

ASSAULT WEAPON BANS: CAN THEY SURVIVE RATIONAL BASIS SCRUTINY?

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In the last two decades, legislatures and courts have been increasingly willing to argue that a certain class of firearms termed “assault weapons” are not protected by the Second Amendment, and may be regulated or banned even though functionally identical firearms are not generally subject to such laws. The United States Supreme Court has long recognized that distinctions in laws must be rationally related to a legitimate state interest.¹ Do assault weapons bans meet this standard, or are they a panic driven response to the fear of gang violence and random mass murder?

I. WHAT IS AN “ASSAULT WEAPON”?

Starting in 1989, with the passage of California’s Roberti-Roos Assault Weapons Control Act (AWCA),² a new term has entered the American legal vocabulary: “assault weapon” (AW). What is it?

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1. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

2. Carl Ingram, *Assault Gun Ban Wins Final Vote: Deukmejian’s Promised Approval Would Make It 1st Such U.S. Law*, L.A. TIMES, May 19, 1989, http://articles.latimes.com/1989-05-19/news/mn-112_1_assault-weapons-ban-military-style-assault-types-of-semiautomatic-rifles/2 (last accessed Feb. 27, 2016).

Generally, these are semiautomatic rifles and pistols that use detachable magazines. AWs usually fire a less powerful cartridge than hunting rifles and have a somewhat military appearance (black plastic stocks, pistol grips, and bayonet lugs being common components). AWs are functionally indistinguishable from sporting arms that have been used for more than a century by civilians in the U.S. with semiautomatic, detachable magazine feed.

Most statutes have combined a make and model named list with a further prohibition against weapons “substantially identical”³ to those already the listed. State by state, these lists tend to vary slightly. New Jersey’s named list bans the “Demro TAC-1 carbine” while California’s similar statute⁴ does not mention it. Many guns appear on both lists, with slight differences in name (FN-FAL, FN-LAR, or FN-FNC type semiautomatic firearms in New Jersey’s list;⁵ Fabrique Nationale FAL, LAR, FNC in California’s list).⁶ Comparing these lists of named weapons and functional characteristics raises some startling conclusions.

That AW bans focused primarily on name and model numbers rather than functional characteristics should be a tipoff. Whatever the public safety hazards these weapons present, those interested in banning them had a hard time finding common risk factors that could have enabled them to write a practical definition. Most weapons were derived from fully automatic military weapons and bear a strong resemblance to their fully automatic ancestors. (There are some exceptions, such as the Calico M-950, for example, which has no military origin). None of these weapons are readily convertible to fully automatic fire. If they were readily convertible to fully automatic fire, then they would qualify as machineguns under federal law⁷ which would subject them to substantially stricter federal⁸ and state licensing laws.⁹

3. N.J.S.A. § 2C:39-1(w)(2)(“Any firearm manufactured under any designation which is substantially identical to any of the firearms listed above.”).

4. Cal. Penal Code § 30510 (2014).

5. N.J.S.A. 2C:39-1(w)(1).

6. Cal. Penal Code § 30510 (2014).

7. 26 USC § 5845(b) (2014)(“The term ‘machinegun’ means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.”). See 27 C.F.R. § 179.11, ATF Rul. 82-3, 82-8, 83-5, and 81-4 for regulations redefining previously semiautomatic guns or parts into machineguns.

8. See generally 26 U.S.C. §§ 5801-5872.

9. Cal. Penal Code § 32650(a) (2014).

II. NAMED LISTS AS CARELESS BILLS OF ATTAINDER

American laws usually prohibit or regulate items not by name, but by functional characteristics. For example, California defines the “destructive device” commonly known as a “Molotov Cocktail” by its functional characteristics: “Any breakable container that contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.”¹⁰ This matches the dictionary definition of “a crude incendiary grenade consisting of a glass container filled with flammable liquid and a wick for ignition.”¹¹

The California Penal Code definition is legally superior to relying on a dictionary definition because a defendant could argue that he did not know what the phrase “Molotov cocktail” meant and was therefore ignorant that he was violating the law. Also, minor non-functional changes (such as substituting an electrical ignitor instead of a wick) might create questions as to whether a named prohibition of a “Molotov cocktail” was insufficiently precise.

