

## WHY BAN “ASSAULT WEAPONS”?

James B. Jacobs<sup>†</sup>

*But the Assault Weapons Ban is and always has been a bit of a red herring, so people concerned about gun violence shouldn't be too sad to see it go. Of all the policy proposals to prevent gun violence, it's probably the least important and the most controversial, making it the ideal sacrificial sacred cow to appease gun rights advocates and to help secure passage of more effective strategies to curbing gun deaths, like a ban on large capacity ammunition magazines.*

—Alex Seitz-Wald<sup>1</sup>

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*Melissa Block (NPR): Let's start with the assault weapons ban that does appear to be dying in the Senate. Is the White House still pushing to have that passed? Do you assume that it's now not going to happen?<sup>2</sup>*

*Vice President Joe Biden: I am still pushing that it pass. We are still pushing that it pass. The same thing was told to me when the first assault weapons ban in 1994 was attached to the Biden Crime bill; that it couldn't possibly pass. It was declared dead several times. I believe that the vast majority of the American people agree with us. The vast majority of gun owners agree with us. That military-style assault weapons are—these are weapons of war.<sup>3</sup>*

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<sup>1</sup> Alex Seitz-Wald, *Don't Mourn the Assault Weapons Ban's Impending Demise*, SALON (Feb. 6, 2013, 7:45 AM), [http://www.salon.com/2013/02/06/dont\\_mourn\\_the\\_assault\\_weapons\\_bans\\_impending\\_demise](http://www.salon.com/2013/02/06/dont_mourn_the_assault_weapons_bans_impending_demise).

<sup>2</sup> Melissa Block, *Interview with Vice President Joe Biden*, NPR (Mar. 20, 2013), <http://www.npr.org/2013/03/20/174880882/interview-with-vice-president-joe-biden>.

<sup>3</sup> *Id.*

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## INTRODUCTION

A majority of Americans favor banning “assault weapons,” as do the overwhelming majority of my students who confidently support criminalizing the manufacture, transfer, receipt, and possession of “assault weapons,” believing them to be automatic-fire firearms or machineguns.<sup>4</sup> This surprises me because the fact that so-called “assault weapons” are not “automatic-fire weapons” has been widely available for decades. I also find it surprising that gun control proponents, like the Brady Campaign to Prevent Gun Violence,<sup>5</sup> continue to expend political capital trying to prohibit a vaguely-defined species of semiautomatic firearms that resemble military weapons, but are

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<sup>4</sup> After the Sandy Hook massacre in Newton, CT, surveys found that a majority of respondents favored a ban. A survey of 1,000 adults a few days after the massacre found that 55% of respondents favored banning “semi-automatic and assault-type weapons.” The poll’s question makes little sense, since practically all modern firearms are semiautomatics. *55% Favor Assault Weapons Ban, But 62% Oppose Complete Gun Ban*, RASMUSSEN REP. (Dec. 21, 2012), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/december\\_2012/55\\_favor\\_assault\\_weapons\\_ban\\_but\\_62\\_oppose\\_complete\\_gun\\_ban](http://www.rasmussenreports.com/public_content/politics/general_politics/december_2012/55_favor_assault_weapons_ban_but_62_oppose_complete_gun_ban). A month later, another poll found that 60% of respondents were in favor of reinstating an assault-weapon ban to address gun violence. Lydia Saad, *Americans Back Obama’s Proposals to Address Gun Violence*, GALLUP (Jan. 23, 2013), <http://www.gallup.com/poll/160085/americans-back-obama-proposals-address-gun-violence.aspx>.

<sup>5</sup> Press Release, Brady Campaign to Prevent Gun Violence, Brady Campaign Statement on Senate Judiciary Committee Passage of Assault Weapons Ban (Mar. 14, 2013), <http://www.bradiycampaign.org/brady-campaign-statement-on-senate-judiciary-committee-passage-of-assault-weapons-ban>.

functionally equivalent to other semiautomatic weapons, and which hardly figure at all in violent crime and infrequently in incidents of mass murders.<sup>6</sup>

While Congress permitted the 1994 Assault Weapons Ban to expire in 2004, proposals to renew the federal ban surface periodically and several states have enacted bans.<sup>7</sup> The December 2012 Sandy Hook Elementary School massacre in Newtown, Connecticut triggered a new round of proposals for banning assault weapons as a strategy for preventing school shootings—or at least minimizing casualties.<sup>8</sup> The post-Sandy Hook bill, while strongly supported by the Obama administration,<sup>9</sup> did not achieve a vote in the House of Representatives or in the Senate.<sup>10</sup> Several state legislatures debated, and a few passed, assault weapons bans (AWBs).<sup>11</sup> All told, seven states currently have an AWB.<sup>12</sup>

Criminalizing the manufacture, sale, and possession of a species of semiautomatic firearms called “assault weapons” by critics, and “sporting rifles” by enthusiasts, is a lightning rod in the politics of gun control. This Article argues that banning assault weapons is pointless and distracts attention from other gun control initiatives.

## I. ASSAULT WEAPONS ARE NOT MACHINEGUNS

Even a cursory internet search makes clear that commercially available assault weapons, such as the popular AR-15, which is the best-selling semiautomatic rifle in the United States, are not machineguns or automatic-fire firearms.<sup>13</sup> Automatics expel all of the bullets<sup>14</sup> in their

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<sup>6</sup> See JEFFREY A. ROTH & CHRISTOPHER S. KOPER, U.S. DEP’T OF JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994–1996 (1999), <https://www.ncjrs.gov/pdffiles1/173405.pdf>.

<sup>7</sup> *Assault Weapons Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (June 19, 2013), <http://smartgunlaws.org/assault-weapons-policy-summary/#state>.

<sup>8</sup> See generally David Jackson & Jackie Kucinich, *Obama Backs New Assault Weapons Ban*, USA TODAY (Dec. 19, 2012, 12:12 AM), <http://www.usatoday.com/story/news/politics/2012/12/18/obama-carney-newtown-assault-weapons-ban/1777793>.

<sup>9</sup> *Id.*

<sup>10</sup> Assault Weapons Ban of 2013, H.R. 437, 113th Cong. (2013); Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013); see also S. 150 (113th): *Assault Weapons Ban of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s150> (last visited Sept. 30, 2015).

<sup>11</sup> *Assault Weapons Policy Summary*, *supra* note 7.

<sup>12</sup> *Id.* (indicating that California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York have passed AWBs).

<sup>13</sup> See 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. L. & POL’Y REV. 41, 45 (1997); David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. CONTEMP. L. 381 (1994); Lois Beckett, *The Assault Weapon Myth*, N.Y. TIMES (Sept. 12, 2014), [http://www.nytimes.com/2014/09/14/sunday-review/the-assault-weapon-myth.html?\\_r=0](http://www.nytimes.com/2014/09/14/sunday-review/the-assault-weapon-myth.html?_r=0); Charles C. W. Cooke, *ABC: But ‘Assault Weapons’ Bans Just Make*

ammunition feeder (magazine, belt, or cylinder) with a single squeeze of the trigger. The 1934 National Firearms Act (NFA), passed in response to Prohibition-era organized crime wars in Chicago and other cities, more or less made automatics and other “gangster weapons”—e.g., machineguns, sawed-off shotguns, and silencers—illegal.<sup>15</sup> The term “more or less” is used because federal lawmakers at that time—doubting federal authority to prohibit manufacture, sale, and possession of weapons outright—imposed a federal licensing and confiscatory taxing scheme on the manufacture, import, sale, and possession of machineguns and other gangster weapons.<sup>16</sup> The tax was set at \$500 per year (\$8,859.44 in 2014 dollars) on importers and manufacturers, \$200 (\$3,543.78 in 2014 dollars) and \$300 (\$5,315.66 in 2014 dollars) per year on retailers and pawnbrokers, respectively, as well as an additional \$200 tax (\$3,543.78 in 2014 dollars) for each transfer of a weapon.<sup>17</sup> The NFA provided that existing machineguns could not be sold or transferred unless the transferor paid all prior unpaid transfer taxes for that weapon.<sup>18</sup>

Within sixty days of the Act taking effect, owners had to register their “gangster weapons.”<sup>19</sup> Possession of an unregistered “NFA

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*Guns Look Different!*, NAT'L REV.: CORNER (May 8, 2014, 2:00 PM), <http://www.nationalreview.com/corner/377555/abc-assault-weapons-bans-just-make-guns-look-different-charles-c-w-cooke>; Brad Plumer, *Everything You Need to Know About the Assault Weapons Ban, in One Post*, WASH. POST: WONKBLOG (Dec. 17, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post>.

<sup>14</sup> A cartridge, also called a round or shell, contains a bullet, a propellant, and a primer. Cartridges can be loaded into a clip. Clips are inserted into either built-in (fixed) or detachable magazines. See *Cartridge*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/cartridge> (last visited Nov. 5, 2015).

<sup>15</sup> National Firearms Act, ch. 757, 48 Stat. 1236 (1934); see also *National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/content/firearms/firearms-industry/national-firearms-act> (last updated Sept. 17, 2015). The Gun Control Act of 1968 (GCA) expanded the NFA's definition of unlawful weapons to include “destructive devices,” including bombs, incendiary devices, weapons with a bore greater than one half inch, frames and receivers that can convert a semiautomatic weapon into an automatic weapon, and additional concealable weapons and flash bang grenades. The GCA also defined the term “firearm” to exclude antique firearms or any devices (excluding machineguns and destructive devices) that could be classified as collector's items. *Id.*; see also Gun Control Act of 1968, 18 U.S.C. § 921 (2012).

<sup>16</sup> JAMES B. JACOBS, CAN GUN CONTROL WORK? 20–22 (2002).

<sup>17</sup> 48 Stat. at 1237. To calculate the 2014 equivalent of dollars in 1934, see *Inflation Calculator*, US INFLATION CALCULATOR, <http://www.usinflationcalculator.com> (last updated Aug. 19, 2015).

<sup>18</sup> 48 Stat. at 1237–38. The Supreme Court upheld this regulatory scheme in *Sonzinsky v. United States*, 300 U.S. 506 (1937).

