

COMMENT

DISARMING KNOWLEDGE OR REVEALING THE CONCEALED: BALANCING DEMOCRATIC ACCOUNTABILITY AND PERSONAL PRIVACY FOR WISCONSIN'S CONCEALED CARRY PERMIT REGISTRY

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This Comment argues that Wisconsin law currently does not provide sufficient transparency for assessing whether the state's concealed carry permitting process is operating correctly and keeping concealed weapons in law-abiding hands. By placing stringent restrictions on law enforcement and public access to concealed carry permit records, the Wisconsin Legislature undervalued the interest in government accountability in favor of overbroad privacy protections. Critics of Wisconsin's concealed carry law have identified possible loopholes in the permitting process—while evidence from other states suggests that—despite restrictions and criminal background checks, criminals have been able to obtain concealed carry permits.

The difficulty lies in striking an appropriate balance between the interests of government accountability and individual privacy. Other states have approached this problem by adopting creative combinations of accountability mechanisms that seek to inform policy through a more open exchange of information. The three most common accountability mechanisms are statistical reports, broad law enforcement access, and public records designation. While not all of these measures would be palatable to Wisconsin legislators, this Comment proposes relatively minor changes to the current policy—such as expanding the content included in the statistical reports, broadening the scope of law enforcement access, or opening the records to the public under limited circumstances—that would promote greater government transparency and still afford privacy protection to individual permit holders.

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INTRODUCTION: OLD DEBATE, NEW QUESTIONS

“I do not accept that we cannot find a common-sense way to preserve our traditions, including our basic Second Amendment freedoms and the rights of law-abiding gun owners, while at the same time reducing the gun violence that unleashes so much mayhem on a regular basis.”¹ These words by the President, part of a eulogy to the twelve victims of a mass shooting at the D.C. Navy Yard,² capture the frustration of the gun control debate. Mass shootings of unprecedented violence and ferocity shook the entire nation in 2012, in Aurora,³ Oak Creek,⁴ and Newtown.⁵ These horrific crimes propelled the perennial gun

1. President Barack Obama, Remarks at the Memorial Service for Victims of the Navy Yard Shooting (Sept. 22, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/09/22/remarks-president-memorial-service-victims-navy-yard-shooting>.

2. See Barbara Starr, Catherine E. Shoichet & Pamela Brown, *12 Victims Slain in Navy Yard Shooting Rampage; Dead Suspect ID'd*, CNN (Sept. 16, 2013, 10:34 PM), <http://www.cnn.com/2013/09/16/us/dc-navy-yard-gunshots>.

3. A gunman opened fire at a movie theater in Aurora, Colorado, injuring fifty-eight people and killing twelve. See *Theater Shooting in Aurora*, CNN, <http://www.cnn.com/SPECIALS/us/colorado-shooting/index.html> (last visited Feb. 24, 2014).

4. A hate-motivated shooting at a Sikh Temple in Oak Creek, Wisconsin, killed six and wounded three. See Ted Rowlands, *Sikhs Repair, Reclaim Temple after Rampage*, CNN (Aug. 10, 2012, 10:38 AM), <http://www.cnn.com/2012/08/09/justice/wisconsin-temple-shooting/index.html>; *At Service, Holder Calls Sikh Temple Shooting a Hate Crime*, CNN (Aug. 10, 2012, 6:03 PM), <http://www.cnn.com/2012/08/10/us/wisconsin-temple-shooting>.

5. Perhaps the most traumatic mass shooting in American history, a twenty-year-old gunned down twenty school-aged children and six adults at Sandy Hook Elementary School in Newtown, Connecticut. See generally *Sandy Hook School*

control debate to the center of national consciousness. In recent years, the gun control debate has assumed new dimensions through controversial pro-gun laws including “super castle doctrine” laws,⁶ “stand-your-ground” laws,⁷ and concealed carry laws. All of these measures are intended to promote and expand individual rights of self-defense and to deter crime.⁸

In 2011, the Wisconsin Legislature passed Wisconsin Act 35, enacted as Wisconsin Statute section 175.60, allowing citizens to obtain permits to carry concealed weapons in public.⁹ While gun advocates have hailed concealed carry as a victory for gun rights and self-defense,¹⁰ others view the increased public presence of guns as a danger to the community.¹¹

Shootings, CNN, <http://www.cnn.com/SPECIALS/us/connecticut-school-shooting/index.html> (last visited Feb. 24, 2014).

6. “Castle doctrine” refers to the common law lack of duty-to-retreat when a person is attacked in his or her home; “super castle doctrine” allows the defender to use deadly force and grants a legal presumption of reasonability. See Wyatt Holliday, “*The Answer to Criminal Aggression is Retaliation*”: *Stand-Your-Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407, 408–09 (2012). See generally Steven Jansen & M. Elaine Nugent-Borakove, *Expansions to the Castle Doctrine: Implications for Policy and Practice*, NAT’L DIST. ATTORNEYS ASS’N, <http://www.ndaa.org/pdf/Castle%20Doctrine.pdf> (discussing whether the expansion of the “castle doctrine” could have unintended consequences for public safety).

7. “Stand-your-ground” laws eliminate the duty-to-retreat from attacks that occur anywhere. See Holliday, *supra* note 6, at 409. This entered the public consciousness largely through media coverage of the shooting of Trayvon Martin and the subsequent acquittal of his shooter, George Zimmerman, despite the fact that Zimmerman’s attorneys did not use a “stand your ground” defense. Maggie Clark, *Zimmerman Verdict Renews Focus on ‘Stand Your Ground’ Laws*, USA TODAY (July 15, 2013, 2:56 PM), <http://www.usatoday.com/story/news/nation/2013/07/15/stateline-zimmerman-stand-your-ground/2517507>.

8. See, e.g., *infra* note 9 and accompanying text.

9. WIS. STAT. § 175.60 (2011–12); *Wisconsin Concealed Carry Gun Law Signed by Governor Scott Walker*, HUFFINGTON POST (July 8, 2011, 5:45 PM), http://www.huffingtonpost.com/2011/07/08/wisconsin-concealed-carry-scott-walker_n_893548.html.

10. See, e.g., *Wisconsin State Legislature Passes Landmark Right-to-Carry Legislation*, NRA-ILA (June 21, 2011), <http://www.nraila.org/News/Read/NewsReleases.aspx?ID=15254> (quoting Chris Cox, executive director of the NRA Institute for Legislative Action, “Today, Wisconsinites are one step closer to being able to defend themselves outside their homes”); Press Release, Rep. Jeff Mursau, Mursau Delivers Concealed Carry to Wisconsin Citizens, *available at* <http://legis.wisconsin.gov/assembly/mursau/pressreleases/Pages/MURSAU-DELIVERS-CONCEALED-CARRY-TO-WISCONSIN-CITIZENS.aspx> (“[C]oncealed firearms improve our ability to secure ourselves, including people who choose not to carry at all.”).

11. See, e.g., LEGAL CMTY. AGAINST VIOLENCE, *GUNS IN PUBLIC PLACES: THE INCREASING THREAT OF HIDDEN GUNS IN AMERICA* (2011), *available at* http://www.waveedfund.org/sites/waveedfund.org/files/LCAV_GunsInPublicPlaces.pdf. A survey conducted by the Wisconsin Anti-Violence Effort in 2011 suggested that about

The National Rifle Association (NRA), America's most powerful gun rights advocacy group, has been quick to claim the recent shootings as evidence that more law-abiding citizens should be carrying firearms.¹² In the now-famous words of the NRA's Executive Vice President and CEO, Wayne LaPierre: "The *only* thing that stops a *bad* guy with a gun is a *good* guy with a gun."¹³ Yet this dubious proposition sidesteps the question of what the people, through the government, can and should do to prevent "bad guys" from acquiring guns in the first place. Many fear that increasing the number of weapons carried in public creates a greater risk of violent escalation in any conflict;¹⁴ as the public sphere is open to all, the people have a vested interest in ensuring that legally concealed weapons are in the hands of the "good guys."

Although Wisconsin's law requires the Department of Justice to maintain a database of all currently registered permit holders,¹⁵ these records are off limits to the public and only available to law enforcement in very limited circumstances.¹⁶ To best reflect Wisconsin's dedication to principles of government transparency and accountability, the legislature should reassess the complete exclusion of concealed carry permits from public records requests and formulate new provisions that better balance both privacy and democratic interests. The proponents of these restrictions may argue that opening these records to the public, as many other government records are, would violate the permit holders' privacy

60 percent of Wisconsin voters opposed the passage of concealed carry legislation. WISCONSIN ANTI-VIOLENCE EFFORT, GUNS IN PUBLIC: WISCONSIN VOTERS OPPOSE THE LEGALIZATION OF CARRYING CONCEALED WEAPONS—FINDINGS FROM A STATEWIDE SURVEY 2, 4 (2011), *available at* [http://www.waveedfund.org/sites/waveedfund.org/files/Survey%20Presentation%20\(2\).pdf](http://www.waveedfund.org/sites/waveedfund.org/files/Survey%20Presentation%20(2).pdf).

12. Wayne LaPierre, NRA, *NRA Press Conference* (Dec. 21, 2012) (transcript available at home.nra.org/pdf/Transcript_PDF.pdf).

13. *Id.* at 5 (emphasis original).

14. See LEGAL CMTY. AGAINST VIOLENCE, *supra* note 11 ("Members of the public who carry guns risk escalating everyday disagreements into public shootouts, especially in places where disputes frequently occur . . ."). See, e.g., Denise Lockwood, *One Brother Had a Gun, Another Had a Sword; Caledonia Standoff Ends Peacefully*, CALEDONIA PATCH (Nov. 29, 2011, 4:21 PM), <http://caledonia.patch.com/groups/police-and-fire/p/one-brother-had-a-gun-another-had-a-sword-caledonia-sc8c7431a3d> (describing an incident that escalated from fighting over a package of cigarettes to an armed standoff between two brothers, one of whom was a CCW permit holder); Jenna Sachs, *Two Men Accused of Firing Shots at Each Other While Driving*, FOX6 MILWAUKEE (July 12, 2013, 10:12 PM), <http://fox6now.com/2013/07/12/two-men-accused-of-firing-shots-at-each-other-while-driving> (describing 2013 news story involving two concealed carry weapons (CCW) permit holders getting into a driving shootout in Milwaukee). See also *infra* note 104 (listing studies intended to gauge whether concealed carry makes the public feel more or less safe).