While most AW bans have functional definitions of the banned weapons, named list definitions based on manufacturer’s name and model number are a common part of these laws. These named lists are similar to “bills of attainder,” legislative acts that punish persons by name for alleged crimes instead of specifying a crime or allowing due process by the courts to determine guilt. For example, a law banning the sale of a named product made by Colt Industries or its AR-15, with no similar ban on sales by another manufacturer would effectively deny Colt the equal protection of law. To make these distinctions in an arbitrary manner is contrary to existing case law.¹²

Not only does the named list approach lead to equal protection problems, but it makes it very easy to subvert these laws. As an example of the defective nature of named lists, California’s Assault Weapons Control Act banned the Intratec TEC-9 by name. The manufacturer responded by making minor non-functional changes to the gun and giving

10. Cal. Penal Code § 16460(5) (2016).

11. ACADEMIC PRESS DICTIONARY OF SCIENCE AND TECHNOLOGY 1404 (Christopher G. Morris eds. 1992).

12. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”).

it a new model number: DC9¹³ (presumably “Designed for California”). The TEC-9 and TEC-DC9 are otherwise identical.¹⁴ When the 1994 federal ban took effect listing the TEC-9, the manufacturer created “an AB-10 (‘after ban’) model that does not have a threaded barrel or a barrel shroud but is identical to the TEC-9 in other respects, including the ability to accept an ammunition magazine outside the pistol grip.”¹⁵ While the federal AW ban prohibited new manufacture of 32 round magazines, ones made before the new law still work in the AB-10 gun.¹⁶

The U.S. Constitution Article I, section 10 prohibits states from passing bills of attainder and limits the legislative branches of state government.¹⁷ In the past, clever state governments have worked around this by executive orders, such as Missouri Governor Boggs’s 1838 order to the militia that Mormons be driven from the state or killed.¹⁸ As a recent work on constitutional law described the problem of bills of attainder:

[T]he paradigmatic example of legislation whose violation of equality and due process contravenes the rule of law. It denies the separation of powers between legislature and judiciary, and the related distinction between legislative and judicial process, and so removes the protection that law is meant to provide from governmental hostility and arbitrary power.¹⁹

In the 1990s, the United States Court of Appeals for the Sixth Circuit struck down a list of named “assault weapon” bans for vagueness.²⁰ Even

13. Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,”* 8 *Stan. Law & Policy Rev.* 41, 46-47 (1997).

14. Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, at 10 (June 2004) at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf> (last accessed July 25, 2016). This report was funded by the Department of Justice in response to a request by Congress.

15. *Id.*

16. *Id.*

17. U.S. CONST. art I, § 9, cl. 1 (“No State shall . . . pass any Bill of Attainder.”).

18. MORMONISM: A HISTORICAL ENCYCLOPEDIA 330 (W. Paul Reeve & Ardis E. Parshall eds., 2010).

19. T.R.S. Allen, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* 148 (2001).

20. *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 251 (6th Cir. 1994) (striking down a city ordinance for vagueness and not reaching bill of attainder question because of vagueness).

The ordinance defines “assault weapon” as any one of thirty-four specific rifles, three specific shotguns and nine specific pistols, or “[o]ther models by the same manufacturer with the same action design that have slight modifications or enhancements. . . .” The weapons are specified by brand name and model, not generically or by defined categories. Plaintiffs challenge the ordinance as an unconstitutional bill of attainder because it constrains only

when the ordinance was amended to prohibit “assault weapons” based on functional characteristics, the Sixth Circuit held that such definitions were vague, because they may require more knowledge than a person of “average intelligence [possesses] to determine whether a particular firearm is included within its prohibition.”²¹

III. WHAT MAKES “ASSAULT WEAPONS” SO DANGEROUS?

The California Department of Justice examined the issue of AWs and public safety both before and after passage of the AWCA in 1989. These reports were not part of the legislative process. They demonstrate that there was no rational basis for the law. Steve Helsley, Acting Assistant Director of the Investigation and Enforcement Branch, wrote a memo on October 31, 1988, a year before the bill passed, asking “whether a definition could be formulated which would allow legislative control of ‘assault rifles’ without infringing on sporting weapons.”²² He concluded, “I do not think that the necessary precision is possible.”²³ Helsley also pointed out that,

Obviously, there have been some high visibility crimes which involved semi-automatics UZI’s and AK-47’s, but I suspect a close analysis would put that frequency at or slightly above the statistical aberration level. Last year, I surveyed the firearms used in violent crimes which were submitted to BFS [Bureau of Forensic Services] analysis. . . . I believed that this would provide a good picture of what criminals use when they want to hurt someone. The figures are self-explanatory and confirmed our intuition that assault type firearms were the least of our worries. It’s really the .22 and .38 Caliber handguns and 12 gauge shotguns that inflict the majority of the carnage.

