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Alcohol, Firearms, and Constitutions

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Thousands of Tennesseans now have permits to carry firearms. The legal questions most likely to arise with respect to these permits relate to Tennessee Code Annotated section 39-17-1305.[1] With some exceptions, this statute prohibits anyone

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1. TENN. CODE ANN. § 39-17-1305 (1997). Section 39-17-1305 is entitled "Possession of firearm where alcoholic beverages are served or sold" and provides as follows:

> (a) It is an offense for a person to possess a firearm on the premises of a place open to the public where alcoholic beverages are served or in the confines of a building where alcoholic beverages are sold.
>
> (b) A violation of this section is a Class A misdemeanor.
>
> (c) The provisions of subsection (a) shall not apply to a person who

from carrying a firearm in a public place where alcoholic beverages are served or sold. After some years of wrestling with the uncertainties of this statute in connection with real, as opposed to merely academic, questions, the authors conclude that, unless the statute is interpreted to prohibit only those activities about which there is no disabling ambiguity, the statute is vague to the point of unconstitutionality under the Due Process Clauses of the United States and Tennessee Constitutions.[2] Further, this statute is unconstitutional under Article I, Section 26 of the Tennessee Constitution to the extent that it attempts to regulate the right to carry firearms in a way that does not "bear some well defined relation to the *prevention* of crime."[3] These conclusions are bolstered by conversations with those who advise law enforcement officers on legal matters. They indicate that they also do not know what the statute prohibits and what it does not.

As discussed below, the way to save the statute's constitutionally is to find a legislative intent to limit the statute's pur-

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is:

(1) In the actual discharge of official duties as a law enforcement officer, or is employed in the army, air force, navy, coast guard or marine service of the United States or any member of the Tennessee national guard in the line of duty and pursuant to military regulations, or is in the actual discharge of duties as a correctional officer employed by a penal institution; or

(2) On the person's own premises or premises under the person's control or who is the employee or agent of the owner of the premises with responsibility for protecting persons or property.

TENN. CODE ANN. § 39-17-1305 (1997).

2. While there is, of course, technically no "due process" clause in the Tennessee Constitution, the Tennessee Constitution contains an analogous "law of the land" clause. *Compare* TENN. CONST. art. I, § 8, *with* U.S. CONST. amend. XIV, § 1. That clause provides, "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." TENN. CONST. art. I, § 8.

3. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 181 (1871) (emphasis added). Although this is an old case, it remains good law, partly because it hews closely to the words of Article I, Section 26 of the Tennessee Constitution, which provides, "[T]he Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." TENN. CONST. art. I, § 26.

view to places where alcohol is the sole or primary product. These places are (1) a bar open for business (or other establishment open for business where alcohol is the sole or primary product)[4] and (2) the premises adjacent to an open bar, such as a parking lot. This legislative intent is easily discernible.

This Essay will take a conservative position; one that maintains constitutionality to the extent it *may* be possible. Still, there is a substantial chance that a court might find the statute to be in such a legal muddle that it would declare the entire statute void for vagueness. There is also a substantial chance that a court might find the statute broadly unconstitutional as not bearing a "well defined relation to the prevention of crime."[5] Neither finding would be unreasonable. In fact, one could argue persuasively that if the three law professors in the state, who probably know more about the statute than any other academic, cannot understand what it prohibits and what it does not, the statute is ipso facto void for vagueness because the average citizen has no chance of figuring out what it means. Further, one also could argue persuasively that strictly prohibiting the carrying of a firearm by, for example, an off-duty police officer or a civilian with a carry permit in any building where alcohol is merely sold as the sole or primary product (such as the typical liquor store, which does not allow alcohol to be consumed on the premises and which is about as likely to engender crime by customers as is a corner drugstore) is unconstitutional under the Tennessee Constitution because it bears no "well defined relation to the prevention of crime."[6] The Authors choose, however, not to make those arguments

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4. By the use of the term "establishment," the authors mean that one would consider, for example, a restaurant with an integral lounge that serves alcohol as one establishment. Also, it should be clear that by the phrase the "sole or primary product," the authors are speaking of the overall issue of what a business serves, not the issue of what happens to be served at a specific time. For example, when a restaurant opens for the day, it is possible that the first customers would order glasses of wine before dinner. The restaurant would not thereby become, for a short period of time, a place where alcohol is the sole or primary product. The reasons behind all this will become clear as the analysis of legislative intent and constitutionality proceed.