15. WIS. STAT. § 175.60(12)(a) (2011–12).

16. § 175.60(12)–(12g).

and potentially jeopardize their security.¹⁷ Yet the necessity of government accountability must temper these concerns to ensure that the registration process is operating correctly and efficiently.

An analysis of the policies of allowing concealed carry is beyond the scope of this Comment; the issue, as with most gun control issues, is polarizing and hotly contested. Instead, this Comment focuses on the interests of government accountability and individual privacy in the issuance of concealed carry permits. It argues that Wisconsin's law fails to strike an appropriate balance between the two, and, after examining the accountability mechanisms of other states, proposes three measures—an expanded statistical report, increased law enforcement access, and limited public access—that would establish a better balance. Part I provides legal background discussing Wisconsin's concealed carry statute, open records laws, and privacy laws. Part II analyzes the status of Wisconsin's concealed carry records and the primary interests at stake—government accountability and individual privacy—before exploring the three major accountability mechanisms the states use to balance these interests. Part III proposes solutions that could strike a better balance for Wisconsin, and Part IV offers brief concluding remarks.

I. THE STATUTORY BACKGROUND

This Part describes Wisconsin laws governing concealed carry, open records, and privacy. Each Subpart relies on a combination of statutes and historical information to explore the background of these laws. While this Part deals primarily with statutory law, Part II further explores and analyzes the interests underlying the goals of government accountability and individual privacy.¹⁸

A. Wisconsin's Concealed Carry Statute

The origins of Wisconsin's concealed carry law lie in the 1998 state constitutional amendment recognizing the right of citizens to bear arms.¹⁹

17. Much ire has been provoked in some situations where local journalists published concealed carry information. For a disturbing account of the fallout one Ohio journalist experienced after publishing concealed carry records, see Rick Schmitt, *Carrying Concealed Weapons Just Keeps Getting Easier*, CTR. FOR PUB. INTEGRITY (Nov. 15, 2011, 6:00 AM), www.publicintegrity.org/2011/11/15/7396/carrying-concealed-weapons-just-keeps-getting-easier. See also discussion *infra* notes 145–55 and accompanying text regarding New York and North Carolina's recent statute changes.

18. See *infra* Part II.B.2.

19. Jeffrey Monks, Comment, *The End of Gun Control or Protection against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 WIS. L. REV. 249, 249–50 (discussing the debate over the

Subsequent Wisconsin Supreme Court decisions assessed the impact of this amendment on existing statutes that prohibited carrying concealed weapons, ruling that the statutes were not unconstitutional in all cases—but could be—based on the circumstances.²⁰ In 2003, the legislature passed the first version of a concealed carry law for Wisconsin, but then-Governor Jim Doyle vetoed the bill.²¹ The legislature passed a similar bill in 2006, and Doyle vetoed it again.²² The legislation returned in 2011, after the 2010 general election placed the state under the control of Governor Scott Walker and a Republican majority.²³ Through the adoption of Wisconsin Statute section 175.60, Wisconsin became a “shall issue” state,²⁴ meaning that concealed carry permits will be granted to any applicants who satisfy the basic requirements: a background check²⁵ and some training.²⁶

The Wisconsin Department of Justice issues the concealed carry permits and maintains records of valid permit holders.²⁷ Section 175.60(12) governs the “Maintenance, Use, and Publication of Records by the Department” and prescribes the stringent limitations on access to the permit holder registry.²⁸ First, access to these records is explicitly shielded from public records inquiries by section 175.60(12)(c):

Notwithstanding s. 19.35, the [DOJ], the [DOT], or any employee of either department may not make information

amendment, and how through passage, Wisconsin became the forty-fourth state to adopt such a provision).

20. WIS. LEGIS. REFERENCE BUREAU, CONCEALED WEAPON LAWS IN THE STATES, WISCONSIN BRIEFS 1 (2006), *available at* <http://legis.wisconsin.gov/lrb/pubs/wb/06wb6.pdf>. The cases were *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (finding statutory prohibition against concealed carry did not violate the state constitution in all cases) and *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785 (finding that the statutory prohibition was unconstitutional in that case).

21. WIS. LEGIS. REFERENCE BUREAU, *supra* note 20, at 1.

22. *Id.*

23. *Fall 2010 General Election Results*, MILWAUKEE J. SENTINEL, Nov. 2, 2010, <http://www.jsonline.com/news/statepolitics/105000829.html>.

24. There are two main kinds of issuance policies for states: “shall issue” and “may issue.” Richard S. Grossman & Stephen A. Lee, *May Issue versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws, 1960–2001*, 26 CONTEMP. ECON. POL’Y 198, 198–99 (2008). In a “shall issue” state, the registering authority is required by statute to grant CCW permits to all qualified applicants. *Id.* In a “may issue” state, the registering authority has greater discretion in determining whether to grant a permit and may require additional information such as reasons why the applicant requires a permit, proof of good character through references, etc. *Id.*

25. WIS. STAT. § 175.60(9)–(9g) (2011–12) (outlining the background check process).

26. § 175.60(4) (outlining the acceptable forms of training).

27. § 175.60(2)(a), (12).

28. § 175.60(12).

obtained under this section available to the public except in the context of a prosecution for an offense in which the person's status as a licensee or holder of a certification card is relevant or through a report created under sub. (19).²⁹

The public has essentially no access to these records, and law enforcement does not fare much better.

Under section 175.60(12)(b), law enforcement officers may only access the permit registry for three very limited purposes.³⁰ First, an officer may access the permit registry to ascertain the validity of a permit.³¹ Second, an officer may access the registry to confirm that an individual is a permit holder if he or she does not have the permit with him or her.³² Finally, an officer may access the registry while investigating whether an individual made intentionally false statements while applying for his or her permit.³³ These restrictions limit law enforcement access exclusively to questions surrounding the permit itself.³⁴ These limitations shield information about the issuance, denial, and revocation of concealed carry permits from public and law enforcement scrutiny, insulating the Department of Justice from democratic accountability.

B. Government Accountability and Wisconsin's Open Records Law

Democratic accountability is entirely dependent on the freedom of information; the people's ability to enact policy changes through elections and ballot initiatives requires knowledge of the policy's failings.³⁵ When this information is withheld from the public, legislators and policymakers escape accountability.³⁶ Seeking to promote the democratic values of transparency and accountability, the federal

29. § 175.60(12)(c). The report referred to in the last sentence is described in section 175.60(19). This annual report is devoted to statistics regarding the number of applications for permits; the number of approvals and denials; and reasons for denials, suspensions, and revocations. *Id.* Any personal identifying information is prohibited from being included in this report. *Id.*

30. § 175.60(12)(b).

31. *Id.*

32. *Id.*

33. *Id.*

34. § 175.60(12)-(12g).

35. See Sverre David Roang, Comment, *Toward a More Open and Accountable Government: A Call for Optimal Disclosure under the Wisconsin Open Records Law*, 1994 WIS. L. REV. 719, 726-29 (providing the arguments in favor of government accountability through open records).

36. For an excellent articulation of the value of open records laws, see Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 182-84 (1999).

government and all the states have enacted legislation that, in theory, should allow public access to a wide array of government information.³⁷

Wisconsin's progressive heritage made government transparency a high priority, and in 1917 it became the first state to adopt a unified public records law.³⁸ Wisconsin's current open records laws were first passed in 1983 and are codified in Wisconsin Statutes sections 19.31–19.39.³⁹ The “Declaration of Policy,” section 19.31, outlines the law's broad scope:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.⁴⁰

Subsequent statutes refined the broad statement of policy, but it illustrates the value the Wisconsin legislature placed on open records. Applied broadly, the issuance of concealed carry permits would obviously fall under the “affairs of government.”

C. Privacy Law in the State of Wisconsin

Wisconsin also has a longstanding dedication to protecting the privacy rights of its citizens. Wisconsin Statute section 995.50 recognizes the right of privacy, provides a statutory basis for invasion of privacy torts,⁴¹ and ensures that the developing common law will continue to afford further privacy protection.⁴² The state has also enacted an “opt-out” law for people applying for licenses through the Departments of Transportation, Natural Resources, and Regulation and Licensing that allows the applicant to prevent the state from providing his or her identifying information to mass marketers.⁴³

37. See *Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/open-government-guide> (last visited Mar. 1, 2013) (providing online links to the open records laws of all fifty states and the federal government to aid journalists).

38. THE WISCONSIN PUBLIC RECORDS AND OPEN MEETINGS HANDBOOK §§ 1.4–1.6 (Melanie R. Swank ed., State Bar of Wisconsin CLE Books 3d ed. 2008).

39. *Id.* § 1.6.

40. WIS. STAT. § 19.31 (2011–12).

41. § 995.50(2).

42. § 995.50(3).

43. WIS. LEGISLATIVE REFERENCE BUREAU, PRIVACY LAWS IN WISCONSIN, WISCONSIN BRIEFS 5 (July 2008), available at <http://legis.wisconsin.gov/lrb/pubs/wb/08wb9.pdf>.

Disclosure of certain kinds of personal information through public records requests will sometimes require notification to the subject of the request, alerting the subject to the potential privacy intrusion.⁴⁴ Wisconsin courts have also recognized that, when determining whether to respond to an open records request, privacy interests can outweigh public interest if revealing the information would threaten personal privacy or safety.⁴⁵ Records that are exempt from public records requests include government employee personnel records, address and personal contact information of state or local public office holders, identities of law enforcement informants, and financial identifying information.⁴⁶ These exemptions, like concealed carry records,⁴⁷ contain personally identifying information; but, unlike the concealed carry records, they do not directly relate to issues of government accountability. Unlike a public official's address or phone number, which do not relate to the performance of his or her duties, concealed carry permit holder identities and other associated records are the most direct means for assessing whether the permitting process is effectively keeping permits out of the wrong hands.