Consequently, I believe that assault weapons cannot be defined in a workable way, by size, caliber, action type or magazine capacity. . . .

the named manufacturers while other manufacturers are free to make and sell similar products. Plaintiffs also contend that the ordinance is unconstitutionally vague.

Id.

21. Peoples Rights Organization v. City of Columbus, 152 F. 3d 522, 536 (6th Cir. 1998) (“Therefore, anyone who possesses a semiautomatic center fire rifle or carbine that accepts a detachable magazine is subject to prosecution so long as a magazine exists with a capacity of twenty rounds or more. Since the ordinance contains no scienter requirement, an owner’s complete lack of knowledge as to the magazine’s existence is of no consequence.”).

22. Memorandum to G.W. Clemons, Dir. Div. Law Enforcement from S.C. Helsley, Acting Asst. Dir., on Assault Rifles, Oct. 31, 1988, 1. Because this document required a Public Records Access request, you can read it at <http://www.claytoncramer.com/primary/other/Helsley88AWCa.pdf> (last accessed July 25, 2016).

23. *Id.*

Unless a realistic definition can be developed for “assault weapons,” we should leave the issue alone.²⁴

After passage of the law in 1989, the California Criminalistics Institute (a unit of the California Department of Justice),²⁵ studied the use of “assault weapons” in 1990 based on information from crime labs throughout the state. It concluded:

It is clear from this data that assault weapons play a very small role in assault and homicide cases submitted to city and county labs. This data shows that in the neighborhood of less than 5% of homicide and assault weapons fall into the § 12276 PC list. This is in agreement with previous data collected on firearms submitted to CA DOJ labs prior to the enactment of the AWCA as well as for the year following the effective date of that law.²⁶

The report explains that they counted “4844 guns which included 45 ‘assault weapons;’” thus, less than one percent of guns were assault weapons. As the report further explained, the Los Angeles Sheriff’s Office (LASO) destroyed 3881 guns, preventing their identification. “If the LASO data is ignored, the total number of guns is 963 which includes 36 ‘assault weapons’ (~3.7%) which is probably a more accurate reflection of numbers of ‘assault weapons’ actual[ly] encountered in homicides and assaults.” Even with this significant loss of data, the report explained why relying on crime labs for determining frequency of criminal use of assault weapons likely overstated their presence:

First, if all guns are not being examined by forensic laboratories, many of those not seen will be the usual pistols and revolvers which make up the bulk of guns used in violent crimes thus maintaining the proportions. It is likely that, if there is a skewing of the data, that it is to accentuate the apparent use of “assault weapons.” This because these weapons are infrequently seen by law enforcement so they are unfamiliar with them as a group and there is frequently a question of whether the firearm is or has been converted to full automatic fire (machine gun). This results in an increased likelihood that a recovered ‘assault weapon’ will be examined by a forensic specialist.²⁷

The report also acknowledges that there were difficulties determining whether a particular firearm was actually a weapon regulated

24. *Id.* at 3.

25. California Criminalistics Institute, <https://oag.ca.gov/cci> (last accessed Apr. 5, 2016).

26. Torrey D. Johnson, Report on a Survey of the Use of “Assault Weapons” in California in 1990, 1, available at <http://www.claytoncramer.com/primary/other/Johnson91AWCa.pdf>.

27. *Id.* at 2.

by the AWCA, and they used the “most generous interpretation. . . . This will give the worst case results.”²⁸ The report concludes: “The incidence of the use of ‘assault weapons’ is very much lower than the media and law makers seem to represent.”²⁹

With so much agreement within the California Department of Justice that assault weapons constituted only a tiny fraction of criminal misuses, why did California Attorney General John Van de Kamp assert the importance of passing the AWCA? His speech to California police chiefs suggests that he saw this as a wedge issue for breaking open the gates to more restrictive gun control laws:

“It can win, but the margin of victory will be narrow at best,” he said. Past defeats have resulted from debate deteriorating “into a pitched battle between those who would ban all guns and those who would regulate none of them,” he said.

