

Louisiana Law Review

Volume 75
Number 2 *The Rest of the Story:
Resolving the Cases Remanded by the MDL*
A Symposium of the Louisiana Law Review
Winter 2014

Article 11

12-31-2014

A Gunman's Paradise: How Louisiana Shields Concealed Handgun Permit Holders While Targeting Free Speech and Why Other States Should Avoid the Same Misfire

Michael J. Lambert

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>



Part of the First Amendment Commons

Repository Citation

Michael J. Lambert, *A Gunman's Paradise: How Louisiana Shields Concealed Handgun Permit Holders While Targeting Free Speech and Why Other States Should Avoid the Same Misfire*, 75 La. L. Rev. (2014)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol75/iss2/11>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

**A Gunman’s Paradise: How Louisiana Shields
Concealed Handgun Permit Holders While Targeting
Free Speech and Why Other States Should Avoid the
Same Misfire**

TABLE OF CONTENTS

Introduction..... 544

I. Surveying the Field: Concealed Handgun Permits
in America..... 547

 A. A Rise in Gun Permits Leads to Oversight by Press..... 549

 B. State Legislatures Shield Permit Records 552

 1. Access to Gun Records Denied..... 554

 2. Attempted Criminalization of the Release
 of Gun Records 556

II. Locked and Loaded: Louisiana Criminalizes Gun
Permit Speech 558

 A. Louisiana Legislature Discusses Proposed Bill 560

 B. Louisiana Institutes Ban on Gun Permit Speech..... 562

 1. Keeping Records “In House” 562

 2. Restraining the Rest 563

 3. Carving Out Exceptions 564

III. Ready, Aim, Fire: First Amendment in Crosshairs
of the Louisiana Legislature..... 564

 A. First Amendment Origins and Development 565

 B. Proper Constitutional Context..... 568

 C. The *Daily Mail* Principle and *Bartnicki* 569

 D. Applying Jurisprudence to Louisiana’s Ban
 on Gun Permit Speech..... 570

IV. Damage Control: Stopping the Criminalization of
Gun Permit Speech..... 575

Conclusion 578

INTRODUCTION

Debra Wills feared for her life.¹ One night in May 2011, Debra called the Union County, North Carolina, police for protection from her threatening, estranged husband, Ricky.² While the police were speaking with Debra inside of her home, Ricky, who lived just a few hundred feet away, drunkenly stumbled over to Debra's house and began shooting at the home.³ As a result of the night's events, Ricky was convicted and sentenced to jail on two counts of assault.⁴ After Ricky's conviction, the Union County sheriff was compelled by law to revoke Ricky's concealed handgun permit, but the sheriff initially failed to do so.⁵ Eventually, North Carolina authorities rescinded Ricky's concealed handgun permit—but only after the New York Times informed the local sheriff's office of Ricky's criminal convictions and outstanding permit.⁶ A New York Times investigation revealed that from 2007 to 2011, Ricky was one of about 200 convicted felons in North Carolina with a concealed handgun permit that should have been revoked or suspended by the sheriff—at least 10 of whom committed murder or manslaughter.⁷ Media in other states have uncovered similar flaws in state handgun-allocation systems where handgun permits remained in the hands of unqualified individuals, including felons and the mentally ill.⁸ As alarming as these stories may be, the media was at least able to publicize the identities of unqualified handgun permit holders and advocate for change in the North Carolina permit system.

Copyright 2014, by MICHAEL J. LAMBERT.

1. Michael Luo, *Guns in Public, and Out of Sight*, N.Y. TIMES (Dec. 26, 2011), <http://www.nytimes.com/2011/12/27/us/more-concealed-guns-and-some-are-in-the-wrong-hands.html?pagewanted=all>, archived at <http://perma.cc/Q3CK-JPE7>. This story is based on an actual event that occurred in North Carolina in 2011. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* See also N.C. GEN. STAT. ANN. § 14-415.18(a1) (West 2013) (“The sheriff of the county where the permit was issued or the sheriff of the county where the person resides shall revoke a permit of any permittee who is adjudicated guilty of or receives a prayer for judgment continued for a crime which would have disqualified the permittee from initially receiving a permit.”). A felony conviction of assault with a deadly weapon is a crime that would have disqualified Ricky from initially receiving a permit; therefore, the sheriff should have revoked Ricky's permit after his conviction for assault with a deadly weapon. *Id.* § 14-415.12(b)(1).

6. Luo, *supra* note 1.

7. *Id.*

8. See *infra* Part I.A.

This would not be the case in Louisiana.⁹ Even if a whistleblower uncovered similar discrepancies in Louisiana's concealed handgun system and revealed them to a newspaper, the newspaper could not inform its readers by exposing the errors of the government.¹⁰ This is the result of a new law passed in Louisiana in 2013 making it illegal for a newspaper or other media outlet to publicize such governmental mistakes.¹¹ If a media outlet releases any information concerning the identification of a concealed handgun permit holder, the state could fine the media outlet \$10,000, and the media outlet's employees could face up to six months in prison.¹²

During the 2013 Legislative Session, the Louisiana Legislature amended its concealed handgun statute, Louisiana Revised Statutes section 40:1379.3, to include section 40:1379.3(A)(3).¹³ The amendment makes it unlawful for "any person" to "intentionally release, disseminate, or make public in any manner any information contained in an application for a concealed handgun permit or any information regarding the identity of any person who applied for or received a concealed handgun permit."¹⁴ Violators of the law could face a \$10,000 fine and could be imprisoned for up to six months.¹⁵ The new law is referred to throughout this Comment as "Louisiana's Ban on Gun Permit Speech."

The Legislature passed Louisiana's Ban on Gun Permit Speech, the first of its kind in the nation, in response to the release of an online map by *The Journal News*,¹⁶ a New York newspaper, in

9. See LA. REV. STAT. ANN. § 40:1379.3(A)(3) (Supp. 2014). As will be discussed at length in this Comment, under Louisiana Revised Statutes section 40:1379.3(A)(3), it is a crime to "intentionally release, disseminate, or make public in any manner any information contained in an application for a concealed handgun permit or any information regarding the identity of any person who applied for or received a concealed handgun permit." See *id.*

10. See *id.*

11. See *id.* § 40:1379.3(A)(3)(a).

12. See *id.* § 40:1379.3(A)(3)(b)(i). "Any person who violates the provisions of this Subparagraph shall be fined ten thousand dollars and may be imprisoned for not more than six months." *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. See generally *Hearing on H.B. 8 Before the H. Comm. on Admin. of Criminal Justice*, 2013 Leg., 113th Reg. Sess. (La. 2013) [hereinafter *House Hearing*]. During a Hearing of the House Committee on Administration of Criminal Justice, Louisiana legislators discussed the fact that Louisiana's Ban on Gun Permit Speech was the first in the country. The bill's sponsor, Representative Jeff Thompson, said, "If Louisiana . . . is the only one in the nation [to criminalize publishing gun permit information], I'm okay with that." *Id.* Additionally, Thompson said his bill was intended to prevent law abiding

December 2012 that identified the names and addresses of thousands of citizens with concealed handgun permits in the New York area.¹⁷ In the months following the publication of the map, constituents around the country voiced fears that their privacy could be invaded by other media outlets publishing their identities and addresses.¹⁸ Responding to these concerns, state legislatures have considered passing laws similar to Louisiana's that criminalize speech on gun permits, and this trend will likely continue.¹⁹

However, given the probable unconstitutionality²⁰ and dangerous effects of Louisiana's Ban on Gun Permit Speech, similar laws should not be enacted in other states. Instead, Louisiana's Ban on Gun Permit Speech should serve as a cautionary example. This Comment argues that Louisiana's Ban on Gun Permit Speech violates the First Amendment to the United States Constitution and Article I, Section 7, of the Louisiana Constitution.²¹ A court should

citizens from being demonized as they were when *The Journal News* released a map of citizens with concealed handgun permits. *Id.*

17. See Dwight R. Worley, *The Gun Owner Next Door: What You Don't Know About the Weapons in Your Neighborhood*, THE JOURNAL NEWS (Dec. 23, 2012), http://www.lohud.com/apps/pbcs.dll/article?AID=2012312230056&ncli ck_check=1, archived at <http://perma.cc/E4XH-8GWL>; *Map: Where are the Gun Permits in Your Neighborhood?*, THE JOURNAL NEWS (Dec. 22, 2012), <http://www.lohud.com/interactive/article/20121223/NEWS01/121221011/Map-Where-gun-permits-your-neighborhood->, archived at <http://perma.cc/4R29-TJH5> [hereinafter *The Journal News Map*]. The map displays all pistol permit holders in Westchester and Rockland counties. *Id.* Each dot on the map represents a permit holder who is licensed to own a handgun. *Id.* The website goes on to explain that *The Journal News* acquired the data by submitting Freedom of Information Act requests for the names and addresses of all pistol permit holders in the New York counties of Westchester, Rockland, and Putnam. *Id.*

18. Jim Malewitz, *Lawmakers Move Swiftly to Block Release of Gun Permit Records*, STATELINE (Mar. 7, 2013), <http://www.pewstates.org/projects/stateline/headlines/lawmakers-move-swiftly-to-block-release-of-gun-permit-records-85899457096#story>, archived at <http://perma.cc/BEJ2-MCEY>. Malewitz references various state legislators echoing the views of their constituents that "releasing the information in bulk will put people at risk." *Id.* Malewitz cites Maine Governor Paul LePage who said, "I have serious concerns that . . . [concealed handgun record] request[s] will incite fear among gun owners and non-gun owners alike regarding their safety. There is no reason why these records should be public." *Id.*

19. For a discussion of the various state legislatures that have attempted to pass similar laws banning the publication of gun permit records, see *infra* Part I.B.2.

20. See *infra* Part III.D (assessing the constitutionality of Louisiana's Ban on Gun Permit Speech).

21. See *infra* Part III; see also LA CONST. art. I, § 7 ("No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write,

strike down the law because it infringes on these constitutional protections against punishment for truthful speech about matters of public concern.²²

Part I of this Comment discusses the development of concealed handgun permit laws in America and how the surge in handgun permits has led to increased investigations of state permit schemes by the press. It further considers how this amplified attention has resulted in permit holders expressing privacy concerns and how many state legislatures have responded to these worries by limiting public access to permit records. Part II then examines the history of gun laws in Louisiana and explores the legislative history of Louisiana's Ban on Gun Permit Speech. Part III addresses the law's constitutionality in the context of First Amendment jurisprudence and analogous privacy precedent from the United States Supreme Court and concludes that, should the law be challenged, it would likely be found unconstitutional. Finally, Part IV demonstrates the negative effects of Louisiana's Ban on Gun Permit Speech and advocates for other state legislatures to abide by the Constitution and refuse to adopt laws criminalizing gun speech.