<sup>19</sup> 48 Stat. at 1238. In *Haynes v. United States*, 390 U.S. 85 (1968), the Supreme Court essentially rendered the NFA unenforceable on Fifth Amendment grounds. Congress then amended the Act. See Gun Control Act of 1968, ch. 44, sec. 102, §§ 921–928, 82 Stat. 1213, 1214–26.

weapon” became a federal felony punishable by a maximum ten-year prison term.<sup>20</sup> Whether on account of the legal prohibition or due to lack of demand for such weapons, the criminal use of machineguns virtually disappeared. However, collectors and fire range owners continued to possess registered automatics.<sup>21</sup> In 1986, Congress passed the Firearms Owners’ Protection Act (FOPA), which made it a crime to possess machineguns not legally possessed prior to FOPA’s enactment, and banned the registration of new machineguns.<sup>22</sup> Owners of registered automatics could continue to possess and transfer them as long as the new owner or transferee obtained approval from the Bureau of Alcohol, Tobacco and Firearms (ATF).<sup>23</sup>

## II. WHAT IS AN ASSAULT WEAPON?

“Assault weapons” are semiautomatic firearms designed to look like military rifles. They are not military rifles—sometimes called assault rifles<sup>24</sup>—such as the U.S. Army’s M-16, which is a “selective fire . . . assault rifle” that can be fired in automatic or semiautomatic mode, or Russia’s AK-47, Germany’s HK G36 assault rifle, and Belgium’s FN Fal assault rifle.<sup>25</sup> In contrast to assault rifles, these semiautomatic look-alikes do not fire automatically. Functionally, they are identical to most other semiautomatics.<sup>26</sup>

Semiautomatic firearm technology was developed in the late nineteenth century. Semiautomatics discharge one bullet per trigger pull

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<sup>20</sup> 26 U.S.C. § 5871 (2012).

<sup>21</sup> To this day, in theory, the National Firearms Registration and Transfer Record provides a comprehensive ownership record of two million weapons covered by the NFA. See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES’ NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD: REPORT NUMBER I-2007-006 (2007) [hereinafter NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD], <https://oig.justice.gov/reports/ATF/e0706/final.pdf>.

<sup>22</sup> Firearms Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. §§ 921–929 (2012)); see also David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1986).

<sup>23</sup> See NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD, *supra* note 21, at 2.

<sup>24</sup> See Maxim Popenker, *Is There Such a Thing as an Assault or Battle Rifle?*, WORLD GUNS, <http://world.guns.ru/assault-e.html> (last visited Nov. 5, 2015).

<sup>25</sup> See *M16*, MIL.-TODAY.COM, <http://www.military-today.com/firearms/m16.htm> (last visited Apr. 13, 2015); *HK G36*, MIL.-TODAY.COM, [http://www.military-today.com/firearms/hk\\_g36.htm](http://www.military-today.com/firearms/hk_g36.htm) (last visited Apr. 13, 2015); *FN Fal*, MIL.-TODAY.COM, [http://www.military-today.com/firearms/fn\\_fal.htm](http://www.military-today.com/firearms/fn_fal.htm) (last visited Apr. 13, 2015). In *Staples v. United States*, the Supreme Court observed that “[t]he AR-15 is the civilian version of the military’s M-16 rifle, and is . . . a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire.” 511 U.S. 600, 603 (1994).

<sup>26</sup> David Kopel, *Guns, Mental Illness and Newtown*, WALL STREET J. (Dec. 18, 2012, 12:01 AM), <http://www.wsj.com/articles/SB10001424127887323723104578185271857424036>.

as rapidly as the shooter can squeeze and release the trigger. The energy created by the exploding gunpowder is used to load the next bullet into the firing chamber. Thus, semiautomatics are sometimes referred to as “self loading” firearms.<sup>27</sup> Practically all modern rifles, pistols, and shotguns are semiautomatics; non-semiautomatic long guns include bolt action, slide action, and breach loaders; non-semiautomatic pistols are called revolvers.<sup>28</sup> Many semiautomatic rifles and pistols load ammunition via detachable magazines;<sup>29</sup> those that do not, have fixed (built-in) magazines that are loaded with clips of cartridges.<sup>30</sup> Both magazines and clips hold varying numbers of cartridges, but large capacity magazines hold more cartridges than large capacity clips. Clips holding ten cartridges are common, but large capacity magazines can hold twice as many, or even more, cartridges.<sup>31</sup> This is attractive to target shooters and to some gun owners concerned about self-defense.<sup>32</sup> Some criminals and mass murderers might also see advantage in the capacity to fire more bullets before needing to reload.

Semiautomatic rifles are labeled assault weapons because of their appearance, not their mechanics. They look like military rifles or like the kind of weapon that Rambo<sup>33</sup> and other movie heroes and villains use. Usually, they are made of black metal and plastic rather than brown wood; non-firearms enthusiasts are more accustomed to, and seem to be

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<sup>27</sup> Robert Johnson & Geoffrey Ingersoll, *It's Incredible How Much Guns Have Advanced Since the Second Amendment*, BUS. INSIDER (Dec. 17, 2012, 12:49 PM), <http://www.businessinsider.com/evolution-of-semi-automatic-weapons-2012-12>.

<sup>28</sup> *Background Information on So-Called 'Assault Weapons'*, NAT'L SHOOTING SPORTS FOUND., <http://www.nssf.org/factsheets/semi-auto.cfm> (last visited Oct. 3, 2015).

<sup>29</sup> The rifle that Patrick Purdy used in the 1989 Stockton California schoolyard massacre, like many semiautomatics, loads ammunition via a detachable magazine. After he emptied a magazine, Purdy needed perhaps two seconds to eject and replace it with another preloaded magazine. See discussion *infra* Part III. AWBs have typically been linked to bans on high capacity magazines (usually more than ten cartridges). Detachable magazines make reloading fast and simple. Whether and how to ban or regulate large capacity magazines is beyond the scope of this Article.

<sup>30</sup> The distinction between a detachable and fixed magazine has been blurred by new “bullet button” firearms models. The magazine can be ejected by means of a bullet attached to a thin pencil-like shaft. See James Tang, *How the Bullet Button Works on AR15—California Legal AR15*, YOUTUBE (June 3, 2009), <https://www.youtube.com/watch?v=VseNzVcIjtc>. Since the shaft and bullet is considered a “tool,” the magazine is considered fixed rather than detachable under California’s AWB.

<sup>31</sup> Sean Davis, *14 Things Everyone Should Understand About Guns*, FEDERALIST (Feb. 24, 2015), <http://thefederalist.com/2015/02/24/14-things-everyone-should-understand-about-guns>.

<sup>32</sup> See Matt MacBradaigh, *Gun Control Facts: Why a “High Capacity” Magazine Ban Would Not Prevent Mass Shootings*, MIC (Jan. 30, 2013), <http://mic.com/articles/24263/gun-control-facts-why-a-high-capacity-magazine-ban-would-not-prevent-mass-shootings>; *Target Sports SKS Magazine Black Warrior 7.62x39 30 Round Blue JMAZ, CHEAPER THAN DIRT!*, <http://www.cheaperthandirt.com/product/2-MGTSJMAZ> (last visited Nov. 5, 2015); see also “Assault Weapons” and “Large” Magazines, NRA-ILA, <https://www.nraila.org/issues/assault-weapons-and-semi-automatic-firearms> (last visited Nov. 5, 2015).

<sup>33</sup> FIRST BLOOD (Anabasis N.V. 1982).

less disturbed by, “traditional” hunting rifles. Proponents of AWBs seem to believe that some semiautomatics look too much like military weapons, or are too futuristic for civilians to own. In effect, they appear to believe that “no one needs to have a gun that looks like that.”

In 1963, Colt began manufacturing the AR-15 “Sporter” rifle, which is a semiautomatic version of what was introduced soon after as the U.S. Army’s M-16.<sup>34</sup> In the decades that followed, scores of semiautomatic models, resembling American, Russian, Israeli, and other military rifles entered the civilian marketplace.<sup>35</sup> Today, the AR-15 is the best-selling rifle in the United States.<sup>36</sup> While it is estimated that there are seven to ten million semiautomatic copies of military rifles in civilian hands,<sup>37</sup> that number should be taken with a grain of salt because there is no definitive definition of assault weapon. Asking which and how many military-like or futuristic features should define a semiautomatic as an assault weapon is like asking how many features make an automobile look too futuristic or too much like a race car for private citizens to own.<sup>38</sup>

### III. CALIFORNIA’S 1989 ASSAULT WEAPON BAN

On January 17, 1989, Patrick Purdy, a disturbed drifter with a long history of criminality and mental instability, used a semiautomatic Type 56 Chinese version of the Russian AK-47 military assault rifle to kill five children and wound thirty others, including one teacher, at a Stockton, California school.<sup>39</sup> As is usual following such atrocities, the media and

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<sup>34</sup> See Maxim Popenker, *Ar-15-Type Semi-Automatic Rifles*, WORLD GUNS, <http://world.guns.ru/civil/usa/ar-15-e.html>; see also *Armalite / Colt AR-15 / M16 M16A1 M16A2 M16A3 M16A4 Assault Rifle (USA)*, WORLD GUNS, <http://world.guns.ru/assault/usa/m16-m16a1-m16a2-m16a3-e.html> (last visited Aug. 20, 2015).

<sup>35</sup> See Susan F. Rasky, *Import Ban On Assault Rifles Becomes Permanent*, N.Y. TIMES (July 8, 1989), <http://www.nytimes.com/1989/07/08/us/import-ban-on-assault-rifles-becomes-permanent.html>.

<sup>36</sup> *The Truth About Assault Weapons*, ASSAULTWEAPON, <http://www.assaultweapon.info> (last visited Aug. 20, 2015).

<sup>37</sup> John Boyle, *Military-Style AR-15 Rifles: ‘The Market Is Saturated’*, USA TODAY (Dec. 3, 2014, 1:38 PM), <http://www.usatoday.com/story/news/nation/2014/12/03/military-style-ar-rifles-market-saturated/19836755>; Ailsa Chang, *Why the AR-15 Is More Than Just a Gun*, NPR (June 24, 2013, 2:57 AM), <http://www.npr.org/2013/06/24/194228925/why-the-ar-15-is-more-than-just-a-gun>.

<sup>38</sup> For a powerful argument that “assault weapon” is an irrational classification, see David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. Contemp. L. 381 (1994).

<sup>39</sup> Marcia L. Godwin, *Stockton, California, Massacre*, in 3 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 781 (Gregg Lee Carter ed., 2d ed., 2012); Josh Richman & Mark Emmons, *Stockton Shooting: 25 Years Later, City Can’t Forget Its Worst Day*, SAN JOSE MERCURY NEWS (Jan. 16, 2014, 3:21 PM), [http://www.mercurynews.com/ci\\_24928327/stockton-shooting-25-years-later-city-cant-forget](http://www.mercurynews.com/ci_24928327/stockton-shooting-25-years-later-city-cant-forget). In

politicians focused on the weapon rather than the killer.<sup>40</sup> *Time Magazine* asked:

Why could Purdy, an alcoholic who had been arrested for such offenses as selling weapons and attempted robbery, walk into a gun shop in Sandy, Ore., and leave with an AK-47 under his arm? The easy availability of weapons like this, which have no purpose other than killing human beings, can all too readily turn the delusions of sick gunmen into tragic nightmares.<sup>41</sup>

*Time Magazine's* conflation of the automatic-fire AK-47 with a semiautomatic version is indicative of the confusion that still persists. Assault weapons are not fully automatic machineguns,<sup>42</sup> and machineguns themselves, which have been strictly controlled since 1934,<sup>43</sup> rarely show up in crimes.<sup>44</sup> Moreover, Purdy would have been no less dangerous with a non-assault semiautomatic, assuming that he could have been prevented somehow from obtaining his first choice of weapon.