This time, Van de Kamp said, the debate should be limited to law enforcement issues. He said there are many members of the NRA, among them police officers, who do not agree with the association’s consistent opposition to all forms of gun control.³⁰

Other evidence suggests the AWCA was based not on public safety but political expedience: “Sponsors of the AWCA, including Senator Roberti, Assemblyman Roos, Attorney General Van de Kamp, and law enforcement administrators, held a strategy session at which they decided that ‘certain weapons probably had too large a constituency to ever be worth the risk of including, Ruger Mini 14, M1 Carbine, M1 Garand, etc.’”³¹ and that “[i]nformation on assault weapons would not be sought from forensic laboratories as it was unlikely to support the theses [that assault weapons were the preferred choice of drug-trafficking organizations and violent criminals] on which the legislation would be based.”³² Helsley also explained the random named list this way:

[T]he list had become an odd collection of firearms which range from

28. *Id.* at 3.

29. *Id.* at 7.

30. Steve Emmons, *Van de Kamp Asks Police Chiefs for Support in Outlawing Assault Rifles*, L.A. Times, Feb. 9, 1989.

31. Memorandum to Patrick Kenady, Asst. Attorney General from S.C. Helsley, Asst. Dir., Enforcement Branch on Roberti-Roos Assault Weapons Control Act of 1989 (c. Feb. 1991), <https://web.archive.org/web/20081201093921/http://www.hoboes.com/pub/Politics/United%20State/s/Trust%20the%20Government/Insight%20into%20Anti-Legislation> (last accessed July 25, 2016).

32. Bruce H. Kobayashi and Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,”* 8 *STAN. L. & POL’Y REV.* 41, 44 (1997) [bracketed material in original].

the long out of production, to exorbitantly expensive, to the “evil” AK 47. As no specifically defined problem drove our efforts, such an odd collection should not be surprising. . . . Most if not all of the principal players in crafting the legislation had absolutely no knowledge of firearms. Most of the weapons on the list are low production or long out of production items that constitute absolutely no conceivable threat.³³

In some cases, non-firearms have been added to the list: the Knight’s Armament RAS was on the list in 2000³⁴ even though the RAS is only a rail adapter system for attaching sights, flashlights, and the like.³⁵

The clear intent was to go after a small minority of guns and their owners, a group unlikely to have the political power to defend their interests. Excluding contrary data demonstrates a lack of rational basis and intellectual honesty.

Van de Kamp was widely considered an unannounced candidate for governor at the time³⁶ and likely was using his support for this law as an opportunity to increase his public profile. While seeking higher public office is not intrinsically problematic, it is not an adequate justification to avoid rational basis. The percentages of AWs criminally used were so low that a ban on handguns or knives would have had a far stronger effect in reducing murders, but this would have been a bridge too far in the California of 1989. Failure to pass it would have done nothing to raise Van de Kamp’s visibility for higher office.

Other studies also demonstrate that AW bans were politicians’ irrational responses to public safety concerns. In 1994, the federal government passed an assault weapon ban similar to those passed by many of the states in years before and after 1994, based on named lists and functional specifications.³⁷ The federal ban also prohibited new manufacture for civilian use of Large Capacity Magazines (LCMs) (those holding more than 10 rounds).³⁸ This law was passed with a sunset clause, causing its automatic repeal in 2004.³⁹

33. Helsley Memo, *supra* note 33.

34. California Dept. of Justice, *Kasler v. Lockyer Assault Weapon List*, <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/infobuls/kaslist.pdf> (last accessed Apr. 13, 2016).

35. Knight’s Armament, *Rail Adapter Systems*, <https://www.knightarmco.com/portfolio/m4-carbine-ras> (last accessed Apr. 13, 2016).

36. Ken Hoover, *California Attorney General Urges Assault Rifle Ban*, UPI (Feb. 13, 1989), <http://www.upi.com/Archives/1989/02/13/California-attorney-general-urges-assault-rifle-ban/5742603349200>.

37. Koper, *supra* note 15, at 4-6 (discussing Title XI, Subtitle A of the Violent Crime Control and Law Enforcement Act of 1994).

