bans on "dum-dum" [hollow point and soft point] ammunition. Today, even the politicians have come around to the understanding that the good guys are out-gunned and need effective fire power to at least be on an equal footing with their illegal counterparts. Police in many jurisdictions are now replacing the "riot gun" with high-power rifles or even fully automatic submachine guns.

Some of the reasons Ohio Citizen's need to carry a concealed weapon:

1) The element of surprise is lost when the person bent on criminal activity could kill or injure the open gun carrier first before continuing his illegal robbery, mayhem, rape, etc.
2) Members of minority groups, such as Jews, Blacks and many foreign-nationals, historically have been the subject of open and clandestine hatred including physical assaults on their places of worship. Individual members, if precluded from transporting their defensive weapons from their home to their meeting place for fear of arrest, are at the mercy of their enemies by being unable to resist an assault on their congregation. Placing security in the hands of the non-Jewish/Black/foreign-national police/military is not acceptable to many of the Jewish/Black/foreign-national population.

3) To correct a deficiency in the laws of Ohio (ORC 2923.12/16 and 4749.10). As it stands now in Ohio, if one is found carrying a concealed weapon or having a concealed weapon within easy access in an automobile, both as a common citizen or a licensed P.I. and regardless of the reason or level of danger, that person faces an arrest, booking, court appearance. In addition, if one is found not guilty, there is nothing to prevent another arrest - under the exact same conditions - the next time. In other words, if a jewelry salesman, with tens of thousands of dollars in precious stones is discovered to be carrying a gun, he will be arrested. Most likely, at his court hearing he will be adjudicated not-guilty and his firearm returned. As he exits the court house, climbs into his jewelry laden car and tucks his handgun into his holster or places it in his glove box, he is again subject to arrest. His previous finding of innocence is no bar to future prosecution.

The second to last thing a morally responsible, prudent person wants to do is kill

56 According to Southern Poverty Law Center's Intelligence Report, 2009, there were 932 hate groups including 27 such organizations in Ohio. http://www.splcenter.org/get

57 In GUN CONTROL, Gateway to Tyranny (Jay Simkin and Aaron Zelman, Jews for the Preservation of Firearms Ownership, Publisher, 1993) the German "Regulations against Jews' possession of weapons, #188, November 11, 1938," (pg 80,81) made it a crime for Jews to have in their possession any firearms or ammunition. This prohibition was preceded by the 1935 Reichsgesetzblatt that forbid Jews from acquiring or carrying firearms or ammunition. Though few Jews in America today have firsthand knowledge of the feelings of being at the mercy of the non-Jewish government, the lessons of history are not lost.

58 Ibid, Ohio v. Feely, pg 84, Judge Thomas H. Crush: "In other words, an honest person in a difficult or dangerous job must subject himself to trial, like a criminal, to find out whether he could have carried a gun and it doesn't carry forward even into the future."
another human being regardless of how reprehensible, villainous or dangerous that person might be. The last thing this morally responsible, prudent person wants to do is be killed by that reprehensible, villainous and dangerous person.\textsuperscript{59}

\textbf{VIII PRIVATE DETECTIVES:} Are Ohio Licensed Private Investigators allowed the same rights as other citizens?

1) Persons, such as private investigators, whose employment requires inconspicuousness, would be at a great disadvantage if only allowed to carry an exposed weapon. Under then current Ohio laws\textsuperscript{60} the state collects Private Investigative license fees permitting the licensee to conduct very dangerous activities while refusing to allow the detective a pragmatic means to protect him/herself. Private investigations are sometimes far more dangerous than the same work performed by public sector police detectives whereas the public police have help (back-up) available via radios and police power of arrest.

2) Ohio Licensed Private Investigators are saddled with the predicament of impossibility. ORC 4749.10 allows private security agents and detectives to carry firearms after completing a state approved course. ORC 4749.08 states: "Nothing in this chapter shall be construed as granting the right to carry a CONCEALED weapon." (emphasis added). There is no provision for an affirmative defense or for carrying a concealed weapon in one's own home. Section 99 of this chapter imposes penalties of up to one year in prison and $1000.00 fine for violating any provision of Chapter 49. Therefore, an Ohio citizen who happens to hold a Private Detective License and a license to carry a firearm under this chapter cannot carry it concealed - which defeats the entire purpose of being a private detective (see #1 above). If this twice licensed detective does carry his weapon concealed because he has an affirmative defense under ORC 2923.12/16, he will still be subject to prose-


\textsuperscript{60} These laws changed after Klein v. Leis and passage of CCW permit system.
cution for violating ORC 4749.10. It would be impossible for this investigator to exercise his rights of self-defense with a concealed firearm without being subject to arrest - even while conducting interviews, telephone consultations and/or investigations in his own home or office.

3) Under ORC 4947.10 Private Investigators and Security Officers are allowed to apply for and receive a license to carry a firearm - UNconcealed. This chapter, as it applies to private investigators is an oxymoron and a real "Catch-22". Chapter 49.08 of Title 47 says, in part: "Nothing in this chapter shall be construed as granting the right to carry a concealed weapon."