In the wake of the Stockton massacre, the California legislature passed the Roberti-Roos Assault Weapons Control Act, the country's first AWB.<sup>45</sup> The Act made it illegal to own or transfer fifty named

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1987, Michael Ryan used a legally owned Type 56 rifle and two other firearms to kill seventeen people and wound fifteen others in Hungerford, United Kingdom. That massacre led to the passage of the Firearms (Amendment) Act 1988 in Great Britain, which bans ownership of semiautomatic centre-fire rifles and restricts the use of shotguns. *Firearms-Control Legislation and Policy: Great Britain*, LIBR. OF CONGRESS, <http://www.loc.gov/law/help/firearms-control/greatbritain.php> (last updated July 30, 2015).

<sup>40</sup> See generally sources cited *supra* note 39. One thinks of the ancient "deodand," that inflicted punishment on an object or animal that caused death, personal injury, or property damage. See Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359-61 (2009).

<sup>41</sup> *Slaughter in a School Yard*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,151105,00.html>.

<sup>42</sup> See OFFICE OF THE ATTORNEY GEN., CAL. DEP'T OF JUSTICE, 2009 FIREARMS USED IN THE COMMISSION OF CRIMES (2009) [hereinafter CAL. DEP'T OF JUSTICE 2009 REPORT], [http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/Firearms\\_Report\\_09.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/Firearms_Report_09.pdf). The 2009 California Attorney General's Report on 147 firearms recovered in crimes and sent to the Department of Justice for investigation found eight weapons to be assault weapons under California's definition, while 120 weapons were handguns. *Id.* at 2.

<sup>43</sup> See *supra* notes 15-20 and accompanying text.

<sup>44</sup> MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, FIREARMS, CRIME, AND CRIMINAL JUSTICE: GUNS USED IN CRIME (1995), <http://www.bjs.gov/content/pub/pdf/GUIC.PDF>. Of the 147 firearms recovered in crimes and sent to the California Department of Justice for investigation in 2009, only three were machineguns. CAL. DEP'T OF JUSTICE 2009 REPORT, *supra* note 42.

<sup>45</sup> Roberti-Roos Assault Weapons Control Act of 1989, CAL. PENAL CODE § 12276 (repealed 2012) (current version at § 30500 (West 2015)). The California Supreme Court upheld the Act in *Kasler v. Lockyer*, 2 P.3d 581 (Cal. 2000), and the Ninth Circuit upheld it in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002). However, both decisions preceded the U.S. Supreme Court's watershed decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which held that the Second Amendment



makes and models of semiautomatic long guns, pistols, and shotguns.<sup>46</sup> In addition, it authorized California’s attorney general to ban other weapons with certain military-like features—essentially a two-feature test.<sup>47</sup>

A large percentage of semiautomatics have the disfavored features enumerated by the Act, such as a barrel shroud, pistol grip, forward pistol grip, folding telescoping stock, and flash hider. Hundreds of long gun and handgun models accept detachable magazines, which because they facilitate reloading, are attractive to consumers for competitive shooting, recreational shooting, and self-defense. Firearms are not designed to accept detachable magazines with a particular number of cartridges. A semiautomatic that accepts a ten cartridge magazine can also accept a fifteen cartridge magazine. In any event, once all of the cartridges in a detachable magazine are spent, the shooter can eject the empty magazine and reload a fresh magazine in a couple of seconds. With dexterity and practice, and using a “speed loader,”<sup>48</sup> it is possible to reload a fixed magazine almost as rapidly as changing a detachable magazine. In those few seconds, a potential mass shooting victim might escape or subdue the shooter.<sup>49</sup> This might provide a rationale for banning large capacity magazines and clips, but not for banning a smattering of semiautomatic assault weapon models that are functionally indistinguishable from hundreds of other semiautomatic models.<sup>50</sup>

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protects an individual’s right to keep and bear arms at home. Eventually, the Supreme Court will have to rule on what types of weapons the Second Amendment protects. However, the Supreme Court chose not to grant certiorari in a defendant’s challenge to California’s assault weapons ban. *People v. James*, 174 Cal. App. 4th 662 (Cal. Ct. App. 2009), *cert. denied*, 559 U.S. 946 (2010).

<sup>46</sup> PENAL § 30510 (continuing § 12276 without substantive change); *see also* OFFICE OF THE ATTORNEY GEN., CAL. DEP’T OF JUSTICE, ASSAULT WEAPONS IDENTIFICATION GUIDE (3d ed. 2001), <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/awguide.pdf?%3E>.

<sup>47</sup> Randy Rossi, Dir., Firearms Div., Cal. Dep’t of Justice, *Kasler v. Lockyer*: California Supreme Court Decision Regarding Roberti-Roos Assault Weapons Control Act (Aug. 22, 2000), <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/infobuls/200004.pdf>.

<sup>48</sup> A “speed loader” is a “loader that can load an entire magazine simply by pulling the magazines [sic] external follower in a downward motion.” *Gun Magazine Speed Loader and Methods: US 20140033592 A1*, GOOGLE, <http://www.google.com/patents/US20140033592> (last visited Oct. 3, 2015); *see also* ADictionary, *Speed Loader Meaning*, YOUTUBE (Apr. 29, 2015), <https://www.youtube.com/watch?v=XiV5lSk-qlE>.

<sup>49</sup> *See* Jason Howerton, *Gun Experts: Limits on Magazine Size Will Only Slow Determined Killer Down by a Few Seconds*, BLAZE (Jan. 17, 2013, 4:15 PM), <http://www.theblaze.com/stories/2013/01/17/gun-experts-limits-on-magazine-size-will-only-slow-determined-killer-down-by-a-few-seconds>; MacBradaigh, *supra* note 32.

<sup>50</sup> Indeed, the 1994 federal AWB outlawed large-capacity magazines (more than ten cartridges). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 110103, § 921–922, 108 Stat. 1796. However, the Act grandfathered large-capacity magazines produced before the Act became effective, *see id.*, thus leaving an estimated twenty-four million large-capacity magazines in circulation. *See* Plumer, *supra* note 13.

None of the other features that various AWBs use to define an assault weapon can be supported with nearly as plausible a rationale as the detachable magazine. Some of the other defining features make the firearm safer, easier to use, or more accurate.<sup>51</sup> A flash suppressor, also known as a flash guard, flash eliminator, flash hider, or flash cone, is a device attached to the barrel that reduces the flash from the burning gas when the bullet is fired. Its primary purpose is to reduce the risk that the shooter will be blinded in low-light conditions. The pistol grip and thumbhole stock make it easier to hold and steady the firearm.<sup>52</sup> The folding or telescopic stock makes it easier and safer to transport and hold the firearm.<sup>53</sup> Other defining features, such as bayonet and grenade launcher mounts, are decorative.<sup>54</sup> Grenades and bayonets have not been a crime problem.<sup>55</sup> In any event, the Gun Control Act of 1968 (GCA) made possession of grenades a serious federal felony.<sup>56</sup> None of these defining features make semiautomatic assault weapons more lethal or dangerous than semiautomatic non-assault weapons.

#### IV. THE 1989 FEDERAL BAN ON IMPORTED ASSAULT RIFLES

The GCA restricted importation of rifles to those which the Secretary of the Treasury, who delegated the task to the ATF, found “generally recognized as particularly suitable for or readily adaptable to sporting purposes.”<sup>57</sup> To say the least, this invited highly subjective

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<sup>51</sup> See Teri Weaver, *NY Safe Act: See What Makes an Assault Weapon Illegal (Video)*, SYRACUSE.COM (Apr. 29, 2014, 12:08 PM), [http://www.syracuse.com/news/index.ssf/2014/04/ny\\_safe\\_act\\_see\\_what\\_makes\\_an\\_assault\\_weapon\\_illegal.html](http://www.syracuse.com/news/index.ssf/2014/04/ny_safe_act_see_what_makes_an_assault_weapon_illegal.html).

<sup>52</sup> See *id.*

<sup>53</sup> A telescopic stock serves the same purpose as a folding stock, except that it shortens the weapon less. A shorter weapon makes it easier to use in an enclosed space. See Kurt Eichenwald, *Americans Don't Have the Right to Bear Just Any Arms*, NEWSWEEK (July 16, 2015, 6:29 AM), <http://www.newsweek.com/2015/07/24/bullet-initiative-354203.html>.

<sup>54</sup> See Weaver, *supra* note 51. Modern military rifles have replaced the grenade launcher or bayonet mount with Picatinny rails that accommodate various attachments, such as grenade launchers, bayonets, and telescopic sights. See *Picatinny Rails, Weaver Rails, What's the Difference?*, BROWNELLS, [http://www.brownells.com/.aspx/lid=10724/guntechdetail/Picatinny\\_Rails\\_Weaver\\_Rails\\_What\\_s\\_The\\_Difference](http://www.brownells.com/.aspx/lid=10724/guntechdetail/Picatinny_Rails_Weaver_Rails_What_s_The_Difference) (last visited Oct. 3, 2015).

<sup>55</sup> See, e.g., CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012: EXPANDED HOMICIDE DATA TABLE 8: MURDER VICTIMS BY WEAPON, 2008–2012, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_8\\_murder\\_victims\\_by\\_weapon\\_2008-2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2008-2012.xls) (last visited Aug. 28, 2015).

<sup>56</sup> See Gun Control Act of 1968, ch. 44, sec. 102, § 925, 82 Stat. 1213, 1224–26 (codified as amended at 18 U.S.C. § 925(d)(3) (2012)).

<sup>57</sup> See *id.*; *Springfield, Inc. v. Buckles*, 292 F.3d 813 (D.C. Cir. 2002); see also OFFICE OF ENF'T PROGRAMS & SERVS., FIREARMS PROGRAMS DIV., U.S. DEP'T OF JUSTICE, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE: 2005, at 22–23 (2005), <http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf>. The GCA was passed in the wake of the

judgment. What is a sporting purpose and when does it become generally recognized?<sup>58</sup> New shooting sports emerge frequently.<sup>59</sup> Some catch on rapidly, some slowly, and some not at all.