38. *Id.* at 6.

39. *Id.* at 4.

One part of the federal law directed the U.S. Attorney General to “to study the ban’s impact and report the results to Congress within 30 months of the ban’s enactment.”⁴⁰ The first report on the effectiveness of the federal law found very little measureable result. The authors (Roth and Koper) admitted on the very first page that they had a hard time “discerning the effects of the ban” at least partly because “the banned weapons and magazines were rarely used to commit murders in this country” before the 1994 ban.⁴¹

Roth and Koper tried to figure out if the ban reduced the number of victims per mass murder.⁴² If the public safety hazard associated with AWs was because of high capacity magazines with the ability to spray bullets everywhere, you would expect to see mass murders decline.

So what did the report find? They found a 6.7% reduction in murder rates in the fifteen states where the federal ban *could* have made a difference. But this reduction was not statistically significant. Because assault weapons had been used in a tiny percentage of murders before the ban, “it is highly improbable that the assault weapons ban produced an effect this large.”⁴³ “The ban did not produce declines in the average number of victims per incident of gun murder or of gun murder victims with multiple wounds.”⁴⁴

What about “protecting police officers?” This was a reason offered repeatedly for the ban. There was a decline in assault weapons used to murder police officers, but Roth and Koper also admitted that “such incidents are sufficiently rare” that the data did not permit a reliable assessment of whether or not the law reduced gun murders of police officers.⁴⁵

Koper’s 2004 final report on the effect of the federal ban on crime rates observes that the ban was so narrowly written as to be easily subverted. “Relatively cosmetic changes, such as removing a flash hider or bayonet mount, are sufficient to transform a banned weapon into a legal substitute, and a number of manufacturers now produce modified, legal versions of some of the banned guns.”⁴⁶ One recent reminder was the 2015 San Bernardino terrorist attack in which the shooter purchased one

40. *Id.* at 20.

41. Jeffrey A. Roth and Christopher S. Koper, *Impacts of the 1994 Assault Weapons Ban: 1994-96*, INCI 173405 (Washington: National Institute of Justice, 1999), <https://www.ncjrs.gov/pdffiles1/173405.pdf> (last accessed July 25, 2016).

42. *Id.* at 7.

43. *Id.* at 8-9.

44. *Id.* at 9.

45. *Id.*

46. Koper, *supra* note 15, at 10.

of these slightly altered guns, and modified it to be functionally equivalent to a banned AW.⁴⁷ Emphasizing the cosmetic nature of both the named list and functional irrelevance of the specification lists, Koper observes:

The gun ban provision targets a relatively small number of weapons based on outward features or accessories that have little to do with the weapons' operation. Removing some or all of these features is sufficient to make the weapons legal. In other respects (e.g. type of firing mechanism, ammunition fired, and the ability to accept a detachable magazine), AWs do not differ from other legal semiautomatic weapons.⁴⁸

If these bans were so easily subverted in ways that did not involve any significant functional change to the firearms available for sale, can such laws qualify as rationally based?

Along with how easily these laws were subverted, Koper summarized other studies showing that the banned guns were used in a tiny percentage of crimes. While the definition of AWs varied across different studies:

[a]ccording to these accounts, AWs typically accounted for up to 8% of guns used in crime, depending on the specific AW definition and data source used A compilation of 38 sources indicated that AWs accounted for 2% of crime guns on average. Similarly, the most common AWs prohibited by the 1994 federal ban accounted for between 1% and 6% of guns used in crime according to most of several national and local data sources examined for this and our prior study.⁴⁹

By comparison, “knives and other cutting instruments” in 2014 caused 13.1% of U.S. murders.⁵⁰ Yet knives can be purchased over the Internet or mail order with no questions asked, even when the search phrase is “combat knives military” (roughly analogous to “assault weapons”) which returns 1,625 results on Amazon.com with prices starting at \$3.⁵¹

Unlike AWs, knives are silent, and can be used without neighbors calling 911 to report gunshots. Even publications long supportive of AW bans have sometimes admitted that there was no rational basis for such laws:

47. Josh Richman, *San Bernardino Shooting Stirs Gun Debate*, San Jose Mercury-News, Dec. 4, 2015 (last accessed Mar. 17, 2016).

48. Koper, *supra* note 15, at 11.

49. *Id.* at 15.