I. SURVEYING THE FIELD: CONCEALED HANDGUN PERMITS IN AMERICA

More than 11.1 million Americans hold concealed handgun permits, according to a July 2014 report from the Crime Prevention Research Center.²³ A concealed handgun permit grants a handgun owner the right to carry a loaded handgun concealed on his or her

and publish his sentiments on any subject, but is responsible for abuse of that freedom."); U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

22. See *infra* Part III.B (discussing why Louisiana's Ban on Gun Permit Speech violates the First Amendment's protection against punishing truthful speech and newsworthy matters); see also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

23. CRIME PREVENTION RESEARCH CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES (2014), available at <http://crimepreventionresearchcenter.org/wp-content/uploads/2014/07/Concealed-Carry-Permit-Holders-Across-the-United-States.pdf>, archived at <http://perma.cc/JM7S-N2VG>. The number of concealed carry permit holders is estimated to be more than 11.1 million, which is an approximation because some states, such as New York, did not make the data available. *Id.* at 4.

person in a vehicle or in public.²⁴ Even though the limitations vary across the country, every state or jurisdiction in the continental United States currently maintains some sort of concealed handgun permit program.²⁵ State and local authorities control the issuance of concealed handgun permits and dictate the allocation, revocation, and restrictions of the permits.²⁶ Although it varies from state to state, Louisiana, for example, requires applicants for concealed handgun permits to submit a detailed application that includes fingerprints and medical and criminal history records, sign an affidavit, complete a firearms training course, and pay a processing fee.²⁷ A handgun permit typically lasts for four or five years, and then the state will require a permit holder to reapply for a permit.²⁸ Thirty-eight states have “shall-issue” systems.²⁹ In those states, issuing authorities are required to grant permits if an applicant meets certain criteria.³⁰ These criteria vary, but most states require permit holders to be a certain age, have handgun training, lack a felony conviction, and be mentally competent.³¹

24. U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-12-717, STATES' LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION (2012) [hereinafter U.S. PERMITS REPORT]. The Government Accountability Office prepared this report in July 2012 to educate lawmakers on the status of concealed carry permits in America. *Id.*

25. See *Concealed Carry Permit Information by State*, USA CARRY, http://www.usacarry.com/concealed_carry_permit_information.html, archived at <http://perma.cc/6AVA-ZB4R> (last visited Sept. 24, 2014) [hereinafter *Concealed Carry Permit Information*]. In July 2014, Washington, D.C., became the final jurisdiction in the continental United States to allow concealed handgun permits after a federal judge ruled that the Washington, D.C., ban on carrying handguns in public was unconstitutional. See Mike DeBonis & Paul Schwartzman, *D.C.'s Leaders Will Propose 'Concealed Carry' Law to Address Federal Judge's Gun Ruling*, WASH. POST (Sept. 17, 2014), http://www.washingtonpost.com/local/dc-politics/dc-leaders-will-propose-concealed-carry-law-to-address-federal-judges-gun-ruling/2014/09/17/8ccf2636-3df6-11e4-b0ea-8141703bbf6f_story.html, archived at <http://perma.cc/DVE7-ULDZ>.

26. See U.S. PERMITS REPORT *supra* note 24, at 7.

27. La. Dep't of Pub. Safety and Corr., Office of State Police, Louisiana Concealed Handgun Permit Application Packet (2014), available at <http://www.lsp.org/pdf/chApplication.pdf>, archived at <http://perma.cc/TF4Z-YYDD>.

28. See U.S. PERMITS REPORT, *supra* note 24, at 23.

29. See *Concealed Carry Permit Information*, *supra* note 25.

30. See U.S. PERMITS REPORT, *supra* note 24, at 5. For example, the concealed handgun permit statute in Louisiana, one of the states with a “shall-issue” system, declares that the Department of Public Safety and Corrections “shall issue a concealed handgun permit to any Louisiana resident who qualifies for a permit under the provisions of this Section.” LA. REV. STAT. ANN. § 40:1379.3(A)(1) (Supp. 2014).

31. LA. REV. STAT. ANN. § 40:1379.3(C) (Supp. 2014).

Alaska, Arizona, Wyoming, and Vermont have “open-carry” systems.³² In these states, no permit is required to carry a concealed handgun.³³ Eight states follow a “may-issue” system in which local authorities have discretion in granting permits.³⁴ “May-issue” states have stricter requirements for obtaining a concealed handgun permit, and applicants may be required to show good cause in order to receive a permit.³⁵

A. A Rise in Gun Permits Leads to Oversight by Press

The number of concealed handgun permits issued in the United States has surged since the passage of the first concealed carry law in 1976.³⁶ The demand for permits increased throughout the 1980s and 90s when states began enacting concealed handgun statutes.³⁷ Since 2002, the number of concealed handgun permits has skyrocketed, as every state now allows citizens to apply for concealed handgun permits and many states have relaxed their standards.³⁸ This rise in handgun permits has, in turn, generated a

32. U.S. PERMITS REPORT, *supra* note 24, at 73–74.

33. *Id.* at 5. Even though these states have an open-carry system, and a permit is not required to carry a concealed handgun, permits are still distributed upon request under a “shall-issue” regime. *Id.*

34. *See Concealed Carry Permit Information*, *supra* note 25. As of the publication date of this Comment, the eight states with “may-issue” schemes are California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, and New York. *Id.*

35. *See* U.S. PERMITS REPORT, *supra* note 24, at 5. For example, Maryland residents must show a “good and substantial” reason to obtain permits. *Id.* at 13.

36. Larry Arnold, *The History of Concealed Carry, 1976-2011*, TEX. CONCEALED HANDGUN ASS’N (Aug. 15, 2014), <http://www.txchia.org/history.htm>, archived at <http://perma.cc/W8G8-LKGN>.

37. *Id.*

38. U.S. PERMITS REPORT, *supra* note 24, at 8. Since June 2002, 11 additional states began operating “shall-issue” programs to allocate concealed handgun permits. *Id.* Illinois became the most recent and final state to begin granting concealed handgun permits, adopting a concealed handgun permit law in July 2013 under a “shall-issue” scheme. 430 ILL. COMP. STAT. ANN. 66/10 (West 2013). *See also* Greg McCune, *Illinois Is Last State to Allow Concealed Carry of Guns*, REUTERS (July 9, 2013), <http://www.reuters.com/article/2013/07/09/us-usa-guns-illinois-idUSBRE9680ZB20130709>, archived at <http://perma.cc/86ZD-BAVH>. In July 2014, a federal judge found that Washington, D.C.’s, ban on concealed handguns was unconstitutional. As of the publication date of this Comment, the D.C. Council was finalizing a new law that will allow people to register for concealed handgun permits. Peter Hermann, *D.C. Mayor Signs into Law Emergency Legislation on New Gun Carry Permits*, WASH. POST (Oct. 10, 2014), http://www.washingtonpost.com/local/crime/dc-mayor-signs-into-law-emergency-legislation-on-new-gun-carry-permits/2014/10/10/51aaf280-50a0-11e4-aa5e-7153e466a02d_story.html, archived at <http://perma.cc/V86N-HSF3>.

spike in controversy regarding the accessibility of concealed handgun permit records.³⁹ As concealed handgun permits became more common, the press began investigating many states' concealed handgun permit laws and cross-referencing permit data with other information, such as criminal records, to scrutinize whether local authorities were granting permits to qualified citizens.⁴⁰

For example, in 2003, WKMG-TV in Orlando reported that Florida officials unlawfully issued concealed handgun permits to citizens who had been involuntarily committed to mental institutions.⁴¹ The *South Florida Sun-Sentinel* discovered that in the first half of 2006, the Florida Department of Agriculture and Consumer Services erroneously issued concealed handgun permits to more than 1,400 people who had pled guilty or no contest to felonies, 216 people with outstanding warrants, 128 people with active domestic violence restraining orders against them, and six registered sex offenders—all in violation of Florida's concealed handgun permit law.⁴² In 2008, *The Commercial-Appeal*, a Memphis-based publication, exposed that Tennessee officials had mistakenly issued permits to nine convicted felons in Shelby County.⁴³ The discovery of these flaws in state handgun allocation systems is one of the reasons why the press argues it needs access to handgun records.⁴⁴ Without access to the data, it becomes impossible for the press to satisfy its duty to inform the public of these mistakes.⁴⁵

39. See Ryan Sibley & Caitlin MacNeal, *Majority of States Prohibit Access to Gun Records*, SUNLIGHT FOUND. (Jan. 19, 2013, 7:25 AM), <http://sunlightfoundation.com/blog/2013/01/18/majority-states-and-counting-dont-allow-gun-records-be-public/>, archived at <http://perma.cc/A83S-WKZQ>. This article reports on the past and present tensions between the press and the state and federal government on the accessibility of concealed handgun permit records. *Id.*

40. Malewitz, *supra* note 18. This article points out how many media entities used gun permit data to assess state concealed handgun systems. *Id.*

41. *Id.*

42. Megan O'Matz & John Maines, *License to Carry*, SUN SENTINEL (Jan. 28, 2007), http://articles.sun-sentinel.com/2007-01-28/news/0701270316_1_gun-licensing-system, archived at <http://perma.cc/5A9H-VDK3>.

43. Malewitz, *supra* note 18.

44. See Kelsey M. Swanson, Comment, *The Right to Know: An Approach to Gun Licenses and Public Access to Government Records*, 56 UCLA L. REV. 1579, 1590 (2009).

45. See *id.* at 1627. Swanson argues that when an applicant applies for a concealed handgun permit, “[a] gun owner is essentially asking the government’s permission to possess or carry a weapon, and the government is making a decision about the person’s qualifications.” *Id.* at 1618–19. Swanson believes the only way to effectively police these decisions is to know who is receiving permits from the government. *Id.* at 1621. Swanson thus argues that

Although the press has uncovered flaws in the initial granting of handgun permits in many states, a larger issue involves what happens after a permit is granted.⁴⁶ When a permit holder requests a renewal, he or she is reevaluated in an effort to confirm that all of the requirements needed to hold a permit are still met.⁴⁷ However, states do not always revoke concealed handgun permits when a citizen is no longer qualified to hold a permit.⁴⁸ As a result, unqualified citizens, such as convicted felons and mentally incompetent citizens, continue to hold their concealed handgun permits even though the law clearly compels the revocation of their permits.⁴⁹ Newspapers and other media outlets thus rely heavily on the availability of permit records to investigate state concealed handgun permit systems and publish information about these types of inconsistencies in the revocation process.⁵⁰

Furthermore, in addition to emphasizing the importance of information concerning the allocation, renewal, and suspension

“government officials are human, and consequently can make mistakes or become subject to political or financial pressure.” *Id.*

46. *Id.* at 1619–22.

47. See U.S. PERMITS REPORT, *supra* note 24, at 23. Eight of the nine states included in the United States Permits Report’s case study had mechanisms in place to monitor eligibility between issuance and renewal. *Id.* For example, the Virginia State Police monitors its state criminal databases and collects information from the courts to identify permit holders who have committed disqualifying offenses. *Id.* at 24. Each state has its own list of what offenses disqualify people from legally maintaining a concealed handgun permit. *Id.* at 14. Typically, states disqualify citizens who abuse controlled substances, citizens convicted of felonies, or citizens convicted of domestic violence. *Id.* Some states disqualify applicants who have been convicted of driving while intoxicated or have chronic drug or alcohol use problems. *Id.* at 15. Other causes of permit disqualification include mental or physical infirmity, failure to pay child support, or failure to pay taxes. *Id.* at 17.