ATF focused its regulatory attention on identifying cheap, imported, small-caliber, concealable handguns (Saturday night specials<sup>60</sup>), which the 1968 Act also banned.<sup>61</sup> It did not ban importation of a long gun until 1984. In ruling that a South African shotgun used by police to deal with riot situations had no sporting purpose, ATF rejected the manufacturer's claim that the shotgun was suitable for police combat-type competitions.<sup>62</sup> According to ATF, such competitions did not constitute a generally recognized sporting purpose,<sup>63</sup> nor was informal target shooting (plinking) a generally recognized sport.<sup>64</sup> All courts that have considered firearms manufacturers', importers', and owners' challenges to ATF's definition of sporting purpose supported the ATF's discretionary designations.<sup>65</sup>

In the wake of the 1989 Stockton, California massacre, ATF Director Stephen E. Higgins stated that semiautomatic weapons with the ability to accommodate large-capacity magazines, collapsible stocks, bayonet attachments, and a few other military-like features,

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assassinations of Robert F. Kennedy on June 6, 1968 (by handgun), see *The Gun that Killed RFK: .22 Caliber Iver-Johnson Cadet Revolver*, HIST. FIREARMS, <http://www.historicalfirearms.info/post/52226442432/the-gun-that-killed-rfk-22-caliber-iver-johnson> (last visited Nov 6, 2015), and Dr. Martin Luther King, Jr. on April 4, 1968 (by bolt action rifle). See SELECT COMM. ON ASSASSINATIONS, U.S. HOUSE OF REPRESENTATIVES, FINDINGS AND RECOMMENDATIONS PT. II.A. (1979), <http://www.archives.gov/research/jfk/select-committee-report/part-2a.html>; see also Kevin Sack, *Tests of Gun in King Killing Are Inconclusive*, N.Y. TIMES (July 12, 1997), <http://www.nytimes.com/1997/07/12/us/tests-of-gun-in-king-killing-are-inconclusive.html>.

<sup>58</sup> BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF THE TREASURY, STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMIAUTOMATIC ASSAULT RIFLES I (1998) [hereinafter ATF STUDY ON SPORTING SUITABILITY], <https://www.atf.gov/files/firearms/industry/april-1998-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf>.

<sup>59</sup> More Americans claim to engage in shooting sports than claim to play tennis. See James B. Jacobs & Domingo Villaronga, *Mapping the U.S. Gun Culture: A Content Analysis of Gun Magazines*, 16 J. FIREARMS & PUB. POL'Y 135 (2004).

<sup>60</sup> *Saturday-Night Special*, DICTIONARY.COM, <http://dictionary.reference.com/browse/saturday-night+special> (last visited Aug. 28, 2015).

<sup>61</sup> See Garen J. Wintemute, *Where the Guns Come from: The Gun Industry and Gun Commerce*, 12 FUTURE CHILD. 55 (2015), [http://www.princeton.edu/futureofchildren/publications/docs/12\\_02\\_04.pdf](http://www.princeton.edu/futureofchildren/publications/docs/12_02_04.pdf). The GCA banned Saturday night specials that failed a point system based upon short barrels, small caliber, short overall length or height, and non-adjustable sights. Such handguns were said to be disproportionately involved in gun crimes. In the 1960s, suppressing cheap handguns was considered a top gun control strategy. *Id.*

<sup>62</sup> See ATF STUDY ON SPORTING SUITABILITY, *supra* note 58.

<sup>63</sup> See *id.*

<sup>64</sup> *Id.* at 16–17.

<sup>65</sup> See, e.g., *Gun S., Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989); *Gilbert Equip. Co. v. Higgins*, 709 F. Supp. 1071 (S.D. Ala. 1989), *aff'd*, 894 F.2d 412 (11th Cir. 1990).

had no sporting purpose.<sup>66</sup> Domestically produced weapons with the same features remained legal.<sup>67</sup> Consequently, President George H. W. Bush's administration banned *importation* of forty-three specifically named foreign-made semiautomatic copies of military assault rifles.<sup>68</sup> Sales surged before the ban became effective.<sup>69</sup> After the ban went into effect, foreign manufacturers produced new models with the offensive features removed or modified. Critics charged them with cynically evading the ban. The manufacturers called it compliance.<sup>70</sup>

## V. THE 1994 FEDERAL ASSAULT WEAPONS BAN

In the early 1990s, with Democrats controlling both houses of Congress and the White House, the Clinton administration launched the strongest gun control initiatives since the 1960s.<sup>71</sup> In 1993, Congress passed the Brady Handgun Violence Protection Act.<sup>72</sup> A year later, Democrats folded an AWB (the 1994 Public Safety and Recreational Firearms Use Protection Act)<sup>73</sup> into an omnibus anti-crime bill (the Violent Crime Control and Law Enforcement Act of 1994) that also contained conservative objectives like new death penalty offenses and

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<sup>66</sup> See Charles Mohr, *U.S. Bans Imports of Assault Rifles in Shift by Bush*, N.Y. TIMES (Mar. 15, 1989), <http://www.nytimes.com/1989/03/15/us/us-bans-imports-of-assault-rifles-in-shift-by-bush.html>; see also Preston K. Covey, *The "Sporting Purpose" Issue in Gun-Control Policy*, 6 J. FIREARMS & PUB. POL'Y 55 (1994), [https://www.saf.org/journal/6/6\\_Covey.htm](https://www.saf.org/journal/6/6_Covey.htm).

<sup>67</sup> See Susan F. Rasky, *Import Ban on Assault Rifles Becomes Permanent*, N.Y. TIMES (July 8, 1989), <http://www.nytimes.com/1989/07/08/us/import-ban-on-assault-rifles-becomes-permanent.html>.

<sup>68</sup> See Matthew Purdy, *Bush to Ban Import of 43 Assault Guns*, PHILA. INQUIRER (July 8, 1989), [http://articles.philly.com/1989-07-08/news/26131588\\_1\\_valmet-hunter-assault-weapons-assault-guns](http://articles.philly.com/1989-07-08/news/26131588_1_valmet-hunter-assault-weapons-assault-guns).

<sup>69</sup> ROTH & KOPER, *supra* note 6.

<sup>70</sup> See David Corn, *What the Fight Over Clinton's 1994 Assault Weapons Ban Can Teach Obama*, MOTHER JONES (Dec. 21, 2012, 6:01 AM), <http://www.motherjones.com/politics/2012/12/bill-clinton-assault-weapon-ban-newtown-shooting>; *Congress Lets Assault Weapons Ban Expire*, NBC NEWS (Sep. 13, 2004, 8:28 PM), <http://www.nbcnews.com/id/5946127/ns/politics/t/congress-lets-assault-weapons-ban-expire/#.VPyW-UKJnww>.

<sup>71</sup> See JACOBS, *supra* note 16, at 30–31, 62–111.

<sup>72</sup> Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–924, 925A (2012)).

<sup>73</sup> Public Safety and Recreational Firearms Use Protection Act, H.R. 4296, 103d Cong. (1994) (as passed by the House, May 5, 1994). The AWB also banned the manufacture and importation, but not the possession, of large-capacity ammunition feeding devices (including magazines that hold more than ten cartridges). *Id.*; see also Plumer, *supra* note 13. The empirical, policy, and legal issues raised by banning large-capacity ammunition feeders is beyond the scope of this Article. For debate in the popular media, see *Should High-Capacity Ammunition Clips Be Banned?*, U.S. NEWS & WORLD REP., <http://www.usnews.com/debate-club/should-high-capacity-ammunition-magazines-be-banned> (last visited Aug. 28, 2015).

grants for localities to hire more police.<sup>74</sup> Congress passed this compromise bill over strenuous NRA opposition.<sup>75</sup>

The AWB applied to both imported and domestically produced semiautomatics with certain military-like features.<sup>76</sup> It prohibited nineteen firearms models by name,<sup>77</sup> while at the insistence of manufacturers, declared around 650 firearm models not prohibited.<sup>78</sup> In addition, the Act authorized ATF to ban other semiautomatics capable of accepting detachable magazines if they possessed *two or more* of five undesirable features: a folding or telescopic stock; a pistol grip that protrudes conspicuously beneath the action of the weapon; a bayonet mount; a flash suppressor or a threaded barrel designed to accommodate a flash suppressor; or a grenade launcher mount.<sup>79</sup> The AWB also prohibited the manufacture, sale, and possession of semiautomatic pistols capable of accepting detachable magazines if they included two or more of the following features: a magazine that attaches outside of the pistol grip; a threaded barrel allowing attachment of a barrel extender, a flash suppressor, a forward handgrip, or silencer; a barrel shroud safety feature; or an unloaded weight of fifty ounces or more.<sup>80</sup> In addition, the ban applied to the manufacture, sale, and possession of semiautomatic shotguns with two or more of the following features: a folding or telescopic stock; a pistol grip that protrudes conspicuously beneath the action of the weapon; a fixed magazine capacity in excess of five rounds; or a detachable magazine.<sup>81</sup>

The AWB grandfathered assault weapons manufactured prior to the date the AWB became effective. Thus, possession of an assault weapon produced in 1993 was lawful, while possession of the exact same firearm model manufactured in 1995 constituted a federal felony

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<sup>74</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. The omnibus bill passed the House 235-195 and passed the Senate 61-38. *H.R.3355—Violent Crime Control and Law Enforcement Act of 1994*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/house-bill/3355/all-actions> (last visited Nov. 6, 2015); see also William Jefferson Clinton, *Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 567, 568-69 (1995); Bill Mccollum, *The Struggle for Effective Anti-Crime Legislation—An Analysis of the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 561 (1995); Beckett, *supra* note 13.

<sup>75</sup> *NRA Vows to Retaliate Over Assault Weapon Ban*, BALTIMORE SUN (May 8, 1994), [http://articles.baltimoresun.com/1994-05-08/news/1994128021\\_1\\_assault-weapon-ban-gun-control-gun-ban](http://articles.baltimoresun.com/1994-05-08/news/1994128021_1_assault-weapon-ban-gun-control-gun-ban).

<sup>76</sup> 108 Stat. at 1996-97.

<sup>77</sup> *Id.* at 1997-98.

<sup>78</sup> *Id.* at 1996-97, 2000-10; see also VIVIAN S. CHU, CONG. RESEARCH SERV., FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 5 (2013), <https://www.fas.org/sgp/crs/misc/R42957.pdf>.

<sup>79</sup> 108 Stat. at 1997-98.

<sup>80</sup> *Id.*; see also NRA ILA, *Anti-Gun Activist: Ban All Detachable-Magazine Semi-Automatics*, DAILY CALLER (June 16, 2014, 7:25 PM), <http://dailycaller.com/2014/06/16/anti-gun-activist-ban-all-detachable-magazine-semi-automatics>.