50. FBI, CRIME IN THE UNITED STATES 2014, Table 7, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-7>.

51. Author's search, www.amazon.com, Mar.14, 2016.

But in the 10 years since the previous ban lapsed, even gun control advocates acknowledge a larger truth: The law that barred the sale of assault weapons from 1994 to 2004 made little difference.

It turns out that big, scary military rifles don't kill the vast majority of the 11,000 Americans murdered with guns each year. Little handguns do.

In 2012, only 322 people were murdered with any kind of rifle, F.B.I. data shows.

The continuing focus on assault weapons stems from the media's obsessive focus on mass shootings, which disproportionately involve weapons like the AR-15, a civilian version of the military M16 rifle. This, in turn, obscures some grim truths about who is really dying from gunshots.

One reason: The use of these weapons may be rare over all, but they're used frequently in the gun violence that gets the most media coverage, mass shootings.

The criminologist James Alan Fox at Northeastern University estimates that there have been an average of 100 victims killed each year in mass shootings over the past three decades. That's less than 1 percent of gun homicide victims.⁵²

"We spent a whole bunch of time and a whole bunch of political capital yelling and screaming about assault weapons," Mayor Mitchell J. Landrieu of New Orleans said. He called it a "zero sum political fight about a symbolic weapon."⁵³

So, if the guns prohibited were a tiny fraction of criminally misused guns, and a tiny fraction of far more commonly used and available murder weapons, why was so much political capital spent on these laws? As Koper's study observes, their use in the highly publicized but rare mass murders gave them a high profile:

Early studies of AWs, though sometimes based on limited and potentially unrepresentative data, also suggested that AWs recovered by police were often associated with drug trafficking and organized crime, fueling a *perception* that AWs were guns of choice among drug dealers

52. Lois Beckett, *The Assault Weapon Myth*, N.Y. TIMES, Sep. 14, 2015, http://www.nytimes.com/2014/09/14/sunday-review/the-assault-weapon-myth.html?_r=0 (last accessed Mar. 14, 2016).

53. *Id.*

and other particularly violent groups.⁵⁴

As Koper points out: “Looking at the nation’s gun crime problem more broadly, however, AWs and LCMs were used in only a minority of gun crimes prior to the 1994 federal ban, and AWs were used in a particularly small percentage of gun crimes.⁵⁵ It hardly needs saying that perception is not reality, although reality is certainly a requirement for an action being reasonable.

Underlying all of the “assault weapon” statutes and ordinances is the explicitly stated belief that they are a public safety hazard. California’s Roberti-Roos Assault Weapons Control Act justified its need this way: “The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state.”⁵⁶ While the statement might well be true, the same could be said for handguns, knives, and automobiles, all of which caused more deaths than the rarely criminally misused named AWs as we discussed above. In light of the apparent suppression of contrary data on criminal misuse, it cannot be said that this legislative statement is rational.

So, AW bans seem to be a strong reaction to a category of weapons that are used far less often for murder than the relatively lightly regulated category of knives. The statutes also seem to be easily subverted by functionally irrelevant changes to firearms.

IV. SENTENCE LENGTH AS AN INDICATOR OF IRRATIONALITY

Looking at the minimum sentences provided for AW violations relative to other crimes gives a pretty clear picture of what the legislatures considered the level of public safety hazard associated with AWs. California’s minimum sentence for possession of an unlicensed machine gun⁵⁷ is substantially shorter than the minimum sentence for sale or importation of an “assault weapon.”⁵⁸ Even more curiously, possession of a hand grenade is even a lighter sentence than either.⁵⁹ (This is a

54. Koper, *supra* note 15, at 14 (emphasis added).

55. *Id.*

56. Cal. Penal Code § 12275.5(a) (1990).

57. Cal. Penal Code § 32625(a) and 1170 (h)(1) (“a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.”).

58. Cal. Penal Code § 30600 (2014) (“[U]pon conviction shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for four, six, or eight years.”).