II. ANALYZING THE INTERESTS AND ACCOUNTABILITY MECHANISMS

This Part first discusses the status of Wisconsin's concealed carry records as if the statutory prohibition against disclosure did not exist. The focus then shifts to defining the two major policy interests: accountability and privacy. Finally, in Subpart C, it explores the three accountability mechanisms and their implementation in other states.

A. The Status of Wisconsin's Concealed Carry Records

Concealed carry permit records—applications, issuances, denials, suspensions, and revocations—are a unique kind of record; to analyze the status of these government documents, the first major question is,

44. WIS. LEGISLATIVE REFERENCE BUREAU, AN INFORMED PUBLIC: PART TWO: THE PUBLIC RECORDS LAW (Oct. 2006), available at http://legis.wisconsin.gov/lrb/gw/gw_17.pdf.

45. WIS. DEP'T OF JUSTICE, WISCONSIN PUBLIC RECORDS LAW WIS. STAT. §§ 19.31–19.39 COMPLIANCE OUTLINE 31 (2012) [hereinafter COMPLIANCE OUTLINE], available at <http://www.doj.state.wi.us/sites/default/files/dls/public-records-compliance-outline-2012.pdf>.

46. WIS. STAT. § 19.36 (2011–12) (listing these and other exemptions from public records requests).

47. See WIS. STAT. § 175.60(2m) (2011–12) (describing the components of a CCW permit as including the licensee's full name, date of birth, residence address, physical description, date of issuance, date of expiration, name of the state, and a unique identification number).

apart from the statutory prohibition against releasing this information,⁴⁸ would these documents fall within the purview of Wisconsin's open records law? According to Wisconsin's open records law, a government record can be "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved . . . which has been created or is being kept by an authority."⁴⁹ Per the declaration of policy in section 19.31, all requests are supposed to be "construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business."⁵⁰ Indeed, the specific prohibition in the Wisconsin law⁵¹—and in other states' laws⁵²—stating that concealed carry permit records are not subject to open records requests, promotes the inference that, without this express limitation, such documents could be subject to open records laws. Yet, even though the courts have found a strong presumption of openness in the open records statute, it is not absolute.⁵³

Even without the statutory prohibition, there might still be limitations on access to these records. The Wisconsin Department of Justice (DOJ) has additional guidelines that would determine whether the concealed carry registry or individual records would be accessible to the public.⁵⁴ An explanation of this four-step balancing test is available on the DOJ website.⁵⁵ Following this procedure, an open records request must satisfy four conditions: (1) the record(s) must exist; (2) the requester must be entitled to access the record pursuant to statute or court

48. § 175.60(12).

49. WIS. STAT. § 19.32(2) (2011–12). The state's broad definition of an "authority" is provided in section 19.32(1) to include "a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order," as well as several other categories. § 19.32(1).

50. § 19.31.

51. WIS. STAT. § 175.60(12) (2011–12) ("Notwithstanding s. 19.35, the department of justice . . . may not make information obtained under this section available to the public except in the context of a prosecution for an offense in which the person's status as a licensee or holder . . . is relevant.").

52. See, e.g., ALASKA STAT. § 18.65.770 (2013) ("[A]pplications, permits, and renewals are not public records."); OHIO REV. CODE ANN. § 2923.129(B)(1) (LexisNexis 2013) ("[T]he records that a sheriff keeps relative to the issuance, renewal, suspension, or revocation of a concealed handgun license . . . are confidential and are not public records.").

53. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, 699 N.W.2d 551 (finding that the public interest in keeping records of an internal police investigation outweighed the public interest in disclosure); *but see id.* at ¶ 85, ¶ 128 (Abrahamson, C.J., dissenting) (rejecting the majority's position that this was an exceptional case that should be exempt from the presumption of openness).

54. COMPLIANCE OUTLINE, *supra* note 45, at 17.

55. *Id.* at 17–30.

decision; (3) the record cannot be prohibited pursuant to statute or court decision; and (4) the records custodian must decide whether the public interest in disclosure outweighs the public interest in nondisclosure.⁵⁶ In the hypothetical scenario where there was no statutory prohibition against treating the permit registry as open records, any requests for access would still need to satisfy this balancing test. According to the DOJ guidelines, this is a policy-based inquiry where the records custodian must consider the policy values of opening or shielding the records based on the specifics of the request.⁵⁷

In many ways, applying the DOJ's balancing test could have provided the flexibility necessary for evaluating the permit process itself while also protecting the privacy interests of law-abiding permit holders. If a permit holder was accused of a crime, the public interest in revealing that information could outweigh the individual's privacy. Law-abiding permit holders would retain their privacy, as the public interest in keeping their records concealed would easily outweigh any public interest in revealing them. The legislature's decision to replace the discretionary balancing test with an inflexible prohibition does little to improve protections for law-abiding permit holders—who probably would have been shielded by the balancing test—but shields the names of suspended and revoked permit holders. This flouts both the presumption of openness and the public interest by discarding the balancing test and precluding even the strongest public interest in disclosures from carrying any weight.⁵⁸

In a token gesture towards oversight, the DOJ provides an annual statistical report of the concealed carry permitting process that is issued to the legislature and the governor.⁵⁹ This report must contain information including “the number of licenses applied for, issued, denied, suspended, and revoked.”⁶⁰ Finally, the report must also include reasons for all application denials, suspensions, and revocations.⁶¹ Ultimately, however, Wisconsin's report is a weak implementation of a relatively weak accountability mechanism.⁶²

56. *Id.* at 17–18.

57. *Id.* at 26–27.

58. See Bill Lueders, *State Weapons Law Conceals Information*, WISCONSINWATCH.ORG (Mar. 10, 2013), <http://www.wisconsinwatch.org/2013/03/10/state-weapons-law-conceals-information>.

59. WIS. STAT. § 175.60(19) (2011–12) (describing the rules creation of the statistical report).

60. *Id.*

61. *Id.*

62. See *infra* notes 114–20 and accompanying text (detailing the more robust statistical reports of Michigan and South Carolina).

B. Striking the Balance: Accountability versus Privacy

The issues surrounding concealed carry permit records involve balancing the people's interest in government accountability against individual permit holders' interest in privacy. This Part provides definitions of these two interests—government accountability and personal privacy—and specifically applies them to the issue of concealed carry.

1. OPEN GOVERNMENT AND ACCOUNTABILITY INTERESTS

Open records are a foundational element of our democratic society.⁶³ Without knowledge of the government's dealings, it is impossible to hold officials accountable for the choices they make.⁶⁴ A representative democracy necessarily requires accountability because elected officials are supposed to act in accordance with the electorate's best interests and wishes.⁶⁵ Establishing a reactive means for assessing the efficacy of the concealed carry permitting process is essential for determining whether the law is achieving its purported goals and serving the public's interests.

Supporters of concealed carry laws often argue that the act of obtaining a permit alone is sufficient proof of the applicant's intent to abide by the state's laws.⁶⁶ They argue that ill-intentioned individuals would not bother going through the laborious process of obtaining a permit when criminals generally have no respect for the laws.⁶⁷ The strength of this argument directly correlates to the inherent difficulty in obtaining a permit: the more difficult the permit is to obtain, the higher the applicant's desire or need for the permit must be.⁶⁸ While these

63. See Thompson, *supra* note 36, at 181–82.

64. See Roang, *supra* note 35, at 728–29.

65. *Id.* at 726; see LEIF LEWIN, DEMOCRATIC ACCOUNTABILITY 1–6 (2007) (describing the underlying assumptions of democratic accountability: that politicians exercise control over events and should be punished by the people when they fail to meet expectations).

66. See Amelia Cerling, *Advocacy Group Demands Public List of Conceal Carry Holders*, WEAU.COM, http://www.weau.com/news/headlines/Advocacy_group_demands_public_list_of_conceal_carry_holders_142399485.html (last updated Mar. 12, 2012, 7:20 PM) (quoting Jeri Bonavia of the Wisconsin Anti-Violence Effort: “When this law was being discussed we were promised that the people who would get these conceal carry permits would be the most law abiding people in the state”).

67. Gary Kleck, *Ideology, Politics, and Propaganda*, in THE GUN CONTROL DEBATE: YOU DECIDE 79–80 (Lee Nisbet ed., 2001) (describing the so-called “overmotivated criminal” argument as a fallacy because it relies on exaggeration for effect).

68. See *id.* at 84. Kleck also sees this as a fallacy in that it assumes an “undermotivated criminal.” *Id.*

assertions of good intentions are probably true for the majority of applicants, there is no way to confirm these claims. Currently, the statistical report of permit denials, suspensions, and revocations is the only mechanism casting any light upon the character of permit holders and applicants.

The creation of a permitting process constitutes recognition by the state that carrying concealed weapons is a privilege that can be granted—but also denied or revoked.⁶⁹ That the state has the power to deny some applications acknowledges that not all applicants or applications will be deemed suitable;⁷⁰ the law assumes that some ineligible citizens will mistakenly or intentionally apply for a concealed carry permit.⁷¹ The criminal background check requirement⁷² ideally would eliminate any applicants with a preexisting record but may not accurately predict future bad acts.⁷³ One of the rare exceptions allowing law enforcement to access the application registry is for investigating falsified information in the application,⁷⁴ anticipating the potential threat of dishonest applicants.

Beyond the risk of dishonest applications, Milwaukee Police Chief Edward Flynn, a prominent critic of the concealed carry law, has sought

69. See WIS. STAT. § 175.60(14) (2011–12) (providing the circumstances under which the DOJ shall revoke a CCW license).

70. According to the 2011 report, there were 65,921 total applications; 7,200 were returned and 847 were denied. WIS. DEPT. OF JUSTICE, CONCEALED CARRY ANNUAL REPORT: DATE RANGE: JANUARY 1–DECEMBER 31, 2011 (2012) [hereinafter CCW REPORT 2011], available at <https://www.documentcloud.org/documents/609223-2011-report.html>. In 2012, the first full year of the law being in effect, 101,047 new applications were received; 1,128 applicants were denied during the background check; 329 licenses were revoked, though 144 of the revocations were due to the license holder moving out of state; and 101 licenses were suspended, all as bond conditions imposed by a court. WIS. DEPT. OF JUSTICE, CONCEALED CARRY ANNUAL REPORT: DATE RANGE: JANUARY 1–DECEMBER 31, 2012 (2013) [hereinafter CCW REPORT 2012], available at <http://s3.documentcloud.org/documents/609222/2012-ccw-statistical-report-amp-letter-2-28-13.pdf>.