<sup>81</sup> 108 Stat. at 1997-98.

carrying a maximum punishment of ten years in prison.<sup>82</sup> Not surprisingly, this grandfathering stimulated a surge in demand for assault weapons in the months before the ban became effective.<sup>83</sup>

Gun control proponents, politicians, and many media outlets praised the AWB as an important contribution to fighting drugs and violent crime.<sup>84</sup> President Clinton said “we will finally ban these assault weapons from our street that have no purpose other than to kill.”<sup>85</sup> Congressman Charles Schumer (D-NY) claimed that “[t]hese killing machines are the weapon of choice of drug traffickers, violent youth gangs and the seriously deranged bent on revenge through mass murder. . . . They have no place in our society.”<sup>86</sup>

The President’s claim that assault weapons were now banned from the streets was certainly an exaggeration in light of the grandfathering provision that left all pre-ban assault weapons untouched. Moreover, contrary to Congressman Schumer’s claim, there was no reason to expect the AWB to reduce street crime. Only one to eight percent of gun crimes are committed with rifles or shotguns of any kind; of those, only a fraction are assault weapons. Even some liberal media pointed out the attenuated relationship between military-like semiautomatic assault weapons and crime.<sup>87</sup> According to a Washington Post editorial:

The [Crime B]ill also includes a ban on assault weapons. They ought to be banned—it’s ridiculous that the banning should even be an issue—but no one should have any illusions about what was accomplished [by the AWB]. Assault weapons play a part in only a small percentage of crime. The provision is mainly symbolic; its virtue will be if it turns out to be, as hoped, a stepping stone to broader gun control.<sup>88</sup>

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<sup>82</sup> *Id.* at 1996–97; see also Robert Farley, *Did the 1994 Assault Weapons Ban Work?*, FACTCHECK.ORG (Feb. 1, 2013), <http://www.factcheck.org/2013/02/did-the-1994-assault-weapons-ban-work>.

<sup>83</sup> See ROTH & KOPER, *supra* note 6, at 5.

<sup>84</sup> See, e.g., Michael Wines, *Clinton Renewing Push for Assault Rifle Ban*, N.Y. TIMES (Apr. 26, 1994), <http://www.nytimes.com/1994/04/26/us/clinton-renewing-push-for-assault-rifle-ban.html>.

<sup>85</sup> Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994 (Sept. 13, 1994), in 30 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1758, 1760 (1994), <http://www.gpo.gov/fdsys/pkg/WCPD-1994-09-19/pdf/WCPD-1994-09-19.pdf> (publishing the remarks of President Clinton).

<sup>86</sup> See Wines, *supra* note 84.

<sup>87</sup> See ROTH & KOPER, *supra* note 6; Lois Beckett, *Fact-Checking Feinstein on the Assault Weapons Ban*, PROPUBLICA (Sept. 24, 2014, 10:57 AM), <http://www.propublica.org/article/fact-checking-feinstein-on-the-assault-weapons-ban>.

<sup>88</sup> Opinion, *Hyping the Crime Bill*, WASH. POST (Sept 15, 1994), <https://www.washingtonpost.com/archive/opinions/1994/09/15/hyping-the-crime-bill/aaea5a9d-7599-4957-812f-9c05b21fd6c4>. On April 6, 1998, President Clinton announced that the Treasury Department had permanently banned the importation of more than fifty semiautomatic assault

Gun control opponents unsuccessfully challenged the AWB as irrational, unconstitutional, and a violation of substantive due process.<sup>89</sup> In *Olympic Arms v. Buckles*—decided several years before the Supreme Court’s *Heller* and *McDonald* decisions<sup>90</sup>—the Sixth Circuit pointed out that since the right to keep and bear arms was not fundamental, it would evaluate the AWB under the less stringent rational basis test.<sup>91</sup> It upheld the law under that highly deferential standard of review:

The list of outlawed weapons was developed by recognizing weapons commonly used in the commission of violent crimes. The “copies or duplicates” language was added to the legislation in order to prevent manufacturers from dodging criminal liability by simply changing the name of the specified weapons. The list of protected weapons was developed based on information provided to congressional representatives that those weapons were commonly used for hunting purposes. Accordingly, it is entirely rational for Congress, in an effort to protect public safety, to choose to ban those weapons commonly used for criminal purposes and to exempt those weapons commonly used for recreational purposes. The fact that many of the protected weapons are somewhat similar in function to those that are banned does not destroy the rationality of the congressional choice. A classification does not fail because it “is not made with mathematical nicety or because in practice it results in some inequality.”<sup>92</sup>

In *Heller* and *McDonald*, the Supreme Court held that the Second Amendment guarantees an individual’s right to keep and bear weapons in common use, at least in the home.<sup>93</sup> Subsequently, most courts considering challenges to AWBs and other gun controls have adopted

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weapons models. Press Release, The White House, Fact Sheet on Modified Assault Weapons (Apr. 6, 1998), 1998 WL 155786. In January 2001, just before leaving office, Clinton issued an executive order banning importation of “assault pistols.” Nancy Gibbs, *Laying Down the Law*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,162229,00.html#ixzz2I1pDqTkx>. The shooters in the 1999 Columbine High School massacre used an Intratec TEC-DC9 (9-mm semiautomatic handgun), a Savage 311-D 12-gauge sawed-off double-barrel shotgun, a High Point model 995 carbine rifle, and a Savage-Springfield 67H 12-gauge pump shotgun. *Weapons & Gear*, A COLUMBINE SITE, <http://www.acolumbinesite.com/weapon.html> (last visited Nov. 6, 2015). None of these are assault weapons.

<sup>89</sup> See, e.g., *Olympic Arms v. Buckles*, 301 F.3d 384 (6th Cir. 2002); *Navegar, Inc. v. United States*, 192 F.3d 1050 (D.C. Cir. 1999); *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996); *United States v. Starr*, 945 F. Supp. 257 (M.D. Ga. 1996).

<sup>90</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>91</sup> *Buckles*, 301 F.3d at 388–89.

<sup>92</sup> See *id.* at 389–90 (footnote omitted) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). The court was wrong about assault weapons being “commonly used for criminal purposes.” *Id.*

<sup>93</sup> *McDonald*, 561 U.S. 742; *Heller*, 554 U.S. 570.

an intermediate standard of review, and under that standard, AWBs have been consistently upheld.<sup>94</sup>

After the federal AWB became effective, manufacturers quickly substituted new firearms models for those banned as assault weapons, for example, by removing the bayonet and grenade launcher mounts.<sup>95</sup> Critics again charged that the manufacturers were circumventing the ban because the new models were functionally identical to the prohibited firearms.<sup>96</sup> Again, manufacturers claimed to be complying with the law.<sup>97</sup>

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<sup>94</sup> See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, No. 14-36-CV, 2015 WL 6118288 (2d Cir. Oct. 19, 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 361 (W.D.N.Y. 2013). In *Kachalsky*, the court footnotes a series of intermediate scrutiny cases. See *Kachalsky*, 701 F.3d at 93 n.17 (citing *Heller v. District of Columbia*, 670 F.3d 1244, 1261–64 (D.C. Cir. 2011) (applying intermediate scrutiny to prohibition of possession of magazines with a capacity of more than ten rounds of ammunition); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9), which prohibits the possession of firearms by a person convicted of a misdemeanor crime of domestic violence); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (applying intermediate scrutiny to 36 C.F.R. § 2.4(b), which prohibits “carrying or possessing a loaded weapon in a motor vehicle” within national park areas); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9)); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(k), which prohibits the possession of firearms with obliterated serial numbers); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms while subject to a domestic protection order); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (applying form of intermediate scrutiny to 18 U.S.C. § 922(g)(9)).

<sup>95</sup> The pro-gun control Violence Policy Center estimates that more than one million new assault weapons have been manufactured for sale in the United States since passage of the 1994 law. JOSH SUGARMANN & MARTY LANGLEY, VIOLENCE POLICY CTR., UNITED STATES OF ASSAULT WEAPONS: GUNMAKERS EVADING THE FEDERAL ASSAULT WEAPONS BAN 2–3 (2004), [http://www.joycefdn.org/assets/1/7/US\\_of\\_Assault\\_Weapons.pdf](http://www.joycefdn.org/assets/1/7/US_of_Assault_Weapons.pdf); see also JOSH SUGARMANN, VIOLENCE POLICY CTR., ILLINOIS: LAND OF POST-BAN ASSAULT WEAPONS (2004), <http://www.vpc.org/graphics/IllinoisAWstudy.pdf>. But see Justin Peters, *The New Assault Weapons Ban Deserved to Die*, SLATE: CRIME (Mar. 20, 2013, 4:00 PM), [http://www.slate.com/blogs/crime/2013/03/20/dianne\\_feinstein\\_gun\\_control\\_the\\_new\\_assault\\_weapons\\_ban\\_deserved\\_to\\_die.html](http://www.slate.com/blogs/crime/2013/03/20/dianne_feinstein_gun_control_the_new_assault_weapons_ban_deserved_to_die.html).

<sup>96</sup> See Brad Plumer, *The Last Assault-Weapons Ban Didn't Work. Will the New One Be Different?*, WASH. POST: WONKBLOG (Jan. 24, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/24/the-last-assault-weapons-ban-didnt-work-will-the-new-one-be-different>.

<sup>97</sup> *Cf.*, e.g., *United States v. Jamieson*, 202 F.3d 1293 (11th Cir. 2000) (vacating the defendant's sentence, which was enhanced on account of his possession of an assault weapon, because the weapon, produced to replace a banned assault weapon, was not itself an assault weapon); see also Seitz-Wald, *supra* note 1.



## VI. THE 2004 EXPIRATION OF THE ASSAULT WEAPONS BAN

Congress gave the 1994 federal AWB a ten-year life span. It would sunset on September 13, 2004 unless Congress acted to renew it.<sup>98</sup> As the expiration date approached, some advocacy groups, law enforcement officials, and politicians called renewal essential to continued reduction of violent crime.<sup>99</sup> Senator Christopher Dodd (D-CT) told his colleagues that,

[q]uite simply, assault weapons are weapons of war. They are designed with one purpose in mind—for slaughtering human beings over a wide area. They belong on a faraway battlefield, not on our Nation’s streets. However one feels about the Second Amendment, assault weapons have no place in a civilized society.<sup>100</sup>

The following exchange between two members of the Senate Judiciary Committee, Senator Diane Feinstein (D-CA) and Senator Larry Craig (R-ID), provides a window on the debate:

[MARGARET WARNER (PBS):] Sen. Craig, the polls show widespread public support for extending this ban; two-thirds of Americans, even some 60 percent of Republicans. Why won’t the Republican leadership let this come for a vote?

SEN. LARRY CRAIG: Well, you only pass laws or bring existing laws and extend their effectiveness or their legality if they work. Less than 3 percent of crimes in this country where firearms were used involved a semi-auto before the ban went in, in ’94; less than 3 percent today. It was a political placebo at the time. It has shown its ineffectiveness. It has a sunset clause. And we’re going to allow it to pass away.

MARGARET WARNER: Sen. Feinstein, a political placebo?

SEN. DIANNE FEINSTEIN: Well, Sen. Craig can get me very upset sometimes, and I think his view on this is diametrically opposed to mine. There is no question that the people want this bill extended.