48. See Luo, *supra* note 1. The example of Ricky Wills and *The New York Times* investigation into the North Carolina concealed handgun system is one example in which the media has found states failing to properly revoke permits. *Id.*

49. *Id.*

50. *Bulk Data – Whether Gun Records or Anything Else – Must Remain Accessible*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2013/bulk-data-whether-gun-recor>, archived at <http://perma.cc/N969-YWSK> (last visited Sept. 30, 2014) [hereinafter *Bulk Data Accessible*]. The Reporters Committee for Freedom of the Press, a nonprofit association that provides legal assistance to journalists, believes that since the process of distributing concealed handgun permits is a state licensing system, investigating those records are important for journalists to keep tabs on the government and to compare permit data with crime statistics. *Id.*

process of state concealed handgun systems, press advocates argue that concealed handgun permit records involve a matter of public concern and are critical in helping the press assist the public in evaluating the policies enacted by legislatures.⁵¹ Proponents of keeping permit records accessible contend that the more the public knows about the concealed handgun permit system, the more knowledgeable and educated citizens will be when they vote for elected officials who may attempt to change current gun laws.⁵² These proponents believe that if the media cannot access concealed handgun data, the government is shielded from external oversight, and therefore, less transparency is provided to the public.⁵³

B. State Legislatures Shield Permit Records

Even though the press has examined gun records for years, recent attention on gun ownership in America has caused citizens and legislators to reevaluate how much access the press has to gun records. National tragedies such as the attempted assassination of Arizona Congresswoman Gabrielle Giffords,⁵⁴ the murders of 12 people at a movie theater in Aurora, Colorado,⁵⁵ and the suicide of

51. See Cheryl M. Sheinkopf, Comment, *Balancing Free Speech, Privacy and Open Government: Why Government Should Not Restrict the Truthful Reporting of Public Record Information*, 44 UCLA L. REV. 1567, 1605–06 (1997). “When citizens are denied access to records that document the activities of government, they cannot make informed choices concerning whether government is functioning honestly and properly.” *Id.* at 1605.

52. See, e.g., Swanson, *supra* note 44, at 1622. Swanson argues that “only with full disclosure can the public be sufficiently informed to hold its public officials fully accountable.” *Id.* Gun permit data is important to determining whether licensing requirements need to be changed. *Id.* “If licensees are more likely than nonlicensees to commit assault, then perhaps the legislature should make a prior assault charge disqualifying, or add additional disqualifying offenses to the statute.” *Id.* at 1622–23. “Disclosure makes possible research that sheds light on the effectiveness of gun laws.” *Id.* at 1623.

53. See *id.* at 1590. Swanson furthers the argument of others that publicly disclosing concealed handgun records “captures the idea that transparency and accountability are fundamental to a democratic government.” *Id.* She explains that by providing concealed handgun records to the public, citizens and the press will be able to review government decisions and notify proper authorities if a permit is given to an unqualified citizen. *Id.*

54. See Marc Lacey & David M. Herszenhorn, *In Attack’s Wake, Political Repercussions*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/us/politics/09giffords.html>, archived at <http://perma.cc/FJ4Y-L6JG>.

55. See Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html>, archived at <http://perma.cc/PJP2-389M>.

Kansas City Chiefs linebacker Jovan Belcher⁵⁶ put gun violence in the national spotlight in 2011 and 2012. Two weeks after Belcher's death, attention to gun violence intensified when Adam Lanza opened fire at Sandy Hook Elementary School in Newtown, Connecticut, on the morning of December 14, 2012, killing 26 people.⁵⁷ Just days after the Newtown shooting, *The Journal News* released an article and an online interactive map that identified the names and addresses of citizens with concealed handgun permits in two New York suburbs.⁵⁸ The map sparked criticism from several different interest groups, including gun and privacy advocates.⁵⁹ Their contention was that releasing the map invaded the privacy of citizens and subjected concealed handgun permit holders to unnecessary scrutiny.⁶⁰

Besides concealed handgun permit holders, some journalists even criticized *The Journal News's* decision to publish such a detailed map of permit holders because they felt it lacked news value.⁶¹ Al Tompkins, a senior faculty member of the Poynter Institute, said: "If you are not breaking the law, there is no compelling reason to publish the data. . . . It is journalistic arrogance to abuse public record privilege."⁶² Twenty-six days after the article and map's release, *The Journal News* changed the interactive map from its original format, where a user could browse and locate individual names and addresses on the map, to a

56. See Marc Santora & Judy Battista, *Chiefs Player Kills Woman and, at Stadium, Himself*, N.Y. TIMES, Dec. 1, 2012, at SP1, available at <http://www.nytimes.com/2012/12/02/sports/football/police-chiefs-player-shot.html>, archived at <http://perma.cc/Y3XE-GUFW>.

57. See James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>, archived at <http://perma.cc/6DSR-XV68>.

58. See Worley, *supra* note 17; *The Journal News Map*, *supra* note 17.

59. See Aaron Mackey, *In Wake of Journal News Publishing Gun Permit Holder Maps, Nation Sees Push to Limit Access to Gun Records*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2013/wake-journal-news-publishin>, archived at <http://perma.cc/9YH3-2EM4> (last visited Sept. 17, 2014).

60. See *id.*

61. See Julie Moos, *Newspaper Publishes Names, Addresses of Gun Owners*, THE POYNTER INST. (Dec. 26, 2012), <http://www.poynter.org/latest-news/mediawire/199148/newspaper-publishes-names-addresses-of-gun-owners/>, archived at <http://perma.cc/VCN6-4VVF>.

62. *Id.* The Poynter Institute, a journalism institution in St. Petersburg, Florida, is one of the nation's authorities on a variety of media topics, particularly media ethics. See *A Brief History of the Poynter Institute*, THE POYNTER INST., <http://about.poynter.org/about-us/mission-history>, archived at <http://perma.cc/3G3H-KFKA> (last visited Dec. 22, 2014).

static image identifying homes of permit holders but without names or addresses.⁶³ Even though this was not the first time a United States newspaper published an accessible database or map of gun permit holders,⁶⁴ the timing and prominence of *The Journal News* article brought unparalleled attention to its decision to release gun permit information on a massive scale.⁶⁵ The article caused many state legislatures to reconsider their policies relating to disclosure of concealed handgun permit records.⁶⁶

1. Access to Gun Records Denied

Most states utilized an open system when they initially enacted concealed handgun laws, either publishing permit data or allowing the public and media to request data and identities of permit holders through public records requests.⁶⁷ Slowly this began to change as citizens pushed for more privacy protections for these records.⁶⁸ Courts also began to acknowledge the privacy concerns of citizens with concealed handgun permits.⁶⁹ During the 2000s, many states began chipping away at the type of concealed handgun permit data that was publicly accessible.⁷⁰ For example, after media outlets in Florida and Virginia released concealed handgun permit databases to the public, the respective legislatures added

63. *The Journal News Map*, *supra* note 17. See also Michael Martinez, *Newspaper Removes Controversial Online Database of Gun Permit Holders*, CNN (Jan. 19, 2013), <http://www.cnn.com/2013/01/18/us/new-york-gun-permit-map>, archived at <http://perma.cc/AY9E-M8W4>.

64. *The Journal News* published a similar article with handgun permit information in 2006. Moos, *supra* note 61. Additionally, in 2007, *The Roanoke Times* in Virginia published mass handgun permit information. *Id.* In 2011, *The Commercial Appeal* in Memphis, Tennessee, also published handgun permit records. *Id.*

65. Mackey, *supra* note 59.

66. *Id.*

67. *Id.*

68. *Id.*

69. In 1999, a man sued the state of Michigan under the Michigan Freedom of Information Act to compel disclosure of handgun permit data. See *Mager v. Dep't of State Police*, 595 N.W.2d 142, 148 (Mich. 1999). The Supreme Court of Michigan found that the Department of State Police was not required to disclose the handgun permit data under the Freedom of Information Act. *Id.* The court determined that gun ownership is “an intimate or, for some persons, potentially embarrassing detail of one’s personal life” and disclosure would be an “unwarranted invasion of the privacy of those citizens.” *Id.* at 146–47.

70. Bill Lueders, *Law Conceals Criminal Information on Concealed Carry License Applicants and Holders*, THE CAP TIMES (Mar. 10, 2013, 7:15 AM), http://host.madison.com/news/local/crime_and_courts/law-conceals-criminal-information-on-concealed-carry-license-applicants-and/article_54f63624-88e3-11e2-8f03-0019bb2963f4.html, archived at <http://perma.cc/PM6M-H7JP>.

confidentiality provisions to their concealed handgun laws during the mid-2000s, making all concealed handgun permit data confidential.⁷¹ The voices of concerned handgun permit holders increased in the wake of *The Journal News's* release of permit holders' identities after the Sandy Hook shootings.⁷²

On January 15, 2013, a little more than three weeks after *The Journal News* released its online map, New York Governor Andrew Cuomo signed a law exempting gun permits from the public records law that normally allows the public to request this information from the government.⁷³ The law allows concealed handgun permit holders to choose whether the public can find out if they own a permit through a public information request.⁷⁴ Four other states—Maine, Virginia, Arkansas, and Mississippi—also blocked public access to gun records in the two months following *The Journal News's* article.⁷⁵ As of the publication date of this Comment, concealed handgun permit information was confidential in 44 states.⁷⁶ Courts have held constitutional these laws protecting the confidentiality of gun records.⁷⁷ But concealed handgun permit records in three states—California, Iowa, and West Virginia—are still public.⁷⁸ In three other states—New York, Ohio, and Oregon—concealed handgun permit records are partially public.⁷⁹

71. *Id.*

72. See Mackey, *supra* note 59.

73. S.B. 2230, 2013–2014 Leg. (N.Y. 2013).

74. See N.Y. Office of Div. Counsel, Guide to the New York Safe Act for Members of the Division of State Police (2013), available at http://www.nypdcea.org/pdfs/NYSP_Safe_Act_Field_Guide.pdf, archived at <http://perma.cc/PN7T-TM9F>. The New York Secure Ammunition and Firearms Enforcement (SAFE) Act exempts disclosure of pistol permit renewal records if the permit holder files an “Opt Out” form. *Id.*

75. See Malewitz, *supra* note 18.

76. *Id.* Since Malewitz's article, North Carolina and Tennessee have passed legislation making concealed handgun permit records confidential. See TENN. CODE ANN. § 10-7-504(o)(1)(A) (West 2013); N.C. GEN. STAT. ANN. § 14-

77. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (declaring that the United State Supreme Court “has never intimated a First Amendment guarantee of a right of access to all sources of information within government control”).

78. In California, applications for and records of concealed weapons permits are public documents. See *Concealed Weapons Permitting in California*, LAW CTR. TO PREVENT GUN VIOLENCE (Jan. 2, 2012), <http://smartgunlaws.org/concealed-weapons-permitting-in-california/>, archived at <http://perma.cc/5G9N-UFF6>. But certain information contained in the applications, such as criminal and medical records, may not be disclosed. *Id.* In Iowa, the application for a concealed handgun permit clearly states at the top of the document, “INFORMATION PROVIDED ON THIS FORM IS PUBLIC RECORD.” Iowa Dep't of Pub. Safety, Iowa Application for Permit to Carry Weapons (2011), <http://www.dps.state.ia.us/asd/weapons/WP5.pdf>, archived at <http://perma.cc>

2. Attempted Criminalization of the Release of Gun Records

Since *The Journal News* published its article, many state legislatures have done more than attempt to merely restrict access to gun records. In 2013, some state legislatures considered criminalizing the publication of gun records in case they were leaked to the press. In Missouri, the legislature passed an extensive gun bill during the 2013 session called the “Second Amendment Preservation Act.”⁸⁰ This bill made it a misdemeanor for anyone to publish identifying information about a gun permit holder.⁸¹ The bill stated, in pertinent part: “No person or entity shall publish the name, address, or other identifying information of any individual who owns a firearm or who is an applicant for or holder of any license, certificate, [or] permit”⁸² Missouri Governor Jay Nixon vetoed the bill, arguing that punishing the publication of gun permit holders’ identities violates the First Amendment.⁸³ Even though the

/P4WS-JB9J?type=pdf. In West Virginia, personally identifying information contained in West Virginia concealed handgun permits is public record. *See West Virginia Concealed Carry*, W. VA. CITIZEN’S DEFENSE LEAGUE, INC., <http://www.wvcdl.org/WVCCW.php>, archived at <http://perma.cc/576S-9N72>.