71. See § 175.60(3) (describing how a permit shall be issued unless the applicant fails to satisfy the requirements).

72. § 175.60(9g) (describing the background check requirement).

73. See *infra* notes 82–84 and accompanying text. Though revocations have not been high, they indicate that it is possible for things to go wrong. In 2012, 29 permits were revoked for felony convictions, 25 for misdemeanor convictions related to domestic abuse, 25 as part of domestic abuse injunctions, 15 for being fugitives from justice, 13 through court orders as conditions of probation, 9 as a part of harassment injunctions, among other reasons. CCW REPORT 2012, *supra* note 70.

74. See § 175.60(12)(b)(1)(a)–(c) (providing that law enforcement may request information about an individual to confirm that a permit is valid, that the individual is a valid permit holder, to investigate whether an individual submitted an intentionally false statement in his or her application, or to check whether the permit holder complied with an order of suspension or revocation).

to raise awareness of loopholes in the application procedure.⁷⁵ According to Chief Flynn, despite prohibitions against felons obtaining concealed carry permits, individuals who may have committed felony level offenses but make plea bargains reducing the charges to misdemeanor level will not be disqualified.⁷⁶ Similarly, a career criminal who is never convicted of a felony-level offense also remains eligible for a concealed carry permit.⁷⁷ Such applications would be legal but undesirable if the intent is to keep concealed weapons out of criminal hands. It is impossible to determine whether these loopholes are actually being exploited without access to the records of applications and issuances of concealed carry permits. However, evidence from other states further illuminates the need for oversight measures.

In 2011, the *New York Times* published a startling exposé of North Carolina's concealed carry policies.⁷⁸ This investigation was possible through the state's open records access to the permit registry,⁷⁹ which has since been closed.⁸⁰ Through these inquiries, reporter Michael Luo discovered that more than 2,400 of the state's concealed carry permit holders "were convicted of felonies or misdemeanors, excluding traffic-related crimes, over [a] five-year period."⁸¹ Though Luo admitted that this was a small proportion of the total number of permit holders,⁸² the number of offenses committed still creates cause for concern. If these individuals had a prior criminal record, they should have been eliminated

75. Gitte Laasby, *Milwaukee Police Call for Concealed-Carry Changes*, MILWAUKEE J. SENTINEL, Mar. 11, 2012, <http://www.jsonline.com/news/crime/milwaukee-police-call-for-concealedcarry-changes-md4fobn-142277075.html>.

76. *Id.* This is not idle speculation. In 2007, Florida's *Sun Sentinel* ran a feature based on information obtained through open records requests, before the state made those records confidential. Florida law had a loophole that had allowed some 1,400 defendants who pled guilty or no contest to felony charges to obtain concealed carry permits. Megan O'Matz & John Maines, *License to Carry: Florida's Flawed Concealed Weapon Law*, SUNSENTINEL, Jan. 28, 2007, http://articles.sun-sentinel.com/2007-01-28/news/0701270316_1_gun-licensing-system.

77. Laasby, *supra* note 75; see also Lueders, *supra* note 58 (quoting Auric Gold, secretary of Wisconsin Carry Inc., a nonprofit gun rights group: "Theoretically, a person could have a lot of misdemeanors but not be disqualified").

78. Michael Luo, *Guns in Public and Out of Sight: More Concealed Guns and Some Are in the Wrong Hands*, 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=1&_r=3&ref=us&#.

79. *Id.*

80. See *infra* notes 152–55 and accompanying text.

81. Luo, *supra* note 78.

82. *Id.* According to a report from the Government Accountability Office, North Carolina had roughly 240,000 CCW permit holders by the end of 2011. U.S. GOV'T ACCOUNTABILITY OFFICE, GUN CONTROL: STATE'S LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION 76 (2012), available at <http://www.gao.gov/assets/600/592552.pdf>.

during the background check process.⁸³ If the background check was functioning correctly, that would imply that these 2,400 permit holders previously had clean records but committed offenses after receiving their permits, provoking questions about the general character of this group and the efficacy of background checks for predicting criminal behavior.⁸⁴ Neither scenario is reassuring.

Accessing the records of concealed carry permit holders in other states has also revealed other discrepancies. In 2007, before the records were sealed as confidential, reporters in Florida discovered that a legal loophole had allowed more than 1,400 people to obtain concealed carry permits despite having pled guilty or no contest to felony charges.⁸⁵ In 2010, the online publication of New York's concealed carry registry revealed a disproportionate number of celebrity figures with permits, in a state where it is notoriously difficult to obtain them, exposing bias within the system.⁸⁶ Nevada journalists were able to use a state supreme court ruling to access records surrounding the revocation of the state governor's concealed carry license.⁸⁷

These examples are illustrative of the actual need for government accountability surrounding these records. Easing access to these records serves two valuable accountability interests. First, it ensures that the issuing agency is subjecting applications to the appropriate degree of scrutiny. Second, it ensures that the agency is adhering to its procedures and not giving preference to certain groups of applicants. An accountability mechanism is both desirable and necessary for the concealed carry permit registry; the next step is to identify the countervailing privacy concerns of permit holders who remain resistant to loosening the restrictions on these records.

2. INDIVIDUALS' PRIVACY INTERESTS

Though everybody has some working understanding of what "privacy" means, defining the rights and expectations of privacy is a complex process that has perplexed scholars and philosophers. One particularly helpful way to understand privacy is to view it as a

83. As part of the application process in North Carolina, the applicant must submit a complete set of fingerprints to the sheriff, who in turn runs a criminal background check. N.C. GEN. STAT. § 14-415.13(b) (2013).

84. See Luo, *supra* note 78.

85. O'Matz & Maines, *supra* note 76.

86. See Robert Farago, *Question of the Day: Should States Keep the Names of Concealed Carry License Holders Secret?*, THE TRUTH ABOUT GUNS (Oct. 3, 2010), <http://www.thetruthaboutguns.com/2010/10/robert-farago/question-of-the-day-should-states-keep-the-names-of-concealed-carry-license-holders-secret>.

87. *Id.*

“three-part relation between a person or persons (P), an object or domain of privacy (O), and some other person or persons (Q).”⁸⁸ The individual (P) can claim to have privacy about (O) in relationship to another person (Q), if (Q) lacks knowledge of or access to (O).⁸⁹ Person Q’s lack of knowledge or access is determined by the control person P exercises over information contained in domain O, and also the limits of person Q’s ability to access the information through his or her own sensory perceptions.⁹⁰ Using this framework, concealed carry permit registries create at least two important privacy relationships: permit holders’ (P) permit status and information (O) in relation to the government/law enforcement (Q1) or in relation to the public (Q2).

The arguments for maintaining strict control over access to the concealed carry permit registry tie the concern for privacy tightly to concerns for personal security.⁹¹ This provides a justification for permit holders (P) to keep their permit status (O) concealed from the general public (Q), which may contain individuals who wish to harm the permit holders. Concealed carry laws generally are promoted as a way that citizens can take a more proactive stance against crime through self-defense.⁹² Presumably, allowing citizens to carry weapons in public is not intended to provoke more violent confrontations between a would-be attacker and a victim armed with a concealed weapon, but to serve as a deterrent to potential criminals who, realizing that more citizens are likely to be armed, will be less likely to initiate an assault in the first place.⁹³ Yet concealed carry’s deterrent effects are highly disputed and remain far from settled.⁹⁴ Arguably then, open carry, with

88. Alan Rubel, *The Particularized Judgment Account of Privacy*, 17 RES PUBLICA 275, 278 (2011); Alan Rubel & Ryan Biava, *A Framework for Analyzing and Comparing Privacy States*, JASIST: J. AM. SOC’Y FOR INFO. SCI. & TECH. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2394675.

89. Rubel, *supra* note 88, at 278.

90. *Id.*

91. For a somewhat inflammatory example of the argument in favor of concealed carry as the right to self-defense by Florida Representative Cliff Stearns, see Rep. Cliff Stearns, *Concealed Carry Permits Are Life Savers*, HUMAN EVENTS (Jan. 26, 2009, 3:01 AM), <http://www.humanevents.com/2009/01/26/concealed-carry-permits-are-life-savers>. See also Farago, *supra* note 86.

92. Stearns, *supra* note 91.

93. This is the foundation of John Lott’s “more guns, less crime” hypothesis; assuming that criminals act rationally, they are less likely to commit crimes if it becomes more difficult. John Lott, *More Guns, Less Crime*, in THE GUN CONTROL DEBATE: YOU DECIDE 471–72 (Lee Nisbet ed., 2001). The expansion of citizen gun ownership is one factor that Lott identifies as a deterrent. *Id.*

94. Glenn Kessler, *Do Concealed-Weapon Laws Result in Less Crime?* WASH. POST (Dec. 17, 2012, 6:02 AM), http://www.washingtonpost.com/blogs/fact-checker/post/do-concealed-weapon-laws-result-in-less-crime/2012/12/16/e80a5d7e-47c9-11e2-ad54-580638ede391_blog.html (describing how other academic studies have criticized

weapons clearly visible and information widely known, should create the greatest deterrent effect.⁹⁵ The essence of concealed carry is secrecy, yet the transmission of strong warning signals is the basis of deterrence theory,⁹⁶ creating a weakness in the deterrent arguments for concealed weapons.

Regardless of whether secrecy best promotes the alleged deterrent effect, Wisconsin law may provide a cause of action that could be used to protect the privacy of these records even without the statutory prohibition. Wisconsin's right to privacy statute includes the relevant portion classifying as an invasion of privacy:

Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.⁹⁷

This cause of action is comparable to the common law tort of "Publicity Given to Private Life."⁹⁸ Assuming that the prohibition against disclosure did not apply, would the disclosure of concealed carry permitting information create a cause of action for a permit holder whose information was revealed? The answer to this question would depend on the facts involved.