59. Cal. Penal Code § 12301(a)(2) (defines grenade as “destructive device”) and 12301(b) (2014) (“shall be punished by imprisonment in the county jail for a term not to exceed one year, or in state prison, or by a fine not to exceed ten thousand dollars (\$10,000) or by both such fine and imprisonment.”).

prohibition on functional hand grenades; possession or importation of a “metal military practice handgrenade or metal replica handgrenade” is prohibited elsewhere.⁶⁰ Adding to this strange disparity, the minimum sentence for forcible rape⁶¹ is less than the minimum sentence for import or transfer of an “assault weapon.” Clearly, the California legislature considers “assault weapons” a greater public safety hazard than machine guns, grenades, or rapists, if the severity of the sentence is any indicator. This suggests a panic reaction, not a rational decision.

V. RATIONAL BASIS SCRUTINY

Can AW laws survive “rational basis” scrutiny? What is the legitimate state interest rationally related to AW bans? They affect weapons that are a small minority of criminally misused guns, and which are already subject to substantial federal and state regulations because they are firearms. Weapons that are more commonly used for murder are available for mail order purchase with no similar level of restrictions.

What is the “rational basis” test? In *Cleburne v. Cleburne Living Center* (1985), the U.S. Supreme Court held that, “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”⁶² In *Cleburne*, preventing mentally disabled people from living a residential neighborhood was not a legitimate state interest.

Many of the existing Equal Protection Clause cases have involved not criminal prosecutions, but administrative actions for which, while there might be genuine concerns about inequality in results, no one would be going to prison. In *Plyer v. Doe* (1977), the Court struck down a law that denied public school education to illegal alien children, upholding a district court opinion that the discrimination lacked “rational basis.”⁶³ In *Cleburne v. Cleburne Living Center* (1985), the city of Cleburne denied a special use permit for a group home for the mentally disabled in a residential neighborhood.⁶⁴ In *FCC v. Beach Communications, Inc.* (1993) the Court upheld a regulatory distinction for a cable TV company

60. Cal. Penal Code § 12020(a)(1)(2014) (“Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison: . . . Manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any metal military practice handgrenade or metal replica handgrenade. . . .”).

61. Cal. Penal Code § 264(a)(2014) (“[R]ape, as defined in Section 261 or 262, is punishable by imprisonment in the state prison for three, six, or eight years.”).

62. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 436, 437 (1985).

63. *Plyler v. Doe*, 457 U.S. 202, 208 (1977).

64. *Cleburne*, 473 U.S. at 436-37.

where “transmission lines interconnect separately owned and managed buildings or if its lines use or cross any public right-of-way.”⁶⁵

Worse, the minimum sentences associated with some of these AW bans (such as California’s) are far more severe than those for possession of machine guns and hand grenades, both of which would seem at least as severe a public safety hazard as AWs. That violation of the AW bans is more serious than forcible rape also shows a certain disproportionate reaction by the legislature.

The AW bans impose prison sentences on violators—far more serious a consequence than the largely economic injuries struck down in many of the previously mentioned cases. But there are Supreme Court decisions where there was no “reasonable” connection between the statute and legitimate governmental end⁶⁶ and where jail time was the penalty.⁶⁷ By comparison, the Supreme Court’s decision in *District of Columbia v. Heller* (2008) explicitly rejects “rational basis” as the standard of scrutiny concerning “the right to keep and bear arms” pointing to *United States v. Carolene Products* (1938) famous footnote four.⁶⁸

In *Romer v. Evans* (1996) the Court overruled an amendment to the Colorado State Constitution because:

First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.⁶⁹

Similarly,

A second and related point is that laws of the kind now before us raise

65. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 311 (1993).

66. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (“The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without *reasonable* relation to some purpose within the competency of the State to effect.”); *Pierce v. Society of Sisters*, 268 US 510, 536 (1925) (“Plaintiffs asked protection against arbitrary, *unreasonable* and unlawful interference with their patrons and the consequent destruction of their business and property.”) (emphasis added).

67. *Id.* at 397 (“Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100) or be confined in the county jail for any period not exceeding thirty days for each offense.”).

68. *D.C. v. Heller*, 554 U.S. 570, 628 n.27 (2008) (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

69. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁷⁰

The AW bans impose a “broad and undifferentiated disability on a single named group,” a category of firearms that have very little in common except for a somewhat menacing appearance, as well as creating a risk of arrest and prison for their owners. (Those who register them are losing privacy rights even if the AWs remain in their owner’s home.)