5. *Andrews*, 50 Tenn. (3 Heisk.) at 181.

6. *Id.*

here, but rather will set out a position that maintains constitutionality to the extent it *may* be possible.

Criminal laws, of course, violate the Due Process Clauses of the United States and Tennessee Constitutions if they are vague. Simply stated, the Due Process Clauses require that a statute be drafted clearly enough that the average person plainly knows what conduct violates the statute and what conduct does not. If there is uncertainty, the statute is unconstitutional.[7] The United States Supreme Court has stated a number of reasons for this: "'First, vague laws do not give individuals fair notice of the conduct proscribed. Second, vague laws . . . engender the possibility of arbitrary and discriminatory enforcement. Third, vague laws defeat the intrinsic promise of . . . a constitutional regime.'"[8] The Tennessee Supreme Court has reached the same conclusion, stating, "'[I]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . Due process requires that the law give sufficient warning so that people may avoid conduct which is forbidden.'"[9]

Tennessee Code Annotated section 39-17-1305 makes it "an offense for a person to possess a firearm on the premises of a place open to the public where alcoholic beverages are served or in the confines of a building where alcoholic beverages are sold."[10] Further, the Tennessee Sentencing Commission has indicated that the statute extends to "areas adjacent to where alcoholic beverages are served, such as parking lots."[11] The statute contains some exceptions, the relevant one for current purposes exempts a person who is "[i]n the actual discharge of official duties as a law enforcement officer."[12]

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7. *See, e.g.*, Connally v. General Constr. Co., 269 U.S. 385 (1926).

8. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 290 n.12 (1982) (citations omitted) (quoting Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1037 (5th Cir. 1980)).

9. State v. Lyons, 802 S.W.2d 590, 591 (Tenn. 1990) (citations omitted) (quoting State v. Thomas, 635 S.W.2d 114, 116 (Tenn. 1982)).

10. TENN. CODE ANN. § 39-17-1305(a) (1997).

11. TENN. CODE ANN. § 39-17-1305 sentencing commission cmts. (1997).

12. TENN. CODE ANN. § 39-17-1305(c) (1997).

The phrases "premises of a place" and "confines of a building" are subject to differing interpretations when considered in the context of places where alcoholic beverages are "served" or "sold," two words that are also ambiguous. The vagueness of these words and phrases makes it impossible for a police officer or a citizen with a carry permit to know what conduct is criminally proscribed. For example, consider a bar, a beer-selling market, a liquor store, an alcohol-serving restaurant that is part of a shopping mall or other multi-purpose building, or a restaurant with an integral lounge. In these instances, it is impossible for a police officer or citizen to discern the limits of the phrase "premises of a place" where alcoholic beverages are served or of the phrase "confines of a building" where alcoholic beverages are sold. Is the whole restaurant covered or only the lounge? Is the whole mall or multi-purpose building covered or merely some part, and if a part, which part?

The ambiguity is even greater when one takes into account the Sentencing Commission's comment on the statute, which includes as prohibited places "areas adjacent to where alcoholic beverages are served, such as parking lots."[13] Under one reading, the far reaches of a parking lot next to a mall would be covered, even if the bar or alcohol-serving restaurant were a half-mile away at the other end of the building. Similar vagueness problems arise with outdoor events where alcohol is served, such as Nashville's Summer Lights Festival.

The statute is also vague with respect to the question of whether its prohibitions apply at all times or only when alcohol is actually being sold or served. Is carrying a firearm prohibited (1) in an alcohol-serving restaurant or beer-selling market on Sunday morning, when alcohol may not be sold or served; (2) when a bar is closed for service, but open for taking employment applications; and (3) in a place like the state office building that houses the Tennessee Performing Arts Center, where alcohol is served during certain performances, but when there is no such performance?