Lott's study and methods and no consensus exists). In a 2012 update, Lott listed eighteen studies that supported his theory, while at least ten claimed concealed carry had no discernible effect. *Id.*

95. See, e.g., Larry Pratt, *Open Carry Deters Crime*, U.S. NEWS DEBATE CLUB (Apr. 25, 2012), <http://www.usnews.com/debate-club/should-people-be-allowed-to-carry-guns-openly/open-carry-deters-crime>. In 2009, the Wisconsin Attorney General acknowledged that open carry is constitutionally legal in Wisconsin and could not be the basis of a disorderly conduct charge unless other factors were at play. Advisory Memorandum from Attorney General J.B. Van Hollen, Wis. Dep't of Justice, to Wis. District Attorneys, Deputy Dist. Attorneys and Assistant Dist. Attorneys (Apr. 20, 2009), available at <http://www.doj.state.wi.us/sites/default/files/2009-news/final-open-carry-memo-2009.pdf>.

96. See, e.g., Pratt, *supra* note 95.

97. WIS. STAT. § 995.50(2)(c) (2011-12).

98. RESTATEMENT (SECOND) OF TORTS § 652D (1977) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.").

An individual's gun ownership could be seen as a private matter,⁹⁹ but there is a significant difference between owning a gun and holding a concealed carry permit. The vast majority of gun owners do not hold concealed carry permits.¹⁰⁰ While self-defense is a major motivation for gun ownership, recreational uses—hunting and target shooting—are equally motivating.¹⁰¹ Self-defense is, however, the primary motivation for allowing concealed carry.¹⁰² It is difficult to argue that the public has a legitimate interest in knowing the names of every person who legally owns a firearm; according to recent polls that could be near 42 percent of all Americans.¹⁰³ But the public interest in knowing the names of the people who are permitted to carry concealed firearms in public is more

99. This position is strengthened by the fact that, in Wisconsin, there is no firearm registration requirement. In fact, the DOJ has adopted procedures specifically to prevent the creation of a firearm registry by requiring the destruction of records pertaining to gun sales. Wis. STAT. § 175.35(2k)(ar) (2011–12). There are many federal protections in place as well. See generally *Gun Owners' Privacy*, ELECTRONIC PRIVACY INFO. CENTER, <http://epic.org/privacy/firearms/> (last visited Jan. 8, 2014).

100. Rough calculations indicate this should be correct. The 2010 U.S. Census estimated the national population, age 18 years and older, to be about 234,564,071 people. LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010, 2 (May 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. A 2011 Gallup poll estimated about 47 percent of Americans self-reported having a gun in their homes or on their property. Lydia Saad, *Self-Reported Gun Ownership in U.S. Is Highest since 1993*, GALLUP (Oct. 26, 2011), <http://www.gallup.com/poll/150353/self-reported-gun-ownership-highest-1993.aspx>. Multiplying age 18 and older population by this percentage provides the rough estimate that 110,245,113 Americans own guns. The best estimates of the number of concealed carry permit holders nationwide indicate there are probably over 8,211,625 permit holders. *Concealed Carry Permit Statistics by State Report*, INQUISITR (Dec. 18, 2012), <http://www.inquisitr.com/444177/concealed-carry-permit-statistics-by-state-report>. This would mean about 7.4 percent of the total number of gun owners also possessed concealed carry permits. Again, this is a very rough estimate, but more accurate data could be very difficult to generate as gun ownership numbers are notoriously unpredictable. See generally Carl Bialik, *Guns Present Polling Conundrum*, THE NUMBERS GUY, WALL ST. J. BLOGS (Mar. 22, 2013, 11:30 PM), <http://blogs.wsj.com/numbersguy/guns-present-polling-conundrum-1223+>.

101. A 2005 Gallup poll surveying gun owners showed that most gun owners used their guns for each of three purposes: 67 percent reported use for crime protection; 66 percent reported use for target shooting; 58 percent reported use for hunting. Joseph Carroll, *Gun Ownership and Use in America*, GALLUP (Nov. 22, 2005), <http://www.gallup.com/poll/20098/gun-ownership-use-america.aspx>.

102. See Carroll, *supra* note 101.

103. Nate Silver, *Party Identity in a Gun Cabinet*, FIVETHIRTYEIGHT BLOG, N.Y. TIMES (Dec. 18, 2012, 12:39 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/12/18/in-gun-ownership-statistics-partisan-divide-is-sharp> (drawing on the results of a 2008 presidential election exit poll).

persuasive if one believes the amount of guns in the public sphere could impact his or her personal security.¹⁰⁴

The element of publicity also depends on the factual specifics of an alleged invasion of privacy. Merely designating a record as public would probably be insufficient to constitute publicity, unless there was a showing that someone actually accessed the record and broadcast its contents. This is exactly what happened in Ohio and New York: journalists used open records laws to access the permit holder registries, then indiscriminately published that information to the public.¹⁰⁵ It is easy to imagine scenarios where there could be valid interests in revealing this data, but it is also easy to imagine scenarios where this kind of mass publication could be dangerous to former law enforcement officers, crime witnesses, or anybody with a gun he or she does not want stolen.¹⁰⁶

Admittedly, Wisconsin's strict prohibitions against access do protect the interests of those who place a higher value on privacy, though

104. Numerous studies indicate that many people do not feel safer with more guns in public. A national survey conducted in 1996 found that 59 percent of the 1,905 respondents claimed that more people carrying guns in their community would make them feel less safe. D. Hemenway, D. Azrael & M. Miller, *National Attitudes Concerning Gun Carrying in the United States*, 7 INJURY PREVENTION 282, 282–83 (2001). A follow-up survey conducted in 1999 asked respondents if they thought regular citizens should be allowed to carry guns into a variety of public places. Of the 2,521 respondents, 88 percent opposed carrying into restaurants, 94 percent opposed carrying on college campuses, 94 percent opposed carrying in sports stadiums, 93 percent opposed carrying in bars, 91 percent opposed carrying in hospitals, and 92 percent opposed carrying in government buildings. *Id.* at 283. More recent studies have indicated strong opposition from students against allowing CCW on campuses. See Ryan Patten, Matthew O. Thomas & James C. Wada, *Packing Heat: Attitudes Regarding Concealed Weapons on College Campuses*, 38 AM. J. CRIM. JUSTICE 551, 557–60 (2013) (finding over 70 percent of respondent students, faculty, staff, and administrators opposed allowing concealed weapons on campus); Amy Thompson, et al., *Student Perceptions and Practices Regarding Carrying Concealed Handguns on University Campuses*, 61 J. AM. COLL. HEALTH 243, 250 tbl.3 (2013) (finding that a total of 70 percent of respondents either agreed or strongly agreed that they would “feel less safe if students, faculty, and visitors carried concealed handguns on [their] campus”).

105. See Schmitt, *supra* note 17; *infra* notes 145–57 and accompanying text (New York).

106. See comments regarding the CCW publication incident in New York described in K.C. Maas & Josh Levs, *Newspaper Sparks Outrage for Publishing Names, Addresses of Gun Permit Holders*, CNN (Dec. 27, 2012, 10:23 AM), <http://www.cnn.com/2012/12/25/us/new-york-gun-permit-map>. For a more reactionary articulation of this argument, see Nick Leghorn, *New York Newspaper Publishes List of Concealed Carry Permit Holders Names, Addresses*, THE TRUTH ABOUT GUNS (Dec. 24, 2012), <http://www.thetruthaboutguns.com/2012/12/foghorn/new-york-newspaper-publishes-list-of-concealed-carry-permit-holders-names-addresses> (describing the publication of concealed carry permit holders' names and addresses as “hate speech” and positively referencing a comment comparing the publication to the Nazi policy of forcing Jews to wear a yellow Star of David).

perhaps at the expense of those who would prefer more accountability. Adopting the strict prohibition against disclosure of concealed carry records avoids the potentially unpredictable results of subjecting all open records requests to the balancing test, and it saves the DOJ records custodians from having to perform this analysis any time a request is submitted. Yet easy decision making is not always good decision making. Even without the prohibition against disclosure, individual permit holders' records would still be protected by the DOJ balancing test and the state's cause of action for invasion of privacy. Responding to a records request, the registry's custodian would need to weigh the public interest in disclosure against the public interest in shielding.¹⁰⁷

Currently, the statute immunizes the department from liability for any "act or omission" occurring under the law, provided such acts were undertaken in good faith.¹⁰⁸ This immunization may need to be modified to promote accountability as it would likely protect the DOJ's records custodians, insulating them from liability for misapplication of the balancing test. If this shield were lifted and a misapplication of the test occurred, the exposed permit holder could bring a suit for invasion of privacy by claiming the records custodian "acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed."¹⁰⁹ While critics may argue that this is insufficient compensation for the aggrieved plaintiff, it creates a threat of litigation that would cause the records custodians to exercise greater care when deciding whether to reveal the records. The Wisconsin Legislature, however, decided these protections were insufficient and instead imposed a complete bar against access. This approach substitutes easy rules in a situation where greater nuance is desirable and necessary to create accountability.

C. Mechanisms of Accountability

The states have developed a variety of ways to balance the interests of government accountability and privacy as they relate to the issuance of concealed carry permits. These responses fall on a spectrum where the interest in privacy and the strength of government accountability are inversely correlated: as the privacy interest is strengthened, the government accountability is weakened, and vice versa. Arguably, this is one reason why so many states employ a combination of different

107. See *supra* notes 54–57 and accompanying text.

108. WIS. STAT. § 175.60(21) (2011–12) ("The department of justice . . . and their employees are immune from liability arising from any act or omission under this section, if done so in good faith.").

109. WIS. STAT. § 995.50(2)(c) (2011–12).

mechanisms. The three most common mechanisms—statistical reports, law enforcement access, and open records access—follow this spectrum, ranging from strong privacy protection/low government transparency to weak privacy protection/high government transparency.