This Chapter covers Private Detectives as well as security guards. They don't relate at all as far as firearm handling goes. Security guards, unlike private investigators, have certain limited powers of arrest and their job often centers around effectively dealing with the public by being standouts - being someone who is easily identifiable. The business of PI's is just the opposite. The very nature of their business is to blend-in, to be unobtrusive, not to be discovered or to be very low-key. Though it might make sense to train and license security guards who need to carry a gun and to restrict them to exposed carry only (if 2923.12/16 is found to be unconstitutional), restricting a PI from carrying a concealed firearm makes no sense at all.

4) Chapter 47.10 says, "no...licensee shall carry a firearm...in the course of engaging in the business of private investigation...unless...successful completion of the basic firearm training program."

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61 Just because the state licenses one to conduct a certain type of business doesn't empower the state to restrict the licensee's statutory and constitutional rights such as, in this case: the right to self protection and protection of one's family and property. If the state has the right to suspend a private investigator's inalienable rights to self preservation - even in his own home - would the State have the right to limit an Ohio licensed doctor's freedom of speech or an Ohio licensed attorney's right to worship as he pleases?

The State certainly has the right to restrict and limit activities of those it licenses to conduct certain types of businesses - providing the State has a sufficient reason for such restrictions. Requiring a security guard, who is charged with protecting the public, per se, to undergo additional training is certainly in the best interest of society. But, there is no State interest in restricting a Private Investigator, who has no arrest powers, from exercising his right to protect himself or his family.
In other words, licensed Private Investigators can complete a course to carry an EXPOSED firearm - a NON-CONCEALED gun. This is the oxymoron. The whole idea of being a PI is to be able to conduct plain clothes, undercover, blend-in-with-the-surroundings or other surreptitious investigations. Should Plaintiff Klein wear a gun on the outside of his clothing - exposed to the world - it would cause him to stick out like the proverbial sore thumb. A PI with an exposed gun is an oxymoron. ORC 4749.13 says that if the licensee "knowingly violate[s] any provision of this chapter. . . ." he/she would be subject to fines of up to $1000 and a year in jail. This is a classic "Catch-22." If Klein complies with the basic firearm training license and wears his gun exposed, he will soon be out of a job. If he carries a concealed gun, he is subject to fine and imprisonment. The state is requiring him to subject himself to training and fees to acquire a permit for something he not only has a constitutional right to do, but even a statutory right to do under ORC 2923.12 and 2923.16.

What makes this chapter so outrageous, as it applies to private investigators, is, licensed PI's are not even afforded the protection of 2923.12/16 inasmuch as, if they carried a concealed weapon AND had an acceptable affirmative defense, they would still be subject to fine and imprisonment under Chapter 4749.

Furthermore, persons working as investigators for attorneys or other in-house corporations are not required to be licensed under this chapter. Ergo, these unlicensed PI's, who exercise their Affirmative Defense under 2923.12 and carry a concealed weapon to protect themselves, are not subject to fine and imprisonment under the PI Chapter for doing the same job as Plaintiff Klein does.

62 KLEIN'S LAWS
Private investigations are sometimes far more dangerous than the same work performed by public sector police detectives whereas the public police have help (back-up) available via radios and police power of arrest. PI's working unarmed or working with an exposed arm are in a very dangerous situation.

Finally, it is clear that any Ohio citizen who is not violating any law such as inducing panic or disturbing the peace, can carry a UNconcealed firearm with impunity while in the public arena. This applies to doctors, lawyers, plumbers and other licensed professionals - except licensed private investigators. PI's, constitutional as well as statutory rights are somehow lost when practicing their profession.

**IX RULING OF THE OHIO SUPREME COURT:** 63

WE LOST. . . BUT WE REALLY WON. The court's seven page syllabus (excluding the dissenting opinion) makes no reference to almost any of the arguments presented at trial. Sound legal points, some never before addressed by any court, were ignored. In addition, opinions expressed by expert witnesses, in friend-of-the-court briefs and hundreds of pages of legal discourse, likewise, generated no comment. Basically, what the Court said was that because the subject laws have been on the books for over 150 years, they must be good laws and thus the Court used this reasoning to overturn the findings of the lower courts.

The Ohio Supreme Court did acknowledge the right to bear UNconcealed arms: "Today we reiterate that the right to bear arms is fundamental." (pg 2, #7). Additionally, the Court established a criteria for defining who may ascertain what an Affirmative Defense is: "Officers can readily ascertain whether a person is violating R.C. 2923.12(A) and need not concern themselves with whether an affirmative defense is available; that is an issue left to judges and juries to determine." (pg 7, #17).

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63 **KLEIN v. LEIS** 99 Ohio St.3rd 537, 2003 Ohio-4779
What's important is what the Ohio Supreme Court did NOT say. The Court did NOT say that a judge cannot issue a PREDETERMINED ruling as to one's Affirmative Defense. Therefore, citizens may avail themselves of any court to seek a ruling to determine if their reason for carrying a concealed weapon meets the judge's criteria for an Affirmative Defense. In other words, now citizens may seek a de facto "bench permit" rather than wait until they are arrested before presenting their AD.