Like homosexuals (the protected group in *Romer*), gun owners and sometimes AW owners have been subject to ferocious, often religiously-based criticism, comparing them to sexual deviants. For example, the Coalition to Stop Gun Violence (CSGV) tweeted about the gun industry: “You’d be hard-pressed to imagine a more degenerate, immoral industry.”⁷¹ In another example, a poster from CSGV showing Satan has the headline, “If the devil did exist, he’d certainly fetishize weapons designed to take human life.” In response to the CSGV question, “What’s the first word that comes to your mind when you hear ‘Gun Culture’?”,⁷² comments again included sexual perversion and bigoted attacks like “Probably amosexual. But the vision that comes to mind is more powerful—a bunch of fat, unkempt, white guys walking around with guns in their belts and dangling off their shoulders, in public places attempting to intimidate others, but claiming they aren’t,” and “Insecure, bullying rednecks.”⁷³ These comments by gun control organizations and activists are probably not typical of Americans, in the same way that the Westboro Baptist Church of “God Hates Fags!” is hardly typical of the support for Colorado’s Amendment 2 at the heart of the *Romer* decision; but they show the potential for the same irrational bigotry.

Another problem with AW bans is that owners of assault weapons are rejected as legitimate citizens. After New York passed the SAFE Act in 2013, Governor Cuomo made it very clear that people who disagreed with the SAFE Act should leave the state, albeit on less severe conditions than Governor Boggs’ order to the Mormons in 1838.

70. *Id.* at 634.

71. GUN FREE ZONE, *CSGV BBQ Guns 1*, <http://gunfreezone.net/index.php/2015/11/20/csgv-discovers-bbq-guns-bigotry-and-stupidity-ensues/csgv-bbq-guns-1> (last accessed July 25, 2016).

72. GUN FREE ZONE, *CSGV Gun Culture 2*, <http://gunfreezone.net/index.php/2015/07/15/csgv-hitting-every-branch-of-the-bigot-tree-on-their-way-down/csgv-gun-culture-2> (last accessed Mar. 17, 2016).

73. *Id.*

Are they these extreme conservatives who are right-to-life, pro-assault-weapon, anti-gay? Is that who they are? Because if that's who they are and they're the extreme conservatives, they have no place in the state of New York, because that's not who New Yorkers are.⁷⁴

Cuomo essentially told AW owners that they were outside the legitimate membership of the polity of New York, almost like they were illegal aliens (the parallel to *Plyer*). While journalists and gun control advocates might properly be considered outside the mainstream, the elected governor of New York is not.

Court decisions have also demonstrated an irrational basis for such laws. Upholding an Illinois city AW ban, Judge Easterbrook wrote:

If it has no other effect, Highland Park's ordinance may increase the public's sense of safety. Mass shootings are rare, but they are highly salient, and people tend to overestimate the likelihood of salient events. . . . If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit.⁷⁵

The same reasoning could have been applied to uphold the constitutional provision struck down in *Romer*. "Colorado voters may be irrational in their bigotry against homosexuals, but if it reduces their perceived risk of homosexuals being given free rein to molest children, that's a substantial benefit." Clearly, when the courts argue that *feeling* safer is a legitimate reason to do something that makes no *real* difference in public safety, this is the definition of irrational. It makes people feel better, but without any actual basis in fact.

VI. AW BANS FAIL RATIONAL BASIS ANALYSIS

The evidence is clear that AW bans fail rational basis scrutiny because AWs are seldom criminally misused relative to more readily accessible weapons. The disproportionate minimum sentences in California's AWCA law relative to much more dangerous weapons suggests a panic reaction that is hardly rational. The comments of journalists, elected officials, and gun control activists reveal bigotry that makes Colorado Amendment 2 seem pretty calm by comparison. Even the courts are reduced to arguing that *perceived* benefit as opposed to

74. Jesse McKinley, *Comment by Cuomo Outrages Republicans*, N.Y. Times, Jan. 22, 2014, http://www.nytimes.com/2014/01/23/nyregion/cuomo-comment-elicits-retort-from-republicans.html?_r=0 (last accessed Mar.16, 2016).

75. *Friedman v. City of Highland Park*, 784 F. 3d 406, 412 (7th Cir. 2015).

actual benefit is a sufficient reason to uphold bans. There is no way to hold that AW bans which deny a fundamental right, as *Heller* determined the Second Amendment to protect, survives the “rational basis” standard of scrutiny.