79. New York provides for a public records exemption where concealed handgun permit holders can opt-out of their records being public. *See supra* note 74. In Ohio, concealed handgun permit data is not public record, but a journalist may, upon request, view information in the gun permit records at the sheriff’s office. Randy Ludlow, *Ohio Gun-Permit Holders Effectively Cloaked*, THE COLUMBUS DISPATCH (Ohio) (Dec. 27, 2012, 5:03 PM), <http://www.dispatch.com/content/blogs/your-right-to-know/2012/12/guns.html>, archived at <http://perma.cc/Z3MY-8G7D>. In Oregon, concealed handgun permit information is confidential unless the disclosure is necessary for criminal justice purposes, a court enters an order directing the disclosure of the records, the holder of the license consents to the disclosure in writing, or the public body determines that a compelling public interest requires disclosure. *See* OR. REV. STAT. ANN. § 192.448(1) (West 2013).

80. H.B. 436, 97th Leg., 1st Reg. Sess. (Mo. 2013). *See also Missouri Poised to Enact Measure Nullifying Federal Gun Laws*, FOX NEWS (Aug. 29, 2013), <http://www.foxnews.com/politics/2013/08/29/missouri-poised-to-enact-bill-nullify-federal-gun-control-laws/>, archived at <http://perma.cc/TBL6-ZFT5>.

81. H.B. 436, 97th Leg., 1st Reg. Sess. (Mo. 2013) (“Any person or entity who violates the provisions of this section by publishing identifying information protected under this section is guilty of a class A misdemeanor.”).

82. *Id.*

83. Letter from Jay Nixon, Mo. Gov., to Jason Kander, Mo. Sec. of State (July 5, 2013), *available at* <http://www.showmepprogress.com/diary/8529/hb-436-we-told-you-so>, archived at <http://perma.cc/6ZDX-KAFK> (“House Bill No. 436 would also infringe upon an individual’s freedom of speech protected by the federal and state Constitutions by making it a crime to publish the name or other information or [sic] someone who owns a firearm. . . . [P]utting aside the perplexing paradox of seeking to protect one constitutional right by significantly

bill appeared to have enough support from the Republican-led House to override Nixon's veto, proponents of the bill in the Missouri State Senate fell one vote short of defeating Nixon's veto.⁸⁴

In Tennessee, the legislature proposed an amendment to Senate Bill 76 that would prohibit a person from publishing any information regarding a handgun permit application unless the record indicated that the permit holder had been charged with a felony or had engaged in other conduct that forbids that person from being eligible to own a permit.⁸⁵ Rather than levy a criminal punishment, the amendment would have given an invasion of privacy cause of action to a permit holder whose name or identifying information was released in violation of the law.⁸⁶ A Tennessee state senator submitted a request for an opinion from the Tennessee attorney general regarding the amendment.⁸⁷ The attorney general concluded that "such legislation is likely susceptible to facial challenge under the First Amendment and the Equal Protection Clause of the United States Constitution."⁸⁸ The amendment was ultimately not added to the bill.⁸⁹

diminishing another, curtailing speech in such a manner clearly violates the free exercise of speech protected by the state and federal constitutions.").

84. See John Eligon, *Missouri Republicans Fail to Block Vetoes on 2 Bills*, N.Y. TIMES, Sept. 12, 2013, at A19, available at [http://www.nytimes.com/2013/09/12/us/missouri-legislature-fails-to-override-tax-cut-veto.html?](http://www.nytimes.com/2013/09/12/us/missouri-legislature-fails-to-override-tax-cut-veto.html?_r=1), archived at <http://perma.cc/Y78W-GNYX>.

85. S.B. 76, 2013 Leg., 108th Sess. (Tenn. 2013).

86. *Id.* "No person obtaining information or other records pursuant to this subsection, including the entire database of handgun permit holders, shall reproduce, publish, make available to another for the purpose of reproducing or publishing, or permit another to reproduce or publish any information obtained pursuant to this subsection." *Id.* § 1(o)(3)(A). "Each handgun carry permit holder whose name or identifying information is released in violation of this subsection shall have a cause of action for invasion of privacy against the person who requested the information and signed the statement pursuant to subdivision (4) and the person who actually publishes the information." *Id.* § 1(o)(7).

87. Tenn. Att'y Gen., Public Access to Governmental Handgun Carry Permit Information, Op. No. 13-23 (Mar. 18, 2013), available at https://archive.org/stream/694193-opinion-public-access-to-governmental-handgun/694193-opinion-public-access-to-governmental-handgun_djvu.txt, archived at <http://perma.cc/NKQ4-GXTW>. Writing about the constitutionality of the proposed amendment to Senate Bill 76, the Tennessee attorney general said, "It is difficult to assert that the State has a legitimate, much less compelling, interest in protecting privacy that would justify the chilling effect on speech created by this cause of action." *Id.*

88. *Id.*

89. *Bill Information for SB0076*, TENN. GEN. ASSEMB., available at <http://www.capitol.tn.gov/Bills/108/Bill/SB0076.pdf>, archived at <http://perma.cc/643H-KQSS> (last visited Aug. 26, 2014).

In South Dakota, State Senator Jess Monroe proposed a bill that would have criminalized releasing information regarding ownership of handgun permits.⁹⁰ At a committee hearing to consider the bill, the bill failed, 5–2, after other senators feared the unconstitutional nature of the bill.⁹¹

And finally, in Maryland, Republican delegate Pat McDonough held a press conference on December 28, 2013, announcing plans to introduce a bill called the “Gun-Owner Privacy Act,” which sought to “prohibit newspapers and other publications from printing personal or private information about firearm owners.”⁹² However, McDonough never formally introduced the bill.⁹³

II. LOCKED AND LOADED: LOUISIANA CRIMINALIZES GUN PERMIT SPEECH

Although the legislative efforts in Missouri, Tennessee, South Dakota, and Maryland fell short of criminalizing the release of gun permit information, Louisiana became the first state to do so in 2013. Seventeen years earlier, in 1996, Louisiana began distributing concealed handgun permits after the Louisiana Legislature passed a concealed handgun statute under a “shall-issue” scheme, allocating concealed handgun permits for five-year terms.⁹⁴ The state made concealed handgun permit records available to the public from 1996 to 2008, but in 2008, the Legislature carved out an exception to Louisiana’s public records law, making permit applications and records of concealed handgun permits confidential.⁹⁵ Since 2008, neither the public nor the media

90. S.B. 97, 2013 Leg., 88th Sess. (S.D. 2013). “No person, newspaper, periodical, publication, or electronic medium may publish or make public any information with the intent of revealing the identity or location of any person in this state based on the second person’s legal ownership or possession of a firearm.” *Id.*

91. David Montgomery, *Banning Info About Gun Owners Defeated*, ARGUS LEADER (Jan. 24, 2013), <http://www.argusleader.com/article/20130125/NEWS/301250027/Banning-info-about-gun-owners-defeated>, archived at <http://perma.cc/WY8T-V5PD>.

92. Baynard Woods, *Delegate McDonough Calls for Gun-Owner Privacy Act*, BALT. CITY PAPER BLOG (Dec. 28, 2012), <http://blogs.citypaper.com/index.php/2012/12/delegate-mcdonough-calls-for-gun-owner-privacy-act/>, archived at <http://perma.cc/96ZP-4WMS>.

93. *Id.*

94. See LA. REV. STAT. ANN. § 40:1379.3 (Supp. 2014); see also Jason Napoleon Thelen, “Midnight Stole My Impala, So I Shot Him”: Handguns and Personal Defense in Louisiana, 73 TUL. L. REV. 331 (1998) (explaining the genesis of Louisiana’s concealed handgun permit statute in further detail).

95. See LA. REV. STAT. ANN. § 40:1379.3(A)(2) (Supp. 2014).

has had access to records concerning concealed handgun permits in Louisiana.⁹⁶

During its 2012 and 2013 legislative sessions, the Louisiana Legislature increased its gun protections to become some of the most extensive in the nation. In 2012, the Legislature passed an amendment to the state constitution that declared that a Louisiana citizen's right to bear arms is fundamental, and any infringement of this right shall be subject to a strict scrutiny standard of judicial review.⁹⁷ After passing a statewide vote, the amendment became effective on November 26, 2012.⁹⁸ With the enactment of the amendment, Louisiana became the first state to protect its citizens' right to bear arms with the most demanding level of judicial review.⁹⁹ Then, in 2013, the Legislature amended Louisiana's concealed handgun statute to allow for lifetime permits—also the first of its kind in the nation.¹⁰⁰ Most recently, the Legislature proposed another groundbreaking bill during the 2013 session—

96. See *id.*; see also *House Hearing*, *supra* note 16 (statement of Carl Redman, former executive editor of *The Advocate* newspaper in Baton Rouge, stating that *The Advocate* used to look through the handgun permit records until 2008 when they were no longer accessible and that there was “no great harm done” when the records were accessible).

97. See LA. CONST. art. I, § 11; see also K. Connor Long, Comment, *Firing Blanks: Louisiana's New Right to Bear Arms*, 74 LA. L. REV. 289 (2013).

98. See LA. CONST. art. I, § 11; Jeff Adelson, *Louisiana Voters Approve Constitutional Changes Protecting Gun Rights, Forfeiting Felon Pensions*, THE TIMES-PICAYUNE (Nov. 6, 2012, 11:00 PM), http://www.nola.com/politics/index.ssf/2012/11/louisiana_voters_approve_const.html, archived at <http://perma.cc/9EJL-PQK4>.

99. Long, *supra* note 97, at 290. Now, Missouri and Alabama have similar amendments to their state constitutions. Alan Burdziak, *Missouri Voters Pass Gun Rights Amendment*, COLUMBIA DAILY TRIB. (Aug. 6, 2014, 9:21 AM), http://www.columbiatribune.com/news/politics/missouri-voters-pass-gun-rights-amendment/article_b9f98bc2-cc77-5253-ab82-60b05babe4b.html, archived at <http://perma.cc/5PXD-928U>. See also *Gun Rights Amendment Approved by Ala. Voters*, WIAT (Nov. 4, 2014, 9:29 PM), <http://wiat.com/2014/11/04/gun-rights-amendment-approved-by-ala-voters/>, archived at <http://perma.cc/CP8C-M2AP>.