There is no question that gun traces to crimes committed with assault weapons have declined, and there is no question that the number of assault weapons available in gun stores, in gun shows, on street corners, have also declined. Coincidentally, but I’m not saying it’s attributable to this, crime has also declined.

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<sup>98</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (stating in section 110105 that the amendment to 18 U.S.C. § 921 is “repealed effective as of the date that is 10 years after [the enactment] date”).

<sup>99</sup> See *Congress to Let Assault Weapons Ban Expire*, FOX NEWS (Sept. 8, 2014), <http://www.foxnews.com/story/2004/09/08/congress-to-let-assault-weapons-ban-expire>.

<sup>100</sup> 150 Cong. Rec. 1953 (2004).

Now, I just appeal to the common sense of Americans all across this great country. Do military-style assault weapons belong on the streets of our cities? Do they belong in a place where they can be bought by terrorists, by gang-bangers, by grievance killers and by criminals?

I think they don't, and I think the people of this country in poll after poll, from anywhere from two-thirds to three-fourths, have said, we agree with you. We want this extended across every demographic group . . . .<sup>101</sup>

Nevertheless, Senator Feinstein's attempt to extend the AWB for another ten years was ultimately defeated with the passage of the Protection of Lawful Commerce in Arms Bill in 2005.<sup>102</sup> What had changed between 1994 and 2004? For one thing, in the months prior to the AWB's expiration, there were no horrific mass shootings that might have rallied public opinion in favor of renewal. Additionally, violent crime nationally had declined dramatically, but no serious studies attributed the decline to the AWB.<sup>103</sup> In 2004, there was also a Republican president—George W. Bush. Many Democrats had become gun shy,<sup>104</sup> some believing that the 1993 Brady Law and the 1994 AWB had cost the Democrats control of Congress in 1994 and had cost Al

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<sup>101</sup> Margaret Warner, *Interview with Senator Dianne Feinstein (D-CA) and Senator Larry Craig (R-ID)*, PBS (Sept. 9, 2004), [http://www.pbs.org/newshour/bb/politics-july-dec04-ban\\_09-09](http://www.pbs.org/newshour/bb/politics-july-dec04-ban_09-09).

<sup>102</sup> Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005). Senator Feinstein proposed Senate Amendment 1623, but it was defeated when the amendment was tabled by the Senate in a 62-37 vote. See S. 397 (109th): *Protection of Lawful Commerce in Arms Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/109/s397> (last visited Nov. 6 (2015)).

<sup>103</sup> Christopher S. Koper, along with Daniel J. Woods and Jeffrey A. Roth published the best evaluation of the AWB's impact on gun crime. They found no statistically significant evidence that either the assault weapons ban or the ban on magazines holding more than ten rounds had reduced gun murders. However, they concluded that it was "premature to make definitive assessments of the ban's impact on gun crime." CHRISTOPHER S. KOPER, UNIV. OF PA., JERRY LEE CTR. OF CRIMINOLOGY, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 2–3 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>. In addition, the independent Task Force on Community Preventive Services examined a number of gun control laws, including the AWB, and found "insufficient evidence to determine the effectiveness of any of the firearms laws reviewed for preventing violence." CTRS. FOR DISEASE CONTROL & PREVENTION, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS (2003), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm>. "There is no compelling evidence that [the federal AWB] saved lives." wrote two Duke University public policy experts. PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 135 (2014).

<sup>104</sup> See Douglas Feiden, *Sen. Dianne Feinstein of California Vows to Revive Federal Assault Weapons Ban in 2013*, N.Y. DAILY NEWS (Dec. 16, 2012, 11:32 PM), <http://www.nydailynews.com/news/national/sen-feinstein-vows-revive-assault-weapons-ban-article-1.1221793> ("[T]he Democratic-controlled Senate for years has shown no appetite to tackle the highly charged issue.").

Gore the presidency in 2000.<sup>105</sup> Although President Bush said he would sign an AWB renewal if Congress passed it, he certainly knew that Congress would not pass it.<sup>106</sup>

After the AWB expired, there was strong consumer demand for the newly unbanned assault weapon models.<sup>107</sup> Ironically, perhaps the most significant effect of both the 1994 ban and the 2004 expiration was a massive increase in the number of assault weapons in civilian hands.<sup>108</sup>

## VII. THE PROPOSED 2013 ASSAULT WEAPONS BAN

Although the AWB died in 2004, it was not forgotten. Gun control proponents continued to call for renewal. For example, the Brady Campaign to Prevent Gun Violence insisted that “[w]e need to enact a new, stronger federal assault weapons ban to keep these dangerous guns off the streets—a law that will ban all military-style weapons and with no sunset provision.”<sup>109</sup>

Shortly after the 2008 presidential election, Barack Obama’s website, Change.gov, listed “making the expired federal Assault Weapons Ban permanent” as one of the new administration’s priorities.<sup>110</sup> The same statement of intent later appeared on

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<sup>105</sup> President Clinton attributed the Democrats’ 1994 election defeat to the Party’s support of the Brady Law and the AWB. See Corn, *supra* note 70. To say the least, Democrats lost enthusiasm for gun control legislation. See Alex Koppelman, *Why Democrats Dumped Gun Control*, SALON (Apr. 18, 2007, 8:00 AM), [http://www.salon.com/2007/04/18/dems\\_and\\_guns](http://www.salon.com/2007/04/18/dems_and_guns).

<sup>106</sup> See *The Assault Weapons Ban: Lessons About Congress*, GOV’T AFF. INST. GEO. U., <http://gai.georgetown.edu/the-assault-weapons-ban-lessons-about-congress-2> (last visited Aug. 28, 2015).

<sup>107</sup> Deborah Sontag, *Many Say End of Firearm Ban Changed Little*, N.Y. TIMES (Apr. 24, 2005), <http://www.nytimes.com/2005/04/24/us/many-say-end-of-firearm-ban-changed-little.html>.

<sup>108</sup> See SUGARMANN & LANGLEY, *supra* note 95.

<sup>109</sup> BRIAN J. SIEBEL, BRADY CTR. TO PREVENT GUN VIOLENCE, ASSAULT WEAPONS: “MASS PRODUCED MAYHEM” 22 (2008), <http://www.bradycampaign.org/sites/default/files/mass-produced-mayhem.pdf> (“Assault weapons are weapons of war that are sought after and used by street gangs, drug dealers, and terrorists, but are of no use to law-abiding persons who own guns for sporting purposes and self-defense. Law enforcement and an overwhelming majority of the American public realize that these guns have no place in civilian hands, and should be banned. For 10 years, America attempted to limit the mayhem caused by assault weapons and the high-capacity ammunition magazines that they utilize. Although the gun industry worked hard to evade the federal ban by marketing assault weapons stripped of enough features to get by, gun makers were not wholly effective at neutralizing the federal ban’s effect. Even accounting for the industry’s evasive efforts, the use of assault weapons in crime declined substantially. Unfortunately, President Bush and the 108th Congress allowed it to lapse.”).

<sup>110</sup> See *Agenda: Urban Policy*, CHANGE.GOV, [http://change.gov/agenda/urbanpolicy\\_agenda](http://change.gov/agenda/urbanpolicy_agenda) (last visited Oct. 3, 2015); see also Ben Garrett, *President Barack Obama and Assault Weapons*, ABOUT.COM, <http://civilliberty.about.com/od/guncontrol/a/Barack-Obama-Assault-Weapons-Ban.htm> (last visited Aug. 28, 2015).

WhiteHouse.gov.<sup>111</sup> In February 2009, newly sworn-in Attorney General Eric Holder reaffirmed the Obama administration's commitment to AWB renewal.<sup>112</sup>

The Obama administration did not seriously press for a new AWB until the December 14, 2012 massacre at Sandy Hook Elementary School in Newton, Connecticut, where twenty children and six adults were killed.<sup>113</sup> The shooter used an AR-15-style Bushmaster semiautomatic rifle belonging to his mother, whom he also killed.<sup>114</sup> Five days after the massacre, President Obama urged Congress to renew the AWB.<sup>115</sup> He asked Vice President Joe Biden, who as a senator had sponsored the 1994 AWB, to lead a task force of congressmen and cabinet members to propose a comprehensive gun control response to the massacre.<sup>116</sup>

Senator Feinstein (D-CA), the Senate's leading AWB proponent, stated at the February 27, 2013 Senate Judiciary Committee hearing:

[T]he need for a federal ban has never been greater. For instance, California law enforcement tells me that our state's assault weapons ban has been effective in reducing the availability of these deadly weapons—but some criminals continue to acquire these guns from neighboring states like Arizona, where they are unregulated. And as Senator Durbin stated at the last hearing, “in the last 20 years, 9 percent of the crime guns in the city of Chicago could be traced to the state of *Mississippi*.” It is clear that we need a national solution.<sup>117</sup>

The editors of *The New York Times*, consistently supportive of gun control proposals, agreed:

The assault weapons ban that expired in 2004 should be renewed and tightened, with a special emphasis on prohibiting magazines that hold more than 10 rounds. The millions who already own such weapons—unnecessary for hunting or protection—should be

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<sup>111</sup> THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT'S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 5 (2013), [https://www.whitehouse.gov/sites/default/files/docs/wh\\_now\\_is\\_the\\_time\\_full.pdf](https://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf).

<sup>112</sup> See Garrett, *supra* note 110.

<sup>113</sup> See David Jackson & Aamer Madhani, *Obama Calls for Assault-Weapons Ban, Background Checks*, USA TODAY (Jan. 16, 2013, 6:34 PM), <http://www.usatoday.com/story/news/politics/2013/01/16/obama-gun-violence-plan-assault-weapons-ban-background-checks/1837793>.

<sup>114</sup> See Matt Smith, *Sandy Hook Killer Took Motive to His Grave*, CNN (Nov. 26, 2013, 7:33 AM), <http://www.cnn.com/2013/11/25/justice/sandy-hook-shooting-report>.

<sup>115</sup> See Michael D. Shear & Peter Baker, *Tough Path Seen by Obama on Ban of Assault Weapons*, N.Y. TIMES (Jan. 10, 2013), <http://www.nytimes.com/2013/01/11/us/politics/biden-to-meet-with-gun-advocates-including-nra.html>.