Plaintiff Klein testified that he wished to exercised his fundamental right to carry a firearm in the concealed manner for the following reason (his AD): Due to his age (61 years) he does not have the physical strength he once had and would be at a disadvantage should some thug attempt to wrest his firearm from an exposed holster if he were required to carry it openly. Plaintiff Klein feared that should he be forced to carry his defensive weapon in an exposed manner his safety, as well as that of the general public, would be at a greater risk should a fight ensue over possession and control of the exposed arm.

Though the convoluted decision is not what the plaintiff’s hoped for, it is far less worrisome than the previous situation where one had to be arrested before determining if one's AD was acceptable. Nor is the decision as convenient as a legislated permit system where the law enforcement branch issues concealed carry permits to those who qualify.

In January of 2004, partly from the pressure of the Klein v. Leis suit, the Ohio Legislature passed into law a CCW permit system. Though various persons and groups had been championing for concealed carry permits in Ohio since at least the mid-seventies, it was the strong push by Ohioans For Concealed Carry (OFCC) that mustered the political backing during this crucial window when publicity and other states CCW permit laws were being passed plus the threat of having the current law found unconstitutional.

64OHIANS FOR CONCEALED CARRY
X LESSONS LEARNED: It is suggested for those who might wish to challenge the constitutionality of any law to keep in mind the following:

1) Do not sue for monetary damages. Allowing, either punitive or compensatory damages to be an issue will bring insurance companies in to defend the subject agency. When money is at stake, insurance companies are required to pull all stops in defending their client. Likewise, agencies that are self-insured will be more inclined to put up a major defense if protecting taxpayer funds. Whereas, when only injunctive relief or a simple changing of the status quo is involved, the agency must expend its own resources to defend the suit.

2) Choose plaintiffs carefully. Plaintiffs must be free of criminal background, articulate and not likely to back out when the pressure is on. To some, having a TV camera and microphone shoved into their face or having to answer tough questions under oath is far too intimidating.

3) From the beginning, be sure all parties understand and agree on who has the final word on tactics, arguments and positions. If winning on a certain position is the goal, make sure not to stray from this position by making motions or introducing evidence that might produce a victory based on a technicality. If the case is a team effort, be sure no one is permitted to make unilateral decisions that affect others.

4) Define all words in the challenged statute/law. Use multiple dictionaries and be prepared to counter the opposition's use of certain words and terms.

5) Understand the difference between "as applied" and "on its face" and which (or both) you are challenging.

6) Be sure plaintiffs have standing. Plaintiffs must be at risk such as facing convic-
tion if they lose the case. Using a number of plaintiffs is recommended in case one or more are found not to have standing.

7) Establish ripeness. Usually, if a law has been ruled one way by one judge and a different way by another judge, it is sufficient. Other controversies also might apply such as blatant unfairness due to changing times and/or PC.

8) Be prepared to address the questions as to what impact declaring the subject law to be unconstitutional will have on the defendants, special groups, the state, cities and other governmental entities.

9) Research the history of the law and its application. How has it been used over its life span? In relation to society's whims (PC), has it been applied more strictly and/or more/less often at different times in the past? Why?

10) Keep local/state laws/constitutions separate from federal statutes and the U.S. Constitution. If federal issues are raised in a suit brought in state court, the defendants might be able to have the case removed to the federal courts.

11) Read the decisions of courts with an eye for what was not said as well as what was ruled upon.

XI THE BOTTOM LINE: Behind the scenes, politics and personal observations.

One Municipal Court Judge, two Common Pleas’ Judges from two different counties and all three 1st Appellate District Court of Ohio judges found the subject laws to be unconstitutional - SIX Judges. However, the majority (5 judges) of the Ohio Supreme Court over-ruled those common sense jurists and the highest ranking law enforcement officers in the county - The Sheriff and County Prosecutor.
Mike Allen, Hamilton County Prosecutor (noted above) had stated publicly of his belief that the challenged laws were not fair laws. Hamilton County Sheriff, Si Leis, also believed the laws should be changed.

Si Leis (as in Klein v. Leis) was a personal friend of Chuck Klein's father (Charles H. Klein, Sr., 1908-2006). The senior Mr. Klein gave a yearly party that Si attended. During these get-togethers Chuck and Si would discuss, banter and joke about the case. Si always believed law-abiding citizens should be allowed to CCW for self-protection. When the CCW licenses were finally available, and in the presence of the media, Si presented Chuck with the first license issued in the Hamilton County.

Though the case was never mentioned until it was over, Chuck also was aquatinted with the Presiding Judge of the 1st Appellate District Court of Ohio, Mark Painter. Their connection was, of course, from social parties (those given by Chuck's Sister).

I am convinced that before the Ohio Supreme Court issued its ruling, someone from the OSC contacted someone from the General Assembly and said words to the effect: “If the GA doesn't promise to pass some form of concealed carry permit system, the OSC will be forced to rule the challenged laws are in fact unconstitutional.” No one, including the plaintiffs, wanted that as the absence of any law would be chaos. Therefore, obviously realizing that something had to be done, the General Assembly, repealed the offensive and challenged laws replacing them with a Concealed Carry Licensing system.

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