The statute is also vague with regard to the terms "served"

13. TENN. CODE ANN. § 39-17-1305 sentencing commission cmts. (1997).

and "sold." "Served" clearly means served ready for consumption, such as in a glass. The term "sold" obviously covers take-out sales, but it may also be read to encompass situations where alcohol is served for consumption when the seller receives remuneration. The important issue is which prohibition applies in a particular situation, the one relating to "premises of a place," the one relating to "confines of a building," or both.

Off-duty police officers are generally treated the same as permit holders under this statute. As stated previously, there is an exception in the statute relating to a person who is "[i]n the actual discharge of official duties as a law enforcement officer."[14] Because the legislature took pains to spell out the specifics of this exception (i.e., the inclusion of the phrase "actual discharge" as it relates to official duties), it clearly intended to distinguish between on- and off-duty police officers. If police officers were to be covered by the exception at all times, the legislature would not have included the phrase "actual discharge of official duties."[15] The easiest way to cover off-duty officers, of course, would have been to write the exception simply for "a law enforcement officer." Interestingly, this exception may be the most clearly drafted part of the statute.

The authors believe that the legislature did not draft the statute in terms of on- and off-duty officers partially because an off-duty officer can, at any moment, confront a situation where he or she believes a crime may be in progress or has been committed and takes action based on that belief. In such a situation, the off-duty officer is covered by the provision of the statute relating to a person who is in "the actual discharge of official duties as a law enforcement officer."[16] As an example, an off-duty officer who hears shots fired in a bar could legally enter the bar while armed. In short, off-duty police officers and citizens with permits to carry firearms are identically situated under this statute until a potentially criminal event co-

14. TENN. CODE ANN. § 39-17-1305(c) (1997).
15. TENN. CODE ANN. § 39-17-1305(c) (1997).
16. TENN. CODE ANN. § 39-17-1305(c) (1997).

mes to the attention of an off-duty officer.

Although this seems clear enough from the statutory language, the legislative history of carry permit regulation also directly affirms that off-duty officers and permit holders are generally treated the same with respect to firearms and alcohol. This situation exists as a result of the unusual way Tennessee has treated carry permits over the years. Prior to the passage of the first carry permit law less than three years ago, there was no provision that allowed civilians to obtain a carry permit. All "permits" given to civilians were issued under the law relating to the carrying of firearms by law enforcement officers.

Because the law relating to firearms and alcohol was in effect during this period, it is clear that the same rules on alcohol apply to off-duty police and permit holders; the way the legislature wrote the statute, police officers and "permit" holders were technically the same in this respect. As a matter of law, they were both holders of police "commissions" under the same statute. The situation with permit holders and alcohol has not changed because of the new statute relating to permits. There was a legislative recognition that the new statute merely changed the rules under which citizens could get permits, by, among other things, "taking politics out of the process" and making permits valid statewide rather than countywide.

To put the effects of what has been said in concrete terms, consider the following illustration. Suppose an off-duty officer or a carry permit holder stops at Kroger, which sells beer, for a loaf of bread and then meets his or her spouse in a free-standing restaurant that serves alcohol. As discussed below, it is impossible to infer legislative intent to force the person to leave all firearms in his or her car, and further, in the case of the restaurant, to park the car away from the restaurant's parking lot. Also, under no conceivable view of the facts could interpreting the statute to criminalize such conduct be squared with the Tennessee Constitution's requirement in Article I, Section 26 that the regulation of the carrying of firearms must "bear some well defined relation to the *prevention* of crime."[17]

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17. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 181 (1871) (emphasis added). Arti-

This seems to be self-evident, and it becomes even clearer when the true legislative intent is discussed. Nevertheless, two inarguably relevant facts should be noted. Leaving a firearm in a car obviously poses dangers both to the public and to police officers because of the possibility that a thief may obtain the firearm when breaking into the car or, worse, find the firearm while stealing the car. In the latter case, the lives of police officers and others are put at substantially more risk because of the added danger they face from an armed driver or passenger if the police stop the stolen car.[18] Also, forcing a restaurant patron to park away from the restaurant's parking lot obviously subjects the person to a greater risk of street crime—a result exactly contra to the requirements of Article I, Section 26 of the Tennessee Constitution.