<sup>116</sup> *Id.*

<sup>117</sup> Press Release, Dianne Feinstein, U.S. Senator for Cal., Feinstein Statement at Hearing on Assault Weapons Ban Bill (Feb. 27, 2013), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=c6287561-bbbf-4971-bfed-3b8f05e63c0f>.

required to register them and submit to a background check to reduce the mass killing that produced this agonized debate.<sup>118</sup>

Senator Feinstein and twenty-four co-sponsors introduced the Assault Weapons Ban of 2013 bill to prohibit the future sale, manufacture, possession, and importation of 157 specifically named commonly-owned military-style assault weapons, as well as any other semiautomatic firearms that can accept a detachable ammunition magazine and that *have one or more* military characteristics.<sup>119</sup> This “one factor” test would have resulted in prohibiting far more firearms models than the “two factor” 1994 AWB.<sup>120</sup> The bill specifically listed 2,258 hunting and sporting firearms models as non-assault weapons.<sup>121</sup> However, like the 1994 AWB, Feinstein’s 2013 bill grandfathered weapons legally-owned prior to the new law.<sup>122</sup> Once again, there was a surge in retail sales of assault weapons.<sup>123</sup>

The Senate Judiciary Committee passed Feinstein’s bill on March 14, 2013,<sup>124</sup> but Senate Majority Leader Harry Reid (D-Nev.), recognizing that the bill had no chance of success, and fearing that it might doom the rest of the gun control package, especially the extension

<sup>118</sup> Editorial, *The Moment for Action on Guns*, N.Y. TIMES (Jan. 14, 2013), <http://www.nytimes.com/2013/01/15/opinion/the-moment-for-action-on-gun-laws.html>.

<sup>119</sup> See S. 150, 113th Cong. (2013); S. 150 (113th): *Assault Weapons Ban of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s150> (last visited Nov. 6, 2015); see also Beckett, *supra* note 87; Ed Pilkington, *Dianne Feinstein Launches Assault Rifle Ban and Proposes Register of Owners*, GUARDIAN (Jan. 24, 2013, 2:27 PM), <http://www.theguardian.com/world/2013/jan/24/dianne-feinstein-assault-rifle-ban-register>. Representative Carolyn McCarthy (D-NY) introduced a companion measure in the House of Representatives. See Assault Weapons Ban of 2013, H.R. 437, 113th Cong. (2013); H.R. 437 (113th): *Assault Weapons Ban of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr437> (last visited Nov. 6, 2015).

<sup>120</sup> Mark Thompson, *Assault Weapons Ban, Part II: How to Prevent a Meaningful Dialogue on Guns and Gun Control*, ORDINARY TIMES: BLOG (Jan. 2, 2013), <http://ordinary-gentlemen.com/blog/2013/01/02/assault-weapons-ban-part-ii-how-to-prevent-a-meaningful-dialogue-on-guns-and-gun-control>.

<sup>121</sup> See S. 150. The bill also sought to ban magazines and other ammunition feeding devices that hold more than ten rounds of ammunition. *Id.*; see also *Assault Weapons Ban of 2013*, DIANNE FEINSTEIN, <http://www.feinstein.senate.gov/public/index.cfm/assault-weapons-ban-summary> (last visited Oct. 3, 2015).

<sup>122</sup> See S. 150.

<sup>123</sup> See William La Jeunesse, *Gun Sales Surge After Connecticut Massacre*, FOX NEWS (Dec. 18, 2012), <http://www.foxnews.com/politics/2012/12/18/gun-sales-surge-after-connecticut-massacre>; Joseph Pisani, *Gun Sales Surge in Wake of Newtown Shooting as Panicked Enthusiasts Rush to Stock Up*, HUFFINGTON POST (Dec. 29, 2012, 1:09 PM), [http://www.huffingtonpost.com/2012/12/29/gun-sales-surge\\_n\\_2380738.html](http://www.huffingtonpost.com/2012/12/29/gun-sales-surge_n_2380738.html); Daniel Politi, *Gun Shows Packed with Customers Eager to Buy Assault Weapons*, SLATE: SLATEST (Dec. 23, 2012, 6:54 AM), [http://www.slate.com/blogs/the\\_slatest/2012/12/23/assault\\_weapons\\_sales\\_at\\_gun\\_shows\\_soar\\_after\\_newtown\\_school\\_massacre.html](http://www.slate.com/blogs/the_slatest/2012/12/23/assault_weapons_sales_at_gun_shows_soar_after_newtown_school_massacre.html).

<sup>124</sup> See Press Release, Sheldon Whitehouse, U.S. Senator for R.I., Judiciary Committee Approves Gun Violence Legislation (March 14, 2013), <http://www.whitehouse.senate.gov/news/release/judiciary-committee-approves-gun-violence-legislation>.

of criminal background checks to private sales, decided to put Feinstein's bill up for a separate vote as a stand-alone amendment to a different gun control bill.<sup>125</sup> The full Senate rejected the amendment by a 60-40 vote, with all Republicans and fifteen Democratic senators voting no.<sup>126</sup>

#### VIII. NEW YORK STATE'S POST-SANDY HOOK ASSAULT WEAPONS BAN

The Sandy Hook massacre also triggered state-level proposals to ban assault weapons. Maryland passed a ban for the first time.<sup>127</sup> Connecticut<sup>128</sup> and New York<sup>129</sup> strengthened their existing AWBs. All told, seven states and several municipalities ban assault weapons.<sup>130</sup>

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<sup>125</sup> See S. 649, 113th Cong. (2013); S. 649 (113th): *Safe Communities, Safe Schools Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s649> (last visited Nov. 6, 2015); see also David Firestone, *Say Goodbye to the Assault Weapons Ban*, N.Y. TIMES: TAKING NOTE (Mar. 19, 2013, 2:59 PM), [http://takingnote.blogs.nytimes.com/2013/03/19/congress-abandons-the-assault-weapons-ban/?\\_r=0](http://takingnote.blogs.nytimes.com/2013/03/19/congress-abandons-the-assault-weapons-ban/?_r=0).

<sup>126</sup> See *Senate Vote 101—Rejects Feinstein Proposal to Reinstate Assault Weapons Ban*, N.Y. TIMES, <http://politics.nytimes.com/congress/votes/113/senate/1/101> (last visited Oct. 3, 2015); see also Tim Brown, *Dianne Feinstein's Assault Weapons Ban Defeated*, FREEDOM OUTPOST (Apr. 17, 2013), <http://freedomoutpost.com/2013/04/feinsteins-assault-weapons-ban-defeated>.

<sup>127</sup> Maryland passed its first ever AWB criminalizing the sale and possession of forty-five specifically-named firearms models, including the popular AR-15. MD. CODE ANN., CRIM. LAW §§ 4-301 to 4-306 (West 2015). A federal court upheld Maryland's law in *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 803 (D. Md. 2014).

<sup>128</sup> 2013 Conn. Acts 13-3 (Reg. Sess.). Connecticut added 100 firearms models to its assault weapons blacklist. Connecticut's law authorized the State Police to add semiautomatics that possess two undesirable features to the banned list. See *id.*; see also Christina Wilkie, *Connecticut Passes Nation's Strictest Gun Law in Wake of Sandy Hook Massacre*, HUFFINGTON POST (Apr. 4, 2013, 11:28 AM), [http://www.huffingtonpost.com/2013/04/04/connecticut-gun-control-sandy-hook-law\\_n\\_3011625.html](http://www.huffingtonpost.com/2013/04/04/connecticut-gun-control-sandy-hook-law_n_3011625.html).

<sup>129</sup> 2013 N.Y. Laws ch. 1, § 37 (codified at N.Y. PENAL LAW § 265.00 (McKinney 2015)); see also Michael Gormley, *NY Passes Nation's Toughest Gun Control Law*, NBC N.Y. (Jan. 14, 2013, 11:05 AM), <http://www.nbcnewyork.com/news/local/Gun-Control-Assault-Weapons-Ban-Magazines-Limit-Cuomo-NY-186794151.html>.

<sup>130</sup> See, e.g., *Assault Weapons in California*, LAW CTR. TO PREVENT GUN VIOLENCE (Oct. 29, 2015), <http://smartgunlaws.org/assault-weapons-in-california>; *Assault Weapons in Connecticut*, LAW CTR. TO PREVENT GUN VIOLENCE (Aug. 19, 2015), <http://smartgunlaws.org/assault-weapons-in-connecticut>; *Assault Weapons in the District of Columbia*, LAW CTR. TO PREVENT GUN VIOLENCE (Sept. 15, 2015), <http://smartgunlaws.org/assault-weapons-in-washington-d-c>; *Assault Weapons in Hawaii*, LAW CTR. TO PREVENT GUN VIOLENCE (Aug. 24, 2015), <http://smartgunlaws.org/assault-weapons-in-hawaii>; *Assault Weapons in Maryland*, LAW CTR. TO PREVENT GUN VIOLENCE (Aug. 10, 2015), <http://smartgunlaws.org/assault-weapons-in-maryland>; *Assault Weapons in Massachusetts*, LAW CTR. TO PREVENT GUN VIOLENCE (Sept. 21, 2015), <http://smartgunlaws.org/assault-weapons-in-massachusetts>; *Assault Weapons in New Jersey*, LAW CTR. TO PREVENT GUN VIOLENCE (Sept. 21, 2015), <http://smartgunlaws.org/assault-weapons-in-new-jersey>; *Assault Weapons in New York*, LAW CTR. TO PREVENT GUN VIOLENCE (Oct. 29, 2015), <http://smartgunlaws.org/assault-weapons-in-new-york>.

New York first enacted an AWB in 2000, following the Columbine High School massacre in Colorado.<sup>131</sup> New York State itself had not experienced a school massacre since 1974, when a student in Olean killed three and wounded eight using a standard hunting rifle and a 12-gauge shotgun.<sup>132</sup> In 2009, a shooter using two semiautomatic non-assault pistols killed thirteen and wounded four at the American Civic Association Immigration Center in Binghamton, New York.<sup>133</sup> Immediately after the December 2012 Sandy Hook Elementary School massacre, Governor Andrew Cuomo urged passage of the Secure Ammunition and Firearms Enforcement Act of 2013 (SAFE Act)<sup>134</sup> to broaden the definition of assault weapon to include any semiautomatic rifle, shotgun, or pistol that possessed one or more of the usual military-style features.<sup>135</sup> The bill was submitted to the legislature on the night of January 15, 2013 as an emergency measure and signed into law the next day.<sup>136</sup> Persons who owned firearms that were legal before passage of the SAFE Act, but illegal afterwards,<sup>137</sup> could keep those firearms, but had to register them with the State Police.<sup>138</sup> Knowing failure to register is a Class A misdemeanor.<sup>139</sup> No one who does not already own a banned assault weapon may purchase or possess one.<sup>140</sup> The owner of a

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<sup>131</sup> 2000 N.Y. Laws ch. 189, § 10 (codified at N.Y. PENAL LAW § 265.00 (McKinney 2015)).

<sup>132</sup> Timothy J. Madden, *Honor Student on Shooting Spree Kills 3, Wounds 8 in Olean*, N.Y. DAY (Conn.), Dec. 31, 1974, at 5, <https://news.google.com/newspapers?nid=1915&dat=19741231&id=vsdGAAAAIABJ&sjid=GvgMAAAAIBAJ&pg=2599,5202028&hl=en>.