1. STATISTICAL REPORTS

Statistical reports of numbers pertaining to the issuance, denial, and revocation of concealed carry permits are one mechanism to promote openness surrounding the permitting process. Depending on the amount and type of information included in the report, this mechanism can create some degree of accountability while maintaining a high level of privacy for the permit holders as their identities are never disclosed. Wisconsin currently employs this mechanism, though the reports are generated by the DOJ and intended primarily for advisory use by the Wisconsin Legislature and the Governor.¹¹⁰ Wisconsin’s statistical report is relatively minimal; it is required to include “the number of licenses applied for, issued, denied, suspended, and revoked . . . during the previous calendar year.”¹¹¹ The report is also required to include the reasons for denials, suspensions, and revocations.¹¹² The report is prohibited from including “any information that may be used to identify an applicant or a licensee, including, but not limited to, a name, address, birth date, or social security number.”¹¹³ Though it is possible to know how many permits were revoked or suspended and the reasons why, it is not possible to know the identity of the individuals whose permits were revoked or suspended.

Statistical reports can provide greater insight, however, depending on the amount and type of information that is published. Michigan provides a more extensive statistical report.¹¹⁴ Michigan’s permit

110. § 175.60(19).

111. *Id.*

112. *Id.* The data is arranged in tables, with the number of denials in one column and the reason in the other. CCW REPORT 2012, *supra* note 70. The categories for disqualification, for either denial of granting or for revocation—many of which are set by federal law—provide a broad, top-down view of the applicant and carrier pool. *Id.* The top reason for denial in 2012 resulted in 374 applications denied for misdemeanor convictions related to domestic abuse (a federal disqualifier). *Id.* While this kind of information allows some inferences to be made, it says nothing about the kinds of crimes that holders have been convicted of or about the number of charges filed against permit holders. *Id.*

113. § 175.60(19).

114. MICH. COMP. LAWS § 28.425e(5) (2013).

database is also off limits to the public,¹¹⁵ but the statistical report is explicitly subject to public disclosure and is readily accessible online.¹¹⁶ The report requires the same data as Wisconsin concerning the number of applications, issuances, denials, revocations, and the reasons behind denials and revocations.¹¹⁷ Additionally, the report must also include: the number of civil and criminal charges—categorized by offense—filed against permit holders that resulted in a finding of responsibility or guilt, the number of pending charges against permit holders, the number of criminal cases dismissed against permit holders, the number of cases against permit holders that resulted in a finding of no responsibility or guilt, and the number of suicides by permit holders.¹¹⁸ These requirements provide a wealth of information that illuminates certain aspects of the permit holding population. South Carolina’s annual concealed carry statistical report does not include as much data as Michigan’s, but it does subdivide the information by county¹¹⁹ and also must include “the name, address, and county of a person whose permit was revoked, including the reason for the revocation.”¹²⁰ This works from the presumption that when a permit is revoked, the secrecy surrounding it should also be revoked.

Wisconsin’s statistical report is the state’s primary accountability mechanism. Though it is possible to acquire this report through an open records request, access is not otherwise facilitated or encouraged.¹²¹ Easing access and including more information in the report—such as demographics, numbers of individuals charged with criminal or civil offenses, numbers of disqualifying gun-related crimes, and/or the number of suicides—would not impose much of an additional burden on the DOJ

115. § 28.425e(4) (“[I]nformation in the database . . . is confidential, is not subject to disclosure under the freedom of information act . . . and shall not be disclosed to any person except for purposes of this act or for law enforcement purposes.”).

116. *Id.* An archive of the reports from the past ten years is available at Michigan State Police, *Concealed Pistol License (CPL) Reports*, MICHIGAN.GOV, http://www.michigan.gov/msp/0,4643,7-123-1591_3503_4654-77621--,00.html (last visited Jan. 8, 2014).

117. § 28.425e(5)(a)–(f).

118. § 28.425e(5)(i)–(n).

119. S.C. CODE ANN. § 23-31-215(T)(7) (2013).

120. *Id.*

121. Again, Michigan’s reports are published online through an official government website. *See supra* note 116. Oklahoma also keeps an archive of its statistical report available online. *See* Okla. State Bureau of Investigation, *Self Defense Act Statistics*, OK.GOV, http://www.ok.gov/osbi/Publications/SDA_Statistics.html (last visited Jan. 28, 2014). Wisconsin should consider adopting a similar mechanism. The only online copies of the statistical reports available at present are scans of the printed reports obtained through open records requests. *See* CCW REPORT 2012, *supra* note 70; CCW REPORT 2011, *supra* note 70.

but could help create a better understanding of permit holders' character and the permit process's efficacy.

2. LAW ENFORCEMENT ACCESS

A second mechanism that may promote government accountability is allowing greater law enforcement access to the permit registry. Obviously, promoting public knowledge and government accountability is a secondary effect of increasing law enforcement access to the concealed carry permit registry. Though the primary intent of opening concealed carry records to law enforcement would be to protect officer safety and foster more efficient investigations,¹²² it would also promote public knowledge and government accountability. Making records more accessible to law enforcement would indirectly raise the level of awareness, both publicly and within the law enforcement field, of the practical effects of concealed carry.¹²³ Though law enforcement records are exempt from Wisconsin's open records law,¹²⁴ informal awareness of who carries weapons would allow law enforcement to judge some of the effects of this law. This mechanism provides some access but also restricts the dissemination of concealed carry information to a limited group (law enforcement officers) and for limited purposes (conducting criminal investigations). Easing access for in-state law enforcement provides the added benefit of easing access for out-of-state law enforcement seeking to confirm the validity of a permit issued in Wisconsin.¹²⁵

122. See Luo, *supra* notes 78, 80–83 and accompanying text. The study published in the *New York Times* revealed that some 900 permit holders were convicted of drunk driving. *Id.* It is easy to imagine that an officer approaching a vehicle that had been driving erratically might like to know whether the driver of the vehicle was a concealed carry permit holder as it could indicate whether or not a gun was present.

123. The fact that so many states do allow law enforcement access, yet mostly prohibit public access, seems to indicate that generally it is up to law enforcement to gauge how these laws function and hold the state accountable. Even the NRA has taken the position that ensuring that permit holders are law-abiding is not the public's job but rather "the function of law enforcement." Hannah O'Brien, *Sunshine Week: Wisconsin Knows Who Has Concealed Carry Permits, but You Can't Find Out*, POSTCRESCENT.COM (Mar. 12, 2012), <http://www.postcrescent.com/article/20120312/APC010401/203120432/Sunshine-Week-Wisconsin-knows-who-has-concealed-carry-permits-you-can-t-find-out>. See also Lueders, *supra* note 58.

124. WIS. STAT. § 19.36(2) (2011–12).

125. The Wisconsin statute does allow law enforcement from other states to request Wisconsin permit information, though it does not precisely describe how this would be accomplished. Compare WIS. STAT. § 175.60(12)(2) (2011–12) ("A person who is a law enforcement officer in a state other than Wisconsin may request and be provided information."), with 18 PA. CONS. STAT. § 6109(1)(1) (West 2013) ("The Pennsylvania State Police shall establish a nationwide toll-free telephone number . . . which shall be

Law enforcement access varies by state, though some states have enacted measures specifically to facilitate law enforcement access to their registries. To respond to law enforcement inquiries, Florida's statute requires its Department of Agriculture and Consumer Services to maintain an online database of all permit holders available at all times.¹²⁶ Though not every state describes the specific means for law enforcement to access concealed carry permit records, many states provide broad discretionary access to law enforcement agencies for "valid law enforcement purposes."¹²⁷

In Wisconsin, law enforcement may only obtain access for one of four specific purposes: (1) to confirm the validity of a license; (2) to confirm whether an individual is a valid license holder if he/she does not have his/her license with him/her; (3) to investigate whether an individual submitted an intentionally false statement on his/her application or renewal forms; or (4) to investigate whether the individual complied with a revocation order.¹²⁸ Similarly, no government agency may reveal the permitting information except "in the context of a prosecution for an offense in which the person's status as a licensee . . . is relevant."¹²⁹ The only offense where this seems especially relevant is unauthorized carrying of a concealed weapon.¹³⁰

Yet despite these broad privacy protections, the law does require a permit holder to display his or her certification to a law enforcement officer if asked.¹³¹ In this situation, there is no express limitation on the situations in which the officer may ask to see the permit other than that they are acting "in an official capacity and with lawful authority."¹³² This vague standard produces the bizarre result that law enforcement could access an individual's permit information by asking during a routine traffic stop, but cannot access the information remotely while conducting an investigation for any non-permit related offense. There is also a prohibition against sorting or accessing "information regarding vehicle stops, investigations, civil or criminal offenses, or other activities

operational seven days a week, 24 hours per day" for answering inquiries about the validity of Pennsylvania permits.)

126. FLA. STAT. § 790.06(7) (2013).

127. See, e.g., ARK. CODE ANN. § 5-73-307(a) (2013) ("[T]his information shall be available . . . at any time, to any law enforcement agency."); KAN. STAT. ANN. § 75-7c06(d) (2012) ("[S]uch information shall be available at all times to all law enforcement agencies . . . when requested for a legitimate law enforcement purpose.").

128. WIS. STAT. § 175.60(12)(b).

129. § 175.60(12)(c).

130. WIS. STAT. § 941.23 (2011–12). Interestingly, in the known incidents of permit holder misconduct, the permit holder's status has come out anecdotally, usually when a party volunteers the information. See Lueders, *supra* note 58.

131. § 175.60(2g)(c).

132. *Id.*

involving the [law enforcement] agency based on the status as licensees”¹³³ This eliminates the ability to look at the behavior of permit holding citizens who may commit wrongful acts that do not rise to a level that would require revocation or suspension of their permits.

Wisconsin’s strong privacy protections against law enforcement access ultimately seem misplaced, creating unnecessary obstacles for law enforcement to acquire useful information about the subjects of an investigation. Under the old DOJ balancing test, law enforcement would enjoy greater access as public interest in disclosure for purposes of investigation is often likely to outweigh the public interest in concealing these records from the state’s officers.¹³⁴ The law’s structure may intend to prevent disparate treatment of permit holders and non-permit holders, but it ignores the fact that concealed carry is a privilege that the state allows and can revoke.