100. See LA. REV. STAT. ANN. § 40:1379.3(V) (Supp. 2014). In 2013, the Legislature amended its concealed handgun statute to allow for lifetime concealed handgun permits as long as the applicant meets the other qualifications in the statute and provides proof of completion of educational training every five years. *Id.* See also H.B. 265, Act No. 84. Prior to 2013, the statute required an applicant to re-apply for a concealed handgun permit every five years. Lauren McGaughy, *Lifetime Concealed-Carry Permit Bill Passes Louisiana House*, THE TIMES-PICAYUNE (Apr. 24, 2013, 5:00 PM) http://www.nola.com/politics/index.ssf/2013/04/gun_control_concealed_carry_b.html, archived at <http://perma.cc/H9HU-RPPK>. Furthermore, in 2013, Governor Bobby Jindal signed seven new gun bills into law, including Louisiana's Ban on Gun Permit Speech. *Id.*

the bill at the heart of this Comment—Louisiana’s Ban on Gun Permit Speech.¹⁰¹

A. Louisiana Legislature Discusses Proposed Bill

Louisiana Representative Jeff Thompson sponsored the bill that later became Louisiana’s Ban on Gun Permit Speech.¹⁰² The bill amended Louisiana’s current concealed handgun statute to criminalize any person who intentionally publishes information about concealed handgun permit holders.¹⁰³ During a hearing before the Louisiana House Committee on Administration of Criminal Justice, Thompson explained that he introduced the bill to ensure the safety and privacy of concealed handgun permit holders in Louisiana.¹⁰⁴ Even though no media outlet in Louisiana had published a mass list or database of gun records, Thompson said he introduced the bill to prevent gun permit information from being released in Louisiana like it was released by *The Journal News* and other media outlets.¹⁰⁵ Thompson said that releasing the names or information of gun permit holders “demonize[d] law-abiding citizens” by invading their privacy.¹⁰⁶ Even though gun records have been confidential in Louisiana since 2008, Thompson said that this bill would prevent the publication of such records if obtained accidentally or unlawfully.¹⁰⁷ Thompson also argued that releasing names of permit holders would risk the safety of citizens by leading to increased threats or burglaries.¹⁰⁸

101. Lauren McGaughey, *Four Gun Bills One Step Closer to Becoming Law After Passing Louisiana Senate Committee*, THE TIMES-PICAYUNE (May 7, 2013), http://www.nola.com/politics/index.ssf/2013/05/gun_bills_senate_committee_la.html, archived at <http://perma.cc/8L8R-7NYG>.

102. H.B. 8, 2013 Leg., 113th Sess. (La. 2013).

103. See LA. REV. STAT. ANN. § 40:1379.3(A)(3) (2000).

104. *House Hearing*, *supra* note 16.

105. *Id.* (statement of Rep. Jeff Thompson) (“Insert name of whatever newspaper subscription you have. You wake up tomorrow, and it says here’s a list alphabetically: name, address, information that the state police has in their database, is suddenly published. . . . That’s wrong. . . . That shouldn’t make you a target.”).

106. *Id.* (statement of Rep. Jeff Thompson) (asserting that the release of handgun permit records by *The Journal News* was an attempt to demonize law abiding citizens).

107. *Id.* (statement of Rep. Jeff Thompson) (“What House Bill 8 does is expand the protection that says it’s not only not subject to a public records request as the current law, but it actually penalizes those that do obtain this information improperly and publish the information.”).

108. *Id.* (statement of Rep. Jeff Thompson) (Thompson claims that newspapers “put a target on that individual’s home when they’re not there”

Louisiana's Ban on Gun Permit Speech did not receive intense pushback from the Republican-led House Committee, but Representative Barbara Norton contested the seemingly-contradictory nature of the bill.¹⁰⁹ Norton stated: "I was under the impression . . . that you all were so proud of your guns and you all would hold them up all over the world. . . . But now you come up and you say that, well, I'm going to be offended if someone knows I have a gun."¹¹⁰ Representative Helena Moreno, a former reporter herself, inquired about the unclear language of the bill regarding who would be punished if someone violated the law,¹¹¹ and Representative Terry Landry questioned why a state with the highest incarceration rate per capita in the world¹¹² would create another felony.¹¹³ Thompson responded by saying that the jail sentence was in the bill to deter publication of concealed handgun permit records.¹¹⁴

The harshest criticism of the bill came from Carl Redman, former executive editor of *The Advocate*, a newspaper in Baton Rouge and New Orleans.¹¹⁵ Redman blasted the bill, saying: "I find it very ironic that the very people who are adamant that we shouldn't take away their Second Amendment rights to bear arms are eager to take away my First Amendment rights to freedom of the press and free speech."¹¹⁶ Redman said regardless of whether a newspaper like *The Advocate* would actually publish gun permit information, "the First Amendment of the United States Constitution protects the right of citizens and the right of the media to publish and print [this type of information]," and that passing the bill is

when newspapers publish lists identifying the addresses of concealed handgun permit holders).

109. *Id.* (statement of Rep. Barbara Norton).

110. *Id.*

111. *Id.* (question of Rep. Helena Moreno) ("[If a] reporter releases the name, so who is targeted then? Is it the reporter? Is it then the producer who aired it? Is it then the news director? Is it then the general manager of that station?").

112. Cindy Chang, *Louisiana is the World's Prison Capital*, THE TIMES PICAYUNE (May 13, 2012, 5:00 AM), http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html, archived at <http://perma.cc/T7B5-DRAE>.

113. *House Hearing*, *supra* note 16 (statement of Rep. Terry Landry) ("I have a problem, with, first of all, the criminal penalty. . . . We're creating another felony by violating this release of information that you have. Does that not concern you . . . ?").

114. *Id.* (statement of Rep. Jeff Thompson).

115. *Id.*

116. *Id.* (statement of Carl Redman).

“criminalizing [a reporter’s] ability to print truthful information.”¹¹⁷ Redman warned that the law would eventually be challenged and struck down as a violation of the First Amendment.¹¹⁸ Despite criticism of the bill, it passed the Louisiana House and Senate and went into effect on August 1, 2013.¹¹⁹

B. Louisiana Institutes Ban on Gun Permit Speech

Louisiana’s Ban on Gun Permit Speech contains three main provisions: an “in-house” provision, a “catch-all” provision, and an exceptions provision.¹²⁰ The first provision prohibits government employees of the Department of Public Safety and Corrections from leaking concealed handgun permit information to the public, the second provision restricts citizens and the press from releasing concealed handgun permit information if the information is obtained, and the third provision creates four exceptions to the first two rules.¹²¹

1. Keeping Records “In House”

The first provision of Louisiana’s Ban on Gun Permit Speech states, in pertinent part:

Absent a valid court order requiring the release of information . . . it shall be unlawful for any employee of the Department of Public Safety and Corrections or any law enforcement officer to intentionally release or disseminate for publication any information contained in an application for a concealed handgun permit or any information regarding the identity of any person who applied for or received a concealed handgun permit issued pursuant to [Louisiana Revised Statutes section 40:1379.3]. A person who violates the provisions of this Subparagraph shall be fined not more

117. *Id.*

118. *Id.* (statement of Carl Redman) (“To tell me that I can’t publish information flies in the face of the First Amendment of the U.S. Constitution [I]f you do this, if you pass this out, we’re going to end up in court with it, and I think we’ll win. I would just like to avoid that, and I would like to see y’all stand up for the First Amendment.”).

119. See Lauren McGaughy, *Bobby Jindal Signs 6 Gun Bills into Law*, THE TIMES PICAYUNE (June 19, 2013, 4:10 PM), http://www.nola.com/politics/index.ssf/2013/06/gun_control_bobby_jindal_law.html, archived at <http://perma.cc/4UUB-NZ7Q>.

120. LA. REV. STAT. ANN. § 40:1379.3(A)(3) (Supp. 2014).

121. *Id.*

than five hundred dollars, imprisoned for not more than six months, or both.¹²²

This provision aims to keep gun permit records “in house” by threatening government employees with criminal charges for leaking the concealed handgun permit information.¹²³ Thompson noted that this provision was geared toward “disgruntled employees” and employees that do not follow the rules.¹²⁴

2. *Restraining the Rest*

Following the “in-house” provision, the statute contains a “catch-all” provision that aims to prevent the rest of the public from releasing information included in concealed handgun permits. It states, in pertinent part:

It shall be unlawful for any person other than an employee of the Department of Public Safety and Corrections or a law enforcement officer to intentionally release, disseminate, or make public in any manner any information contained in an application for a concealed handgun permit or any information regarding the identity of any person who applied for or received a concealed handgun permit issued pursuant to this Section. Any person who violates the provisions of this Subparagraph shall be fined ten thousand dollars and may be imprisoned for not more than six months.¹²⁵

By directing this provision at “any person” except for employees of the Department of Public Safety and Corrections or law enforcement officers, the statute brings all other individuals within its reach.¹²⁶ Under this statute, anyone who publicizes that another person applied for or possesses a concealed handgun permit could be held criminally liable—including members of the press and regular citizens.¹²⁷ In the “catch-all” provision, the penalty for non-government violators is a mandatory \$10,000 fine and possible

122. *Id.* § 40:1379.3(A)(3)(a).

123. *Id.*

124. *House Hearing, supra* note 16. (statement of Rep. Jeff Thompson) (explaining that the first part of Louisiana’s Ban on Gun Permit Speech was included because “every now and then you get a disgruntled employee; you get somebody that doesn’t follow the rules”).

125. LA. REV. STAT. ANN. § 40:1379.3(A)(3)(b)(i) (Supp. 2014).

126. *Id.*

127. *Id.* See also *House Hearing, supra* note 16. (statement of Carl Redman) (“It’s not just newspapers. . . . It’s anybody who disseminates the information. . . . If somebody found out that Representative Honoré had a concealed carry permit and made the comment in public, they would be liable to prosecution.”).

imprisonment for up to six months.¹²⁸ This penalty is significantly harsher than the penalty in the “in-house” provision for government employees, which is only a \$500 fine or imprisonment for up to six months, or both.¹²⁹

3. Carving Out Exceptions

The third provision of Louisiana’s Ban on Gun Permit Speech provides four circumstances in which the release of information regarding concealed handgun permits will not result in a penalty.¹³⁰ The first exception in which publishing gun permit information is legal is if a valid court order requires the release of the gun permit information.¹³¹ The second exception is triggered when a permit holder is charged with a felony involving a handgun.¹³² This exception does not consider the other ways in which a permit holder could no longer qualify for a permit, including committing a violent misdemeanor, suffering a mental illness that prevents the safe handling of a gun, or abusing a controlled dangerous substance or alcohol, among others.¹³³ The final two exceptions explain that the statute does not apply if the permit holder approved the publication of his or her identity or had already made public his or her identity.¹³⁴

III. READY, AIM, FIRE: FIRST AMENDMENT IN THE CROSSHAIRS OF THE LOUISIANA LEGISLATURE

By criminalizing speech involving the identity or information of a concealed handgun permit holder, Louisiana’s Ban on Gun Permit Speech infringes upon an individual’s freedom of speech and freedom of press protected by the Louisiana Constitution and the First Amendment to the United States Constitution.¹³⁵ Accordingly, a

128. LA. REV. STAT. ANN. § 40:1379.3(A)(3)(b)(i) (Supp. 2014).

129. *Id.* § 40:1379.3(A)(3)(a).

130. *Id.* § 40:1379.3(A)(3)(b)(ii).