It is clear that the statute makes sense only if read as prohibiting off-duty police officers and citizens with carry permits from possessing a firearm (1) in a bar that is open for business (or other establishment open for business, where alcohol is the sole or primary product) and (2) on the premises adjacent to an open bar, such as a parking lot. This prohibition makes interpretive sense as a matter of legislative intent, and it "bears some well defined relation to the prevention of crime,"[19] if one focuses on the well-known and widely held belief that bars and guns do not mix. (Even in the so-called "Wild West," it often was true that firearms could not be brought into bars.) With this focus, legislative intent suddenly pops into clarity.

The Sentencing Commission's comment, which includes in

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cle I, Section 26 of the Tennessee Constitution would be violated in the case of off-duty police officers and permit holders by a broader interpretation of the statute than herein suggested. Indeed, this provision would be violated by any statute that attempted more broadly than the current statute, when properly interpreted, to restrict the right of either off-duty officers or permit holders to carry firearms where alcohol is sold or served.

18. The situation in Israel, a country with more than its share of experience with firearms in the hands of citizens, is instructive here. At least in some parts of the country, Israeli citizens may carry firearms with few restrictions. The authors understand, however, that firearms may not be left in vehicles because of the kind of dangers the authors have mentioned.

19. *Andrews*, 50 Tenn. (3 Heisk.) 165, 181 (1871).

the statute's prohibition parking lots and other premises adjacent to where alcohol is served, also fits with this easily inferred legislative intent if the statute is read as suggested. As with bars and guns not mixing, it also is a well-known fact that bar parking lots are especially likely sites for altercations. The edict to "take it outside" is a staple of a bar owner's vocal repertoire.

The interpretation suggested above is easily reachable by reading the statute to apply only to places where alcohol is the sole or primary product that is served or sold. While the *language* of the statute is facially silent on the "sole or primary product" point, this reading easily can be inferred, as discussed above, from (1) the fact that the exception for police officers is limited to officers who are in the actual discharge of official duties (indicating that the legislature believed that bars and guns do not mix for off-duty officers), (2) the Sentencing Commission's comment about the meaning of the term "premises" (which sensibly includes parking lots in the same category as bars, because the misuse of firearms is particularly likely there), and (3) the impossibility of inferring any other legislative intent, especially in light of the requirement of the Tennessee Constitution that the regulation of the carrying of firearms have a "well defined relation to the prevention of crime."[20]

In the final analysis, the legislative intent so inferred comes down to plain common sense, as is typical of good legislation. There simply is no basis in fact to fear gunfights breaking out in restaurants and their parking lots or in Kroger, and it can be

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20. *Id.* At this point it should be clear why an establishment must be considered as a whole, and why, in the "sole or primary product" test, the authors are speaking of the overall issue of what a business serves, not the issue of what happens to be served at a specific moment in time. Situations like those mentioned in footnote four, such as a restaurant that includes an integral lounge and a restaurant that at a particular point in time (such as when it has opened for its first customers) may by chance be serving alcohol rather than food, do not fit within the inferred legislative intent. In this connection, note that by treating a restaurant and its integral lounge separately, rather than as a whole, the restaurant's parking lot could not be used by off-duty officers and carry permit holders who have a firearm, merely because the restaurant and lounge share the same parking lot. This is a nonsensical and unconstitutional result that does not reflect legislative intent.

easily inferred that the legislature passed this statute with the constitutional view to the prevention of crime rather than from the idea that grocery stores and restaurants would become modern versions of the O.K. Corral.[21]

21. The authors might add that this reading is supported by the laws of other states. A good example is Texas, which prohibits citizens with carry permits from possessing a firearm in an establishment "if the business derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption." TEX. PENAL CODE ANN. § 46.035(b)(1) (West 1998).