3. OPEN RECORDS

The third accountability mechanism—subjecting concealed carry records to open records law—provides the greatest degree of government accountability but raises the most concerns for individual privacy. Despite—or perhaps because of—the attention given to gun control issues in early 2013, a number of states that had previously allowed open records access to their permit registries passed new legislation within the past year making the records explicitly confidential.¹³⁵ Consequently, in 2013, almost every state has made these records confidential.¹³⁶ A few states, however, still have mechanisms similar to open records access.

Delaware employs a unique approach—similar to open records access—by requiring a list of all pending applicants to be published in a

133. § 175.60(12g)(b)(3).

134. See *supra* notes 54–57 and accompanying text (discussing the DOJ balancing test).

135. This happened in Maine, see Judith Meyer, *Maine Makes Info on Concealed Gun Permits Secret*, NEW ENGLAND FIRST AMEND. CENTER (May 22, 2013, 5:25 PM), <http://www.northeastern.edu/firstamendmentcenter/?p=2470>; also in Montana, see Dan Boyce, *Why the AG Doesn’t Want the AP to Know Who Has a Concealed Carry Permit*, MONT. PUB. RADIO (July 29, 2013, 6:33 PM), <http://mtpr.org/post/why-ag-doesn-t-want-ap-know-who-has-concealed-carry-permit>; in Virginia, see H.B. 1833, 2013 Leg., Reg. Sess. (Va. 2013), VA. CODE ANN. § 18.2-308.07(C) (2013); and Mississippi, see H.B. 485, 2013 Leg., Reg. Sess. (Miss. 2013), MISS. CODE ANN. § 25-61-11.1 (2013).

136. Many sources have had trouble keeping up with the rapid developments across the 50 states in the past year. At the time of this writing, this listing from the Reporters Committee for Freedom of the Press seems predominantly accurate, though specific investigation is best done by searching the individual state’s laws. Aaron Mackey, *Gun Permit Data Accessibility in All 50 States*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2013/chart-gun-permit-data-access> (last visited Jan. 8, 2014).

“newspaper of general circulation published in the county.”¹³⁷ Admittedly, Delaware is a “may-issue” state and exercises a great degree of discretion in determining who may receive a permit¹³⁸ and requires evidence of the applicant’s “good moral character.”¹³⁹ No other state imposes this publication requirement, indicating that Delaware is an outlier as far as gun control is concerned.

Beyond the dichotomous yes/no divide, more nuanced solutions are also possible. In 2004, Ohio signed its concealed carry act into law as Ohio Statute section 2923.129.¹⁴⁰ This law put records of concealed carry permits beyond the reach of individual members of the public, but the state’s Governor, Robert Taft, insisted on including language that would allow journalists to access the information.¹⁴¹ The current language states that, though these records are not public records,

[a] journalist . . . may submit to a sheriff a signed, written request to view the name, county of residence, and date of birth of each person to whom the sheriff has issued, renewed, or issued a replacement license to carry a concealed handgun The request shall include the journalist’s name and title, shall include the name and address of the journalist’s employer, and shall state that disclosure of the information sought would be in the public interest. If a journalist submits a signed, written request to the sheriff . . . the sheriff shall grant the journalist’s request.¹⁴²

The statute further limits the journalist’s ability to photocopy any of the information obtained through such an investigation,¹⁴³ but the existence of even this limited provision allows valuable access. While this is a limited open records policy, it promotes a discretionary openness that provides a good balance of the interests involved. Unfortunately,

137. 11 DEL. CODE ANN. § 1441(b) (2012).

138. § 1441(d) (“[T]he Court may or may not, in its discretion, approve any application.”).

139. § 1441(a)(2) (“[T]he person shall file . . . a certificate of 5 respectable citizens of the county in which the applicant resides The certificate shall clearly state that the applicant is a person of full age, sobriety, and good moral character, that the applicant bears a good reputation for peace and good order in the community . . . and that the carrying of a concealed deadly weapon . . . is necessary for the protection of the applicant or the applicant’s property.”).

140. OHIO REV. CODE ANN. § 2923.129(B)(2) (2013).

141. Rick Schmitt, *Carrying Concealed Weapons Just Keeps Getting Easier*, CENTER FOR PUB. INTEGRITY (Nov. 15, 2011, 6:00 AM), www.publicintegrity.org/2011/11/15/7396/carrying-concealed-weapons-just-keeps-getting-easier.

142. § 2923.129(B)(2)(a).

143. *Id.* (The last sentence provides the limitation on copying.).

pending legislation may strip the law of this exception, rendering the records confidential.¹⁴⁴

Other states, initially with some degree of openness, have sought to limit or eliminate public access, ostensibly in response to permit holders' privacy concerns. The most dramatic backlash against open records for concealed carry permits unfolded in New York. Up until early 2013, the State of New York had explicitly designated their concealed carry permit registry as a public record.¹⁴⁵ The recent decision to change this designation and shield the permit records from open records requests arose in response to a story run by *The Journal News* entitled "The Gun Owner Next Door: What You Don't Know about the Weapons in Your Neighborhood."¹⁴⁶ The online version of this article provoked outrage by including an interactive map displaying the addresses of all permit holders licensed to own handguns in two New York counties.¹⁴⁷ Despite the facts that New York's concealed carry database was explicitly designated as public records in the statute¹⁴⁸ and that the journalists were operating within their legal right to access this information, the act of aggregating and publishing this "public" information was seen as a violation of permit holder privacy—potentially creating a greater risk of home invasion—and stigmatizing legal gun owners.¹⁴⁹ Galvanized by the public reaction, New York's legislature quickly added a provision to their new gun control law, amending the old statute to allow handgun permit holders to opt out of having their information included as public records.¹⁵⁰

A similar scenario recently played out in North Carolina; prior to 2013, the concealed carry registry was a matter of public record and led to important journalistic investigation of the permitting process.¹⁵¹ In

144. S.B. 60, 130th Gen. Assemb., Reg. Sess. (Ohio 2013), available at http://www.legislature.state.oh.us/BillText130/130_SB_60_I_Y.pdf.

145. N.Y. PENAL LAW § 400.00(5) (McKinney 2008) ("The name and address of any person to whom an application for any license has been granted shall be a public record.")

146. Dwight R. Worley, *The Gun Owner Next Door: What You Don't Know about the Weapons in Your Neighborhood*, J. NEWS (Dec. 24, 2012), <http://www.lohud.com/article/20121224/NEWS04/312240045/The-gun-owner-next-door-What-you-don-t-know-about-weapons-your-neighborhood>.

147. *Map: Where Are the Gun Permits in Your Neighborhood?*, J. NEWS (Dec. 22, 2012, 4:51 PM), <http://www.lohud.com/interactive/article/20121223/NEWS01/121221011/Map-Where-gun-permits-your-neighborhood->.

148. PENAL § 400.00(5).

149. *N.Y. Gun-Control Law Limits Access to Permit Info*, USA TODAY (Jan. 19, 2013, 3:30 PM) <http://www.usatoday.com/story/news/nation/2013/01/19/ny-gun-control-law-limits-public-info/1847485/>.

150. *Id.*

151. *See supra* notes 78–84 and accompanying text.

July of 2012, a local CBS affiliate published a searchable registry online, revealing the identities and locations of registered permit holders.¹⁵² Outcry from gun advocates likely played a role in the amendment of the statute,¹⁵³ which now shields the registry from open records requests,¹⁵⁴ though partisan politics played a role as well.¹⁵⁵

While these scenarios were a blow to open records, they also suggest that the public was more offended by the publication of the registry than by the fact that they were matters of public record. There is an obvious difference between information that is technically accessible to the public through a formal request process and information that is on the front page of a newspaper. Common sense could have avoided the public backlash and subsequent legislative restrictions. The new ability to limit the release of personally identifying information in certain circumstances may actually strike a better balance between privacy and accountability, as individuals who may really need protection can prevent the widespread dissemination of identifying and locating information.¹⁵⁶ Yet, from the torts perspective, the fact that New York's and North Carolina's permit registries were legally and explicitly designated as a public record undermines the notion that publication violated the permit holders' "reasonable expectation of privacy" in relation to this information.¹⁵⁷

152. See Anne Blythe, *Gun-Rights Group Pressures TV Station after Report*, NEWSOBSERVER.COM (July 25, 2012), www.newsobserver.com/2012/07/25/2218895/gun-rights-group-pressures-tv.html.

153. See Editorial, *Gains, Losses in Open Government*, WILSON TIMES (North Carolina), Dec. 29, 2013, <http://www.wilsontimes.com/News/Feature/Story/27996086---Gains-losses-in-open-government>. This "publication followed by legislative backlash" seems to be a common pattern, having also played out in both Florida and Virginia in the past decade. Christine Haughney, *Legislature Restricts Access to Gun Permit Data*, N.Y. TIMES, Jan. 15, 2013, <http://www.nytimes.com/2013/01/16/nyregion/new-yorks-new-gun-law-restricts-public-access-to-permit-data.html>.

154. See N.C. GEN. STAT. 14-415.17(c) (2013) ("[T]he list of permit holders and the information collected . . . for a permit are confidential and are not a public record.").

155. North Carolina, like Wisconsin, now has both a Republican governor and legislative majority, which has allowed a number of controversial, partisan laws to be passed. See Margaret Newkirk & Romy Varghese, *Protests Swell as Republican Party Remakes North Carolina*, BLOOMBERG (July 15, 2013, 9:02 AM), <http://www.bloomberg.com/news/2013-07-01/protests-swell-as-republican-party-remakes-north-carolina.html>. The state's new law dramatically expanded concealed carry rights generally, allowing concealed weapons in previously off limits places including public parks, playgrounds, and restaurants and bars serving alcohol. Kimberly Johnson, *New Gun Laws Divide North Carolina*, ALJAZEERA AM. (Dec. 9, 2013, 5:00 AM), <http://america.aljazeera.com/articles/2013/12/9/new-gun-laws-dividingnorthcarolinians.html>.