131. *Id.*

132. *Id.*

133. *See id.*

134. *Id.*

135. LA. CONST. art. I, § 7 (“No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.”). U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). Arguments in this Comment addressing the constitutionality of Louisiana’s Ban on Gun Permit

court should strike down Louisiana's Ban on Gun Permit Speech because it forbids dissemination of truthful speech that implicates a matter of public concern.¹³⁶

A. First Amendment Origins and Development

From a historic perspective, Louisiana's Ban on Gun Permit Speech is the kind of limit on speech that the founding fathers intended to prohibit under the First Amendment.¹³⁷ Most scholars

Speech in regards to the First Amendment of the U.S. Constitution are also applicable to Article I, Section 7, of the Louisiana Constitution. The Supreme Court of Louisiana interpreted Article 1, Section 7, of the Louisiana Constitution to safeguard against the same infringements to free speech and free press as the First Amendment of the U.S. Constitution. *See State v. Franzone*, 384 So. 2d 409, 411 (La. 1980). In *Franzone*, the Supreme Court of Louisiana established that Article I, Section 7, of the Louisiana Constitution "serve[s] the same purpose and provides at least coextensive protection" as the First Amendment. *Id.* In addition, the First Amendment has been interpreted to be incorporated to the states through the Due Process Clause of the Fourteenth Amendment. *See Palko v. Connecticut*, 302 U.S. 319 (1947); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

136. *See infra* Part III.D.

137. *See* Patrick J. Charles & Kevin Francis O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, 2012 UTAH L. REV. 1691, 1694 (2012). Charles and O'Neill discussed letters between Massachusetts Chief Justice William Cushing and James Madison from 1789 prior to the drafting of the Bill of Rights. *Id.* at 1691. Cushing shared with Madison Article XVI of the Massachusetts Declaration of Rights that stated, "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth." *Id.* at 1691-92. Cushing told Madison that Article XVI stood for the principle that restraints on the press from the government are not allowed. *Id.* Charles and O'Neill explained that state constitutions, such as Massachusetts's, that included an explicit article devoted to a free press influenced the inclusion of the Press Clause into the First Amendment and that the First Amendment was meant to have the same meaning as the state constitutional provisions—that a free press meant a press without interference from the government. *Id.* at 1694. Louisiana's Ban on Gun Permit Speech contradicts this view because the Louisiana government is telling the press and the public that they cannot speak or publish materials about gun permits holders without facing jail time and a fine. *See Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). *Landmark Communications* involved a Virginia criminal statute that prohibited the release of information from a proceeding of the Virginia Judicial Inquiry and Review Committee. The United States Supreme Court found that "[t]he type of 'danger' evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification." *Id.* Louisiana's Ban on Gun Permit Speech is similar to the Virginia statute because both criminal laws banned publishing or releasing truthful and newsworthy information that the government deemed to be "private."

agree that the founders wrote the Free Speech and Free Press Clauses into the First Amendment with the intention of preventing the system of censorship used in England where approval or licenses from the government were required before publication.¹³⁸ Potter Stewart, a former Associate Justice of the United States Supreme Court, believed that the founders saw America as a nation where the government did not control speech and the press provided a check on the government.¹³⁹ There are only certain narrow classes of speech, such as false statements of fact, obscenity, and true threats, that are not protected by the First Amendment.¹⁴⁰

Among the many protections of speech that the First Amendment provides, under most situations, the First Amendment shields the press from prior restraints,¹⁴¹ which are restrictions imposed by the government on speech prior to publication.¹⁴² The First Amendment

138. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBS. 648, 652 (1955). In 17th Century England, printing developed as a monopoly granted to the Crown. *Id.* No person could print any material unless it was licensed by the Stationers' Company, a monopoly run by the government. *Id.* Emerson argues that "[t]he struggle over licensing laws was certainly not forgotten" when the founders wrote the First Amendment. *Id.*

139. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975). ("The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches."). It must be noted that although some justices and scholars believe the Press Clause of the First Amendment creates special protections for the press as an institution, most courts have given the press the same freedoms granted to private citizens under the Free Speech Clause. Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011) ("Because the freedoms to publish and to disseminate speech are also protected by the Speech Clause, the Press Clause has been left with nothing to do. Members of the press thus enjoy the same freedoms of expression as any individual person, but nothing more."). *See also* Charles & O'Neill, *supra* note 137, at 1695 ("[T]he Supreme Court has never recognized the free press as a distinct and separate constitutional entity. Instead, the Court's free speech jurisprudence has engulfed any constitutional protections afforded to it.").

140. *See* Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 187 (2007). These categories of speech "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

141. *See* Emerson, *supra* note 138 ("[T]here can be little doubt that the First Amendment was designed to foreclose in America the establishment of any system of prior restraint . . . Indeed, it was argued in some quarters that this was the sole purpose of the First Amendment.").

142. Professors Rotunda, Nowak, and Young define prior restraint as "[a]ny governmental order which restricts or prohibits speech prior to its publication." RONALD D. ROTUNDA, JOHN E. NOWAK, & J. NELSON YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.16, at 72 (3d ed.

also protects the press from subsequent punishments, which are fines or jail time imposed on the press after publication.¹⁴³ First Amendment jurisprudence has established that although prior restraints are not per se unconstitutional, they “are the most serious and the least tolerable infringement on First Amendment rights.”¹⁴⁴ In *Near v. Minnesota*, the United States Supreme Court expressly invoked the doctrine of prior restraints for the first time, declaring that the “liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”¹⁴⁵ Furthermore, in *New York Times Co. v. United States*, also known as the “Pentagon Papers” case, the United States Supreme Court struck down an injunction against *The New York Times* and *The Washington Post* after the federal government sought to prohibit publication of classified documents leaked to the newspapers concerning America’s involvement in the Vietnam War.¹⁴⁶ In later United States Supreme Court jurisprudence, the Court recognized that the First Amendment prohibits the government from punishing the press after publication if the content contains truthful information about a matter of public concern and there is no government interest of the “highest order.”¹⁴⁷ In the years since the “Pentagon Papers” case, the United States Supreme Court has

1986). The Supreme Court has never established an exact definition of prior restraint. Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 6 (1989). The Court has applied the doctrine of prior restraint to various government activities, including judicial injunctions, government licenses, a state tax on newspapers, a license fee applied to literature vendors, a statute prohibiting publication of juvenile offenders without the court’s permission, and a zoning ordinance limiting theaters showing X-rated films, among others. *Id.* at 7.

143. See Sheryl A. Bjork, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. MIAMI L. REV. 165 (1989). A subsequent punishment “penalizes the disseminator ‘after the communication has been made as a punishment for having made it.’” *Id.* at 168.

144. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

145. *Near v. Minnesota*, 283 U.S. 697, 716–17 (1931).

146. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Justice Brennan went further in his concurring opinion and specified that there is an “extremely narrow class of cases” in which a prior restraint would overcome this elevated threshold. *Id.* at 726 (Brennan, J., concurring). Brennan wrote that such cases might arise when the “nation ‘is at war,’” when publication “might prevent actual obstruction to [the nation’s] recruiting service,” or when the publication involves “sailing dates of transports or the number and location of troops.” *Id.* The “Pentagon Papers” case stands for the proposition that freedom of the press trumps all but only the most profound governmental objectives. *Id.*

147. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979).

never upheld a content-based criminal prosecution of the press for publishing truthful speech that involves government activity.¹⁴⁸

B. Proper Constitutional Context

Although Louisiana's Ban on Gun Permit Speech penalizes speech after publication, the law *functions* much like a restraint on speech prior to publication akin to what is traditionally known as a prior restraint.¹⁴⁹ The categorization of a law such as Louisiana's Ban on Gun Permit Speech as a prior restraint or subsequent punishment may matter for procedural purposes,¹⁵⁰ but for courts analyzing the constitutional validity of a law, the "operation and effect" of the law is the central inquiry and the categorization of the law is less significant.¹⁵¹ In *Smith v. Daily Mail Publishing Co.*, the United States Supreme Court declared that "[w]hether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity."¹⁵²

148. See Stone, *supra* note 140, at 202.

149. See *Daily Mail*, 443 U.S. at 101. Respondents successfully argued that the statute at issue in *Daily Mail* that barred publication of juvenile defendants "is not in the classic mold of prior restraint, there being no prior injunction against publication. Nonetheless, [Respondents] contend that the prior-approval requirement acts in 'operation and effect' like a licensing scheme and thus is another form of prior restraint." *Id.* A similar argument can be made for Louisiana's Ban on Gun Permit Speech.

150. Although the line between defining an action by the government as a prior restraint and a subsequent punishment is blurry at best, the tangible distinction between the two is not in the "priorsness" of the restraint but in the consequences and procedural differences of violating the law. See Larry Alexander, *There is No First Amendment Overbreadth (But There are Vague First Amendment Doctrines); Prior Restraints Aren't "Prior"; and "As Applied" Challenges Seek Judicial Statutory Amendments*, 27 CONST. COMMENT. 439, 444 (2011). If a traditional prior restraint, an injunction for example, is ignored, the violator will have to comply with the injunction for fear of being punished for contempt of court. *Id.* On the other hand, if a statutory restriction on speech is ignored, the violator can raise a constitutional challenge to the charge. *Id.* Then, if the court nullifies the law as unconstitutional, the charge will be thrown out. *Id.* See also Stone, *supra* note 140, at 201.

151. "With respect to these contentions it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the state must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. 697, 708 (1931). See also *Daily Mail*, 443 U.S. at 97, 101 ("First Amendment protection reaches beyond prior restraints.").

152. *Daily Mail*, 443 U.S. at 101–02. See also Stone *supra* note 140, at 202 ("I conclude that the [prior restraint] test articulated in *Pentagon Papers* is

C. The Daily Mail Principle and Bartnicki

Louisiana's Ban on Gun Permit Speech fits squarely within a line of United States Supreme Court cases addressing analogous privacy laws forbidding speech.¹⁵³ In assessing Louisiana's Ban on Gun Permit Speech, a court would likely use the doctrinal rule that came out of the seminal case of *Smith v. Daily Mail Publishing Co.* and its subsequent jurisprudence.¹⁵⁴ In *Smith v. Daily Mail Publishing Co.*, the Court synthesized its prior jurisprudence into a principle still used today to assess privacy and free speech conflicts. The "Daily Mail principle" is the doctrinal rule that the First Amendment protects the publication of "truthful information about a matter of public significance" unless the government's restriction on speech satisfies a "state interest of the highest order."¹⁵⁵ In 2001, the Court expanded on the *Daily Mail* principle in *Bartnicki v. Vopper*, explaining that even the illegal conduct of another person in initially obtaining information about a matter of public concern does not remove the First Amendment shield from subsequent publication of that information.¹⁵⁶ Therefore, the Court has supported the principle that truthful information about a matter of public concern, even if obtained through the illegal activity of a third party, is constitutionally protected unless the government's restriction on the speech satisfies a "state interest of the highest order."¹⁵⁷

essentially the standard the Court would have applied in a criminal prosecution of the *Times* for publishing the Pentagon Papers.").

153. See generally Stone, *supra* note 140; Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829 (1978); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1964); Florida Star v. B.J.F., 491 U.S. 524 (1989); Bartnicki v. Vopper, 532 U.S. 514 (2001).

154. *Daily Mail*, 443 U.S. 97. See also Janelle Allen, *Assessing the First Amendment as a Defense for Wikileaks and Other Publishers of Previously Undisclosed Government Information*, 46 U.S.F. L. REV. 783 (2012) (discussing the applicability of *Daily Mail* and its progeny to situations in which the press publishes information that could violate the law).

155. See Florida Star v. B.J.F., 491 U.S. 524, 536–37 (1989) (internal quotation marks omitted). The Court assessed the law at issue in *Florida Star* under two separate inquiries under the "Daily Mail principle." First, the Court asked if the newspaper "lawfully obtain[ed] truthful information about a matter of public significance." *Id.* Secondly, the Court asked if punishing the appellant according to the law in question "further[ed] a state interest of the highest order." *Id.* at 537.

156. *Bartnicki*, 532 U.S. at 535.

157. *Id.* at 545. Although this is the sum of Justice Steven's plurality opinion in *Bartnicki*, scholars have been mindful to point out that the exact meaning and scope of the "Daily Mail principle" since *Bartnicki* is not entirely clear. Allen, *supra* note 154, at 798. After *Bartnicki*, two lower court cases did not apply the

D. Applying Jurisprudence to Louisiana's Ban on Gun Permit Speech

In applying this jurisprudence to Louisiana's Ban on Gun Permit Speech, the initial inquiry concerns whether the speech restricted by the law is truthful and a matter of public concern.¹⁵⁸ First, concealed handgun permit records are truthful. Permit records are documents based on factual assertions by the applicants and must be approved by the state in order for a permit to be granted.¹⁵⁹ Second, speech is considered to be a matter of public concern under the First Amendment when it can "be fairly considered as relating to any matter of political, social, or other concern to the community" or when it "is a subject of general interest and of value and concern to the public."¹⁶⁰ Gun permit record data is a matter of public concern because this information helps educate the public on the effectiveness of a government-controlled system that affects public safety.¹⁶¹ One of the most efficient ways the public can find out whether concealed handgun laws are functioning properly is for the press to evaluate the allocation of concealed handgun permits to see who has received permits.¹⁶² Members of the community have a legitimate interest in knowing if guns are in the hands of qualified individuals and if the

"Daily Mail principle" due to distinguishable facts. *Id.* at 807. In *Peavy v. WFAA-TV*, the defendant journalist assisted in the illegal activity himself. See *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 188–90 (5th Cir. 2000). In *United States v. Rosen*, a lobbyist transmitted classified information. See *United States v. Rosen*, 445 F. Supp. 2d 602, 607–09 (E.D. Va. 2006).

158. This is an application of the "Daily Mail principle" and *Bartnicki*. See Lee Levine, Nathan E. Siegel, & Jeanette Melendez Bead, *Handcuffing the Press: First Amendment Limitations on the Reach of Criminal Statutes as Applied to the Media*, 55 N.Y.L. SCH. L. REV. 1015, 1017 (2011).

159. See LA. REV. STAT. ANN. § 40:1379.3(A)(3) (Supp. 2014).

160. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011) (citations omitted) (internal quotation marks omitted). Speech on matters of public concern is "at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

161. See discussion *supra* Part I.A. See also Swanson, *supra* note 44, at 1590 ("Because issuing a concealed carry license is an exercise of government power . . . citizens have a right to know who receives one."). See also *CBS, Inc. v. Block*, 725 P.2d 470 (Cal. 1986) (opining that there is "public interest" in concealed handgun permit record).

162. See discussion *supra* Part I.A. See also Swanson, *supra* note 44, at 1590 ("Without knowing this licensee's identity, the public will not be able to review this government decision and perhaps notify the proper authorities.").

government is responsibly revoking licenses from unqualified citizens.¹⁶³

Because information contained in concealed handgun permit records satisfies the test for being “truthful information about a matter of public significance,” a governmental restriction on this speech would have to promote a “state interest of the highest order” to be considered constitutional.¹⁶⁴ The legislative history of the law shows that the alleged state interest in passing Louisiana’s Ban on Gun Permit Speech was to protect the privacy and safety of concealed handgun permit holders.¹⁶⁵ Yet, numerous Supreme Court decisions have considered proclaimed privacy interests to be constitutionally inadequate.

In *Cox Broadcasting Corp. v. Cohn*, protecting the privacy of a rape–murder victim was not enough to overcome the rights of the press to publish truthful, newsworthy information.¹⁶⁶ In *Cox*, the father of a deceased rape victim brought an invasion-of-privacy suit against a broadcasting company for releasing a report identifying his daughter, which violated a Georgia statute.¹⁶⁷ The United States Supreme Court held that the Georgia statute was unconstitutional because the First Amendment prohibited punishing the press for publishing a newsworthy matter of public concern, adding that “[t]he freedom of the press to publish that information appears to us to be of critical importance to our type of government.”¹⁶⁸

Four years later, in *Smith v. Daily Mail Publishing Co.*, the United States Supreme Court determined that the state’s interest in shielding the identification of a juvenile defendant was not enough to justify penalizing a newspaper that had published the defendant’s identity in violation of a West Virginia statute.¹⁶⁹ Similarly, in

163. See *supra* Part I.A; see also Swanson, *supra* note 44, at 1590. Citizens may want to know certain statistics about owners of concealed handgun permits, such as the percentage of licensees that have been convicted of crimes while holding a valid license or whether licensees are more likely to drive under the influence. Swanson, *supra* note 44.

164. See *Florida Star v. B.J.F.*, 491 U.S. 524, 536–37 (1989) (internal quotation marks omitted). For a discussion of the “*Daily Mail* principle,” see *supra* Part III.C. Since the Court does not provide an exact test for determining “state interest of the highest order,” the only way to determine if Louisiana’s interests are of the highest order is to compare to analogous precedent. *Id.*

165. See *supra* Part II.A.

166. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

167. See *id.* at 495.

168. *Id.*

169. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979) (“[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper” (quoting W. VA. CODE § 49-7-3 (1976))).

Florida Star v. B.J.F., the Court considered a circumstance in which a media outlet published a rape victim's identity in violation of a Florida rape-shield statute forbidding such publication.¹⁷⁰ Again, the Court concluded that even though the interests in protecting a rape victim's identity were "highly significant," they were not enough to overcome the protections guaranteed to the media under the First Amendment.¹⁷¹

In *Bartnicki v. Vopper*, the question before the Court was slightly different from the questions presented in its previous cases.¹⁷² In *Cox, Daily Mail*, and *Florida Star*, the information eventually published was legally obtained by the media and then published in violation of a privacy law.¹⁷³ In *Bartnicki*, however, the media outlet aired a recording between a local union president and the union's chief negotiator that was obtained through an *illegal* wiretap by a third party.¹⁷⁴ The Court, although splintered in a 4–2–3 decision, found that even though "[p]rivacy of communication[s] is an important interest," the Wiretapping Act must give way to the interest of full and free dissemination of information concerning public issues.¹⁷⁵ Reflecting on the Court's

170. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) ("No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. . . . An offense under this section shall constitute a misdemeanor of the second degree. . . ." (quoting FLA. STAT. ANN. § 794.03 (West 2014))).

171. *Florida Star*, 491 U.S. at 537.

172. *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) ("Simply put, the issue here is this: 'Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?'").

173. See *Cox*, 420 U.S. 469; *Daily Mail*, 443 U.S. 97; *Florida Star*, 491 U.S. 524.

174. The conversation took place between a local union president and the union's chief negotiator in the middle of union negotiations. *Bartnicki*, 532 U.S. at 518. In speaking about the timing of a proposed strike, one party said, "If they're not gonna move for three percent, we're gonna have to go to their, their homes To blow off their front porches" *Id.* at 518–19. An anonymous third party recorded the conversation, breaking the law, and the third party gave the recording to the president of a local citizens' organization that opposed the union's proposals. *Id.* at 514. The president then gave the recordings to a radio station that subsequently aired the recordings. *Id.* The radio station did not participate in the illegal interception of the conversation that violated the Wiretapping Act. *Id.* at 525.

175. *Id.* at 516. The conversation was deemed to be of public interest because the statements were made about a contentious labor negotiation. *Id.* at 525. The section of the Wiretapping Act at issue in *Bartnicki* was 18 U.S.C. § 2511(1)(c), which states that "any person who intentionally discloses, or endeavors to

own jurisprudence, four Justices in *Bartnicki* found that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”¹⁷⁶

Although in these cases the United States Supreme Court found that interests of the press outweighed privacy interests, the Court has stated that there are some “exceptional cases” in which the press would be restricted from publishing truthful, newsworthy information, such as when the country is at war, when prohibiting obscenity, and when the community is threatened by incitements to violence.¹⁷⁷ These limited situations contribute little to the public debate and are likely to result in imminent and serious harm.¹⁷⁸ But none of these exceptional circumstances are present when discussing Louisiana’s Ban on Gun Permit Speech.

In applying the United States Supreme Court’s jurisprudence to Louisiana’s Ban on Gun Permit Speech, it is unlikely that the privacy of a concealed handgun permit holder would be considered a state interest of the “highest order” or come close to meeting the standard of one of the “exceptional cases.” If the interests in protecting the privacy of phone conversations and the names of juvenile defendants and rape victims were not enough to overcome the First Amendment protection of the press to publish private

disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . . shall be punished.”

176. *Bartnicki*, 532 U.S. at 535. The Court discussed weighing the privacy interests of the local union president and the union’s chief negotiator with the interest in publishing matters of public importance. *Id.* at 534. The Court quoted Warren and Brandeis’ classic *Harvard Law Review* article in which the scholars declared that “[t]he right of privacy does not prohibit any publication of matter which is of public or general interest.” *Id.* at 534 (quoting Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)). Concurring Justices Breyer and O’Connor agreed with the plurality’s “narrow” holding that the lawful conduct of the radio station in publishing matters of unusual public concern was protected. *Bartnicki*, 532 U.S. at 535–36 (Breyer, J., concurring). The concurring justices gave strong weight to the fact that the speakers, the president of the teacher’s union, and the union’s chief negotiator were limited public figures because they “voluntarily engaged in public controversy” and “thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy.” *Id.* at 539. But the concurring justices preferred a more “ad hoc” test that relied on individual facts rather than broad immunity for the press. *Id.* at 536.

177. *See* *Worrell Newspapers, Inc. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984), *aff’d*, 469 U.S. 1200 (1985).

178. *See* *Stone*, *supra* note 140, at 203.

information without liability,¹⁷⁹ then the privacy of a citizen who applied for and received a permit to carry a handgun in public would not come close to superseding the rights of the press. The privacy of concealed handgun permit holders pales in comparison to the privacy interests of a sexual assault victim or an accused juvenile. Breaching the privacy of a sexual assault or rape victim results in more negative consequences than does breaching the privacy of a concealed handgun permit holder. If a sexual assault victim's identity is published, the victim could incur embarrassment and the release could potentially deter other rape victims from speaking out.¹⁸⁰ If an accused juvenile's identity is published, the juvenile could be stigmatized because of an act made early in life and could potentially be hindered from rehabilitation.¹⁸¹ These detrimental effects are of a much lesser degree when the identification of a concealed handgun permit holder is published. If the identity of a concealed handgun permit holder is released, there is little concern of deterring citizens from applying for gun permits¹⁸² or of a stigma attaching to the holders of concealed handgun permits.¹⁸³ Promoting gun owner privacy may further a state interest of protecting the privacy and safety of handgun permit holders, generally speaking, but that interest does not come close to meeting the threshold required by the Constitution to prohibit the press from publishing truthful information of a matter of public concern.

Therefore, a court is unlikely to find that protecting the identification of concealed handgun permit holders is of the highest order of state interests. Under the doctrine established by the United States Supreme Court, specifically the *Daily Mail* principle, Louisiana's criminalization of those who publish

179. See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 101 (1979); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

180. *Florida Star*, 491 U.S. at 537. The appellees argued that two of the reasons for forbidding publication of victims of sexual offenses was to protect the safety of victims, who may be targeted for retaliation if their identities were public, and to encourage victims of sexual crimes to report offenses without fear of being exposed to the public. *Id.*

181. *Daily Mail*, 443 U.S. at 104. The state asserted that keeping the identities of juvenile defendants confidential is important because releasing the identity of a juvenile defendant may encourage further antisocial conduct and could cause the juvenile to lose future employment or incur other negative consequences. *Id.*

182. See Swanson, *supra* note 44, at 1625 (explaining that "there is not enough evidence to say that disclosure actually conflicts with the goal of allowing citizens to carry or own firearms").