156. See *supra* notes 78–84 and accompanying text.

157. See *supra* notes 97–98 and accompanying text. The element that the publicity would be highly offensive to a reasonable person is directly tied to whether or not the individual had a reasonable expectation of privacy. From an objective perspective,

Regardless, these outraged reactions provide a reason for states to shield their concealed carry records from the public, usually through an explicit statutory limitation.¹⁵⁸ While it limits accountability to close these records, it also preserves privacy and avoids provoking the wrath of gun owners and gun rights interest groups.¹⁵⁹ Arguably, instituting other accountability mechanisms such as statistical reports and broad law enforcement access can lessen the blow of sealing concealed carry permit records from the public's eyes. Alternatively, states that decide to keep open records could implement additional legislation creating civil or even criminal liability for indiscriminate publication.

III. TOWARDS A MORE BALANCED APPROACH FOR WISCONSIN

All Americans, regardless of their position on gun rights or the concealed carry debates, have an interest in preserving government accountability.¹⁶⁰ As the policy goal of Wisconsin's open records law clearly states: "representative government is dependent upon an informed electorate."¹⁶¹ Though concealed carry provokes very strong reactions and emotions on both sides of the aisle, advocates and opponents should both be able to recognize the value in fostering some measures for investigating Wisconsin's issuance of these permits. Based on the understanding of the interests in accountability and individual privacy, it is possible to recommend specific revisions to Wisconsin's concealed carry statute that would strike a more even balance between the two interests. Maintaining the proper balance is essential to ensuring unilateral support for these measures.¹⁶² This Part examines the accountability mechanisms and proposes changes to the current Wisconsin law through the adoption of some form of each.

publication where the individual had no reasonable expectation of privacy could not be highly offensive. Arguably, when information is deemed a public record, the reasonable expectation of privacy concerning that record is greatly diminished, if not eliminated.

158. See, e.g., ALASKA STAT. § 18.65.770 (2013) ("Applications, permits, and renewals are not public records . . . and may only be used for law enforcement purposes."); OHIO REV. CODE ANN. § 2923.129(B)(1) (LexisNexis Supp. 2013) ("[T]he records that a sheriff keeps relative to the issuance, renewal, suspension, or revocation of a concealed handgun license . . . are confidential and are not public records.").

159. See *supra* note 17.

160. See *supra* notes 35–36 and accompanying text.

161. WIS. STAT. § 19.31 (2011–12).

162. See also Nik Clark, *We Need Solutions That Work, Not Anti-gun Rhetoric*, MILWAUKEE J. SENTINEL, Oct. 31, 2012, <http://www.jsonline.com/news/opinion/we-need-solutions-that-work-not-antigun-rhetoric-tb7e8b4-176677201.html> (an opinion article expressing disdain for the reliance on rhetoric when real compromise is necessary to solve issues of gun control).

A. A More Extensive and Accessible Statistical Report

Adopting an enhanced statistical report requirement would involve only a minimal departure from current policy yet would yield valuable information to legislators and the public. Revising the required components of Wisconsin's statistical report, stated in section 175.60(19), to include more information (akin to Michigan's requirements¹⁶³) would allow more insight than the Wisconsin Legislature and public currently have. Additionally, the legislature should post the reports online to facilitate public access.¹⁶⁴ This information is already recognized as a public record¹⁶⁵ yet requires a formal open records request to access. This revision should not raise privacy concerns as neither Wisconsin's nor Michigan's reports include any personally identifying information.¹⁶⁶ Requiring a more robust statistical report is an inoffensive proposal that would not impose any additional burdens on privacy and could yield valuable information to the public and the legislature about the efficacy of Wisconsin's concealed carry law. Additionally, expanding the scope of information should not create much—if any—additional work for the DOJ. While adopting an enhanced statistical report is the least controversial accountability mechanism, the balance would still favor privacy rights over government accountability.

B. Ease Limitations on Law Enforcement Access

Easing Wisconsin's strict limits on law enforcement access to the concealed carry permit registry is another accountability mechanism that should be considered for revision. Many states provide law enforcement access to their concealed carry permit registries for general law-enforcement-based purposes.¹⁶⁷ Not only would removing access limitations promote officer safety by alerting investigators to the potential presence of a weapon, it would also allow law enforcement to observe the strength of the permitting process's front-end checks firsthand.

163. *Supra* notes 114–18 and accompanying text.

164. *See, e.g.*, Michigan State Police, *Concealed Pistol License (CPL) Reports*, MICHIGAN.GOV, http://www.michigan.gov/msp/0,4643,7-123-1591_3503_4654-77621--,00.html (last visited Jan. 8, 2014).

165. WIS. STAT. § 19.36(1) (“[A]ny portion of that record containing public information is open to public inspection.”).

166. MICH. COMP. LAWS § 28.425e(5)(e)(5) (2012); WIS. STAT. § 175.60(19) (2011–12).

167. *Supra* notes 126–27 and accompanying text.

The Wisconsin statute requires permit holders to present their permit to a law enforcement officer if they are asked while the officer “is acting in an official capacity and with lawful authority.”¹⁶⁸ This eliminates the expectation that an individual has the right to maintain the privacy of his or her concealed carry permit status from law enforcement when asked directly. Seemingly, this also undermines the expectation that individuals should be able to keep their permit status private from law enforcement under any circumstance. Wisconsin’s limits on law enforcement access to the permit registry create unnecessary obstacles in situations where individuals have a dubious claim to privacy.

Revising the statute to allow law enforcement to access the registry for any law enforcement purpose would eliminate the hoops and make investigation more efficient. Critics may believe that access to this information could lead to disparate treatment of permit holders. To some degree this is unavoidable; knowing that a stranger is likely armed with a deadly weapon will affect the interaction. To the extent that expanding this access would actually be considered, the state may also consider adopting a mechanism to prevent abuse of the privilege. While this solution may provoke more controversy than the statistical report, the permit holder has a weak claim to a right to privacy of his or her permit information relative to the state and law enforcement.¹⁶⁹

C. Open the Records, Subject to Limitations

Completely opening the records would be the most controversial change and may swing the pendulum too far towards accountability, but the state could tailor a limited public access provision. To a degree, this would resemble a reinstatement of the DOJ’s balancing test,¹⁷⁰ allowing disclosure when the public interest in revealing the records outweighs the public interest in shielding them. Requiring a statement of purpose as part of the records request, as in the Ohio statute,¹⁷¹ would facilitate the balancing test by forcing the inquirer to articulate the public interest in disclosure. Misapplication of the test could subject the custodian and

168. § 175.60(2g)(c).

169. See *supra* notes 88–90 and accompanying text. Using the particularized judgment view of privacy as the schema provides a rationale for limiting public access to concealed carry permits but cannot justify limiting law enforcement access. Law enforcement officers have the right to ask the permit holder to see the permit, but cannot access the records remotely.

170. See COMPLIANCE OUTLINE, *supra* note 45, at 26–27; *supra* notes 54–57 and accompanying text.

171. OHIO REV. CODE ANN. § 2923.129(B)(2)(a) (LexisNexis Supp. 2013).

would-be publishers to civil liability for invasion of privacy.¹⁷² Though critics may argue that this relief is insufficient recompense for the party whose records were disclosed, the threat of litigation or the creation of criminal liability would ensure that the records custodian exercised discretion with the appropriate degree of gravitas.

If a permit holder was charged with any offense that could revoke his or her permit, there should be a corresponding revocation of the privacy presumption. This could be taken a step further, following the South Carolina model,¹⁷³ and require publication of the names of revoked permit holders. The intent is to protect the rights of law-abiding permit holders but also to punish and expose permit holders who violate the laws, allowing lawmakers to evaluate the process's efficacy at keeping legally concealed weapons in the right hands.

Because Wisconsin's concealed carry law is relatively fresh on the books,¹⁷⁴ it seems problematic that it does not provide strong oversight mechanisms for reviewing its effectiveness. The harsh prohibitions against accessing these records prevent meaningful assessment of the law, implying that Wisconsin legislators were more concerned with passing the law quickly than with its practical impact.¹⁷⁵ Critics of the law have repeatedly emphasized that, if the Wisconsin Legislature is convinced that the law is working correctly, they should ease restrictions on the records so citizens and legislative watchdog groups can verify its success.¹⁷⁶ While this argument understates the individual privacy concerns, it does raise a valid concern: professed confidence in the law's efficacy while it remains immune from oversight is unconvincing as it can be nothing more than baseless opinion and blind faith.

CONCLUDING REMARKS

Concealed carry law in Wisconsin is still new and untested; potential weaknesses should be expected to a degree. Yet weighing the interests in government accountability against the interests in personal

172. See *supra* notes 97–103 and accompanying text (describing Wisconsin's invasion of privacy statute and the possibility of a cause of action).

173. S.C. CODE ANN. § 23-31-215(T)(7) (2013).

174. The law went into effect on November 1, 2011. WIS. DEP'T OF JUSTICE, WISCONSIN'S CARRYING CONCEALED WEAPON LAW QUESTIONS AND ANSWERS 1 (2013), available at <http://www.doj.state.wi.us/sites/default/files/dles/ccw/ccw-faq.pdf>.

175. See Todd Richmond, *Wisconsin DOJ Proposes New Concealed Carry Rules*, MINNESOTA PUB. RADIO NEWS (July 16, 2012), <http://minnesota.publicradio.org/display/web/2012/07/16/news/wisconsin-concealed-carry-guns/> (describing comments of John Hogan, Senate Republican Leader Scott Fitzgerald's chief-of-staff that "the emergency rule was to get the permits going We just want to make sure people are still able to get their permits").

176. See Cerling, *supra* note 66.

privacy reveals a significant slant towards the latter. This Comment proposed three possible improvements to restore the balance and realign Wisconsin with traditional devotion to the principles of open government. Adoption of any one of these suggestions—or ideally some combination of all three—would provide greater insight into the efficacy of Wisconsin’s permitting process and help the legislature correct for oversights and loopholes. A more balanced approach need not offend gun rights advocates or concealed carry permit holders; as previously stated, the strict prohibitions against permit disclosure do not greatly advance the interests of law-abiding citizens. The groups that “benefit” the most are the state itself, for escaping public scrutiny, and those whose permits are suspended or revoked. Adopting additional accountability mechanisms would placate watchdog groups clamoring for more transparency and provide reassurance to permit holders that they are in good company.