183. *Id.* at 1624 (commenting that "[w]hile in some communities owning a gun might be looked upon unfavorably, this is not the case in most of the country").

handgun records, which are truthful and of public concern, would not pass constitutional muster.¹⁸⁴

IV. DAMAGE CONTROL: STOPPING THE CRIMINALIZATION OF GUN PERMIT SPEECH

Although its unconstitutionality seems evident from a review of the jurisprudence, Louisiana's Ban on Gun Permit Speech will likely remain in effect for years to come. Repealing Louisiana's Ban on Gun Permit Speech would be ideal, but given the ease with which the bill passed through the Legislature and Louisiana's strong history of pro-gun legislation, a repeal is unlikely.¹⁸⁵ Until then, the only thing that can be done is to prevent other states from following in the footsteps of Louisiana. If states do not want the public or the press accessing gun permit records, states can

184. Additionally, Louisiana's Ban on Gun Permit Speech could likely be successfully challenged as a content-based restriction on speech. Although this Comment primarily focuses on the implications of Louisiana's Ban on Gun Permit Speech for the press, the broad language of the statute implies that citizens could also be punished for "disseminating" information about concealed handgun permits. See *supra* note 128. The law makes it a crime for "any person" to "intentionally release, disseminate, or make public in any manner any information contained in an application for a concealed handgun permit." See LA. REV. STAT. ANN. § 40:1379.3(A)(3)(b)(i) (Supp. 2014). Therefore, conversations among people in person, on the phone, or on the Internet are potentially implicated by the law. If a citizen was prosecuted under Louisiana's Ban on Gun Permit Speech and a challenge was brought, a court would likely analyze the law as a content-based restriction. In *Turner Broadcasting System, Inc. v. F.C.C.*, the Court defined content-based restrictions as those sought to "suppress, disadvantage, or impose differential burdens upon speech because of its content." 512 U.S. 622, 642 (1994). Here, the law targets a specific category of speech—speech related to ownership of concealed handgun permits. Content-based restrictions are evaluated under a strict scrutiny analysis. *Id.* at 658. Therefore, the law would be upheld only if it is necessary to promote a compelling governmental interest and is the least restrictive means to further that interest. *Id.* at 680. Similar to the reasoning used to evaluate why the state's interests of handgun permit owner safety and privacy would not be strong enough to overcome the "*Daily Mail* principle" standard of a state interest of the "highest order," a court is unlikely to find that the privacy and safety of concealed handgun permit holders are compelling state interests. See *infra* Part III.D. On the other hand, if the Court considered Louisiana's Ban on Gun Permit Speech a content-neutral restriction, the law would likely fail the *O'Brien* test because the law does not further an "important or substantial government interest," and thus it would still be deemed unconstitutional. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

185. House Bill No. 8 passed in the Louisiana Senate by a margin of 33–2, while it passed in the Louisiana House by 76–18. *2013 Regular Session*, LA. ST. LEGISLATURE, <http://www.legis.la.gov/Legis/BillInfo.aspx?s=13RS&b=HB8&sbi=y>, archived at <http://perma.cc/CQ9T-RH4S>. For more on Louisiana's history of pro-gun legislation, see *supra* Part II. See also Long, *supra* note 97.

constitutionally remove gun permits from the public records and make them completely confidential,¹⁸⁶ but they should not tread on the First Amendment and pass a law similar to Louisiana's Ban on Gun Permit Speech. Missouri, Tennessee, and South Dakota have already considered passing similar bans of gun permit speech.¹⁸⁷ In the future, other states will undoubtedly consider similar legislation, but they should reverse course and ignore the precedent set by Louisiana, choosing instead to respect the guarantees of the First Amendment.

There are at least five negative side effects of passing such laws. First, Louisiana's Ban on Gun Permit Speech and similar laws prevent citizens and potential whistleblowers from coming forward if they spot errors in the way the state allocates gun permits or if the state fails to revoke gun permits from felons or other unqualified citizens.¹⁸⁸ With these laws in place, a whistleblower could not legally bring these improprieties to the attention of a media outlet, and the media outlet could not report this information to the public and put pressure on the government to fix these problems.¹⁸⁹

A second adverse consequence of passing criminalization laws is the chilling effects such laws would have on gun permit speech. A ban on gun permit speech curbs not only criticism of gun permits, but it also curbs complimentary speech. Laws banning gun permit speech strike against the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁹⁰

Third, laws forbidding gun permit speech involving the identification of permit holders also burden basic news reporting. The media will have to be careful when covering basic newsworthy events such as pro- or anti-gun rallies, gun shows, or daily crime reports in fear of violating the statute by including the name of a gun permit holder.¹⁹¹ The media may end up choosing not to cover these

186. See discussion *supra* Part I.B.

187. See discussion *supra* Part I.B.3.

188. See Gavin Aronsen, *New Louisiana Law Would Jail Journos for Publishing Gun Info*, MOTHER JONES (May 22, 2013, 3:39 PM), <http://www.motherjones.com/politics/2013/05/louisiana-gun-bill-journalist-criminal-jindal>, archived at <http://perma.cc/R8QK-AJ2R>; see also Swanson, *supra* note 44, at 1621.

189. Aronsen, *supra* note 188.

190. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This has been a repeated statement by the United States Supreme Court describing one of the core purposes of the First Amendment.

191. Jeff Zalesin, *Louisiana Criminalizes Publishing Gun Permit Information*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (June 24, 2013), <http://www.rcfp.org/browse-media-law-resources/news/louisiana-criminalizes->

events in fear of criminal prosecution, even though these events have substantial interest value to the public. In an already tough economic climate for the press, especially the newspaper industry, some media outlets would struggle to pay \$10,000 fines.¹⁹² This is not the type of free press that the founding fathers intended.¹⁹³

Another negative impact of gun speech criminalization laws is the consequences that those laws could have on safety. One of the motivations of the Louisiana Legislature for passing Louisiana's Ban on Gun Permit Speech was to protect the safety of gun permit holders.¹⁹⁴ Louisiana Representative Jeff Thompson argued that publicizing a citizen's ownership of a concealed handgun would put the permit holder at a higher risk of home burglaries, but the opposite result is just as plausible.¹⁹⁵ A public map and list with the addresses of concealed handgun permit holders may actually decrease theft against permit holders and increase theft against innocent neighbors without handgun permits.¹⁹⁶

Finally, state and federal legislators are expected to support and defend the Constitution of the United States, yet legislators who support criminalizing speech on gun permits are ignoring this First Amendment commitment. In the four states that have considered passing legislation criminalizing gun permit speech—Missouri,

publishing-gun-permit-information, archived at <http://perma.cc/W7V6-7WL9> (quoting Louisiana media lawyer Loretta Mince remarking, "even a reporter who wasn't trying to directly violate the statute might nonetheless find themselves in violation of the statute just pursuing their regular journalism activities").

192. See PEW RESEARCH CTR., THE STATE OF THE NEWS MEDIA 2013 (2014), available at <http://stateofthemediamedia.org/2013/overview-5/>, archived at <http://perma.cc/FLF7-7S9T> (describing, among other topics, the current economic struggles of the press).

193. See Emerson, *supra* note 138; see also *supra* Part III.A.

194. See *House Hearing*, *supra* note 16.

195. ALESSANDRO ACQUISTI & CATHERINE TUCKER, MIT SCH. OF BUS., GUNS, PRIVACY, AND CRIME (2010). The MIT School of Business completed a study attempting to answer the question of how the release of addresses of those with concealed handgun permits would affect crime. *Id.* The study focused on the change in the crime rates after a local newspaper released a database containing the names and zip codes of concealed handgun permit holders. *Id.* The study found that crimes such as burglaries increased in areas with fewer gun permits, while those crimes decreased in areas with more gun permits. *Id.*

196. See Swanson, *supra* note 44, at 1624. Swanson maintains the view that the fact that someone is likely to have a gun in his home might dissuade criminals from targeting that person because the person will have a means by which to combat the criminal. *Id.* Additionally, there is no evidence in states where gun records are public that the homes of licensees are being targeted more than others. *Id.*

Tennessee, South Dakota, and Maryland—many legislators have seen the constitutional flaws of these bills but still support them, often for political gain.¹⁹⁷ For example, Missouri Representative Ed Schieffer admitted that Missouri's proposed law, which criminalized the release of concealed handgun permits similar to Louisiana's Ban on Gun Permit Speech, would be deemed unconstitutional, but he said he was considering voting for the law because he did not "want to be on record for not supporting guns."¹⁹⁸ Schieffer's fellow Missouri House Representative, Ben Harris, echoed similar sentiments, saying, "if you don't vote for any gun bill, it will kill you."¹⁹⁹

The benefit of Louisiana's Ban on Gun Permit Speech is that it can serve as a warning for the rest of the country. Louisiana's law ignores the First Amendment and neglects to consider the law's negative consequences. These types of laws will prevent the publication of information gleaned from whistleblowers, chill both pro- and anti-gun speech, hinder news reporting, negatively affect safety, and potentially cause political mistrust. To states considering legislation that criminalizes gun permit speech: heed Louisiana's dangerous example and resist introducing, supporting, and voting for laws punishing gun permit speech.

CONCLUSION

In the heat of a shootout between free speech and the privacy of gun permit holders, the Louisiana Legislature fired the first shot by adopting Louisiana's Ban on Gun Permit Speech. The law shields concealed handgun permit holders while targeting free speech, and in turn, the law insulates the government from public scrutiny—but the battle is far from over. As the number of gun permits continues to rise and the press attempts to cling to its remaining rights, similar laws may be proposed and adopted. Legislatures in other states should resist the temptation to follow Louisiana's lead and, instead, support and defend the Constitution of the United States, as they vowed to do. Protecting the privacy of gun permit holders should be a goal of the government, but not when it comes at the cost of infringing upon free speech, one of the tenets upon which this country was founded. Louisiana's Ban on Gun Permit Speech should be an example of the type of

197. See, e.g., *supra* note 80.

198. *Id.*

199. *Id.* The quoted language above illustrates the political pressure on elected officials to support pro-gun legislation. See Robert Draper, *Inside the Power of the N.R.A.*, N.Y. TIMES (Dec. 12, 2013), http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html?_r=0, archived at <http://perma.cc/Z5QE-5KWJ>.

unconstitutional legislation other states should avoid. Louisiana was the first state to criminalize reporting on gun permits. Let Louisiana also be the last.

*Michael J. Lambert**

* J.D./D.C.L., 2015, Paul M. Hebert Law Center, Louisiana State University. I would like to thank my family and friends for their constant support, encouragement, and patience through the writing process. I also want to thank the entire *Louisiana Law Review* family for giving me this opportunity. Finally, I want to thank Professors Christine Corcos, Michael Coenen, and Kelli Sager for their feedback on my Comment and for inspiring me to love media law and the First Amendment. This Comment is dedicated to my three grandparents who passed away during my law school career: Peter Albert Keller, Sr., Helen Heltz Lambert, and Joseph Lawrence Lambert.