<sup>133</sup> Robert D. McFadden, *13 Shot Dead During a Class on Citizenship*, N.Y. TIMES (Apr. 3, 2009), [http://www.nytimes.com/2009/04/04/nyregion/04hostage.html?\\_r=0](http://www.nytimes.com/2009/04/04/nyregion/04hostage.html?_r=0).

<sup>134</sup> See Becky Bratu & Pete Williams, *New York Passes Major Gun Control Law—First Since Newtown Massacre*, NBC NEWS (Jan. 15, 2013, 1:38 PM), [http://usnews.nbcnews.com/\\_news/2013/01/15/16515653-new-york-passes-major-gun-control-law-first-since-newtown-massacre?lite](http://usnews.nbcnews.com/_news/2013/01/15/16515653-new-york-passes-major-gun-control-law-first-since-newtown-massacre?lite); Howard Glaser, *Cuomo Gun Safety Legislation Passes NY State Senate with Bipartisan Support, Assembly Action Today*, HUFFINGTON POST (Mar. 17, 2013, 5:12 AM), [http://www.huffingtonpost.com/howard-glaser/cuomo-gun-safety-legislation\\_b\\_2476419.html](http://www.huffingtonpost.com/howard-glaser/cuomo-gun-safety-legislation_b_2476419.html).

<sup>135</sup> N.Y. PENAL §§ 265, 400 (McKinney 2015).

<sup>136</sup> See *Enacts the NY SAFE Act of 2013*, N.Y. State Senate, <http://www.nysenate.gov/legislation/bills/2013/s2230> (last visited Nov. 6, 2015); Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES (Jan. 15, 2013), [http://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html?\\_r=1](http://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html?_r=1).

<sup>137</sup> PENAL § 265.

<sup>138</sup> *Id.* § 400.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* Some gun rights groups and gun owners vowed to defy the law. See Glenn Rhee, *BREAKING: A Million NY Gun Owners Defy NY Safe Act Deadline (Video)*, PREPPER CHIMP (Apr. 16, 2014), <http://prepperchimp.com/2014/04/16/breaking-a-million-ny-gun-owners-defy-ny-safe-act-deadline-video>. The New York State Police refused to release registration statistics. Adam Edelman, *Low Assault-Weapon Registration Stats Suggest Low Compliance with Gov. Cuomo’s Landmark SAFE Act Gun Control Law*, N.Y. DAILY NEWS (June 23, 2015, 2:26 PM), <http://www.nydailynews.com/news/politics/ny-safe-act-weapons-registry-numbers-released-article-1.2267730> (noting that New York State Police subsequently released registration statistics indicating low compliance); J.D. Tuccille, *New York Resists Court-Ordered*

registered assault weapon cannot sell or transfer it to anyone in New York State except to a dealer, who in turn can only sell it to an out-of-state purchaser.<sup>141</sup> Violation is a Class E felony carrying a seven-year maximum prison term.<sup>142</sup>

Not surprisingly, manufacturers, retailers, and many gun owners strenuously opposed the SAFE Act.<sup>143</sup> Owners of assault weapons objected to the SAFE Act for diminishing the value of their previously legal, but now prohibited, assault weapons.<sup>144</sup> There were protests around the state, including demonstrations at which protesters symbolically burned assault weapons registration forms. Some sheriffs in upstate counties announced that they would not enforce the SAFE Act.<sup>145</sup>

In order to comply with the SAFE Act, some firearms retailers removed military-like features from weapons in their inventory.<sup>146</sup> Moreover, owners of a now-banned AR-15 could themselves make their firearm legal by removing the pistol grip with a wrench.<sup>147</sup> Some critics complained that, by adapting firearms to comply with the SAFE Act, retailers and gun owners were evading the law. They pointed out that the altered weapons were functionally identical to banned assault weapons. Of course, this was the same point that gun owners had been making all along.<sup>148</sup>

At least four different gun owners' rights groups and individual gun owners immediately challenged—on Second Amendment grounds—the SAFE Act's AWB, and the seven bullet magazine

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*Release of 'Assault Weapon' Registration Data*, REASON.COM: HIT & RUN BLOG (May 19, 2015, 11:13 AM), <https://reason.com/blog/2015/05/19/new-york-resists-court-ordered-release-o>.

<sup>141</sup> See PENAL § 265(h).

<sup>142</sup> *Id.* § 265.01-b.

<sup>143</sup> See Mary Lou Byrd, *Gun Companies Leave New York Following SAFE Act*, WASH. FREE BEACON (Nov. 5, 2013, 2:29 PM), <http://freebeacon.com/issues/three-gun-companies-leave-ny-following-gun-law>.

<sup>144</sup> Mary Lou Byrd, *Protesters Shred SAFE Act Registration Cards*, WASH. FREE BEACON (Apr. 16, 2014, 4:21 PM), <http://freebeacon.com/issues/protesters-shred-safe-act-registration-cards>.

<sup>145</sup> See Mark Boshnack, *NY Sheriffs: We Won't Enforce Gun Laws, Magazine Limits*, DAILY STAR (New York) (Sept. 7, 2013), <http://www.policeone.com/chiefs-sheriffs/articles/6435415-NY-sheriffs-We-wont-enforce-gun-laws-magazine-limits>.

<sup>146</sup> See, e.g., Maxim Lott, *Cosmetic Tweaks to AR-15 Thwart New York's 'Ban' on Assault Rifles*, FOX NEWS (Feb. 16, 2014), <http://www.foxnews.com/us/2014/02/16/cosmetic-tweaks-to-ar-15-thwart-new-york-ban-on-assault-rifles>.

<sup>147</sup> Teri Weaver, *NY Safe Act: See What Makes an Assault Weapon Illegal*, SYRACUSE.COM (Apr. 29, 2014, 12:08 PM), [http://www.syracuse.com/news/index.ssf/2014/04/ny\\_safe\\_act\\_see\\_what\\_makes\\_an\\_assault\\_weapon\\_illegal.html](http://www.syracuse.com/news/index.ssf/2014/04/ny_safe_act_see_what_makes_an_assault_weapon_illegal.html).

<sup>148</sup> See Lott, *supra* note 146; see also Nick Leghorn, *Gun Review: Black Rain Ordnance NY Legal AR-15*, TRUTH ABOUT GUNS (May 5, 2014), <http://www.thetruthaboutguns.com/2014/05/foghorn/gun-review-black-rain-ordnance-ny-legal-ar-15-bro-pg5-ny>.



restriction.<sup>149</sup> Citing the Supreme Court’s decisions in *Heller*<sup>150</sup> and *McDonald*,<sup>151</sup> they argued that the right to keep and bear arms includes the right to possess weapons commonly used for self-defense.<sup>152</sup> Moreover, they insisted that since the Supreme Court found the possession of a firearm in the home to be a fundamental right, courts should review gun controls according to the stringent compelling state interest standard.<sup>153</sup> Twenty-two state attorneys generals filed a joint amicus brief supporting one of the Second Amendment challenges to the SAFE Act.<sup>154</sup> Ten states filed an amicus brief in support of the SAFE Act, as did New York City.<sup>155</sup>

Federal Judge William Skretny adopted a three-step analysis to resolve whether the SAFE Act’s AWB violated the Second Amendment: (1) determine whether the weapons in question are commonly-used for lawful purposes; (2) determine whether the challenged restrictions substantially burden rights protected by the Second Amendment; and (3) determine what level of scrutiny to use by reference to how closely the restriction burdens the “core” right of self-defense within the home.<sup>156</sup> Finding that the AWB did not substantially burden the core right of self-defense, Judge Skretny adopted an “intermediate scrutiny” standard for evaluating the ban’s lawfulness.<sup>157</sup> He then observed that “the legislature is ‘far better equipped than the judiciary’ to make sensitive policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks.”<sup>158</sup> He found that

features[, such as folding stocks and pistol grips,] that increase a weapon’s utility for self-defense also increase its dangerousness to the

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<sup>149</sup> See *Kampfer v. Cuomo*, 993 F. Supp. 2d 188 (N.D.N.Y. 2014); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 990 F. Supp. 2d 349 (W.D.N.Y. 2013).

<sup>150</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>151</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>152</sup> See *Kampfer*, 993 F. Supp. 2d at 192; *Cuomo*, 990 F. Supp. 2d at 368.

<sup>153</sup> See *Cuomo*, 990 F. Supp. 2d at 367–68.

<sup>154</sup> Brief of Alabama et al. as Amici Curiae in Support of Plaintiffs-Appellants-Cross-Appellees, *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, No. 14-0036-CV (May 6, 2014), 2014 WL 2039060; see also Mary Lou Byrd, *Twenty Two States Support Lawsuit Against Cuomo’s SAFE Act*, WASH. FREE BEACON (May 8, 2014, 1:00 PM), <http://freebeacon.com/issues/twenty-two-states-support-lawsuit-against-cuomos-safe-act>.

<sup>155</sup> Brief of Maryland et al. as Amici Curiae in Support of Defendants-Appellees, *N.Y. State Rifle & Pistol Ass’n*, No. 14-0319-CV (Aug. 21, 2014), 2014 WL 4275755; Brief for the City of New York, as Amicus Curiae in Support of Defendants-Appellees-Cross-Appellants, *N.Y. State Rifle & Pistol Ass’n*, No. 14-0036-cv(L) (Aug. 5, 2014), [http://michellawyers.com/wp-content/uploads/2013/04/NYSRPA-v.-Cuomo\\_Brief-for-the-City-of-New-York-as-Amicus-Curiae-In-Support-of-Defendants-Appellees-Cross-Appellants.pdf](http://michellawyers.com/wp-content/uploads/2013/04/NYSRPA-v.-Cuomo_Brief-for-the-City-of-New-York-as-Amicus-Curiae-In-Support-of-Defendants-Appellees-Cross-Appellants.pdf).

<sup>156</sup> *Cuomo*, 990 F. Supp. 2d at 363.

<sup>157</sup> *Id.* at 367.

<sup>158</sup> *Id.* at 368 (quoting *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 665 (1994)).

public at large[, and] . . . that the banned features are unusually dangerous, commonly associated with military combat situations, and are commonly found on weapons used in mass shootings.<sup>159</sup>

The Second Circuit Court of Appeals mostly affirmed Judge Skretny's opinion.<sup>160</sup> Under an intermediate level of scrutiny, the court found the seven bullet load limit to be unconstitutional.<sup>161</sup> But the Second Circuit affirmed the district court and upheld New York State's AWB against claims that it violated the Second Amendment and against claims that it was unconstitutionally vague.<sup>162</sup> While recognizing that semiautomatic assault weapons are popular with lawful gun owners, the court found that "the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves."<sup>163</sup> The AWB leaves plaintiffs free to manufacture, purchase, and possess numerous semiautomatic firearms models that are functionally equivalent to the banned military-style assault weapons.<sup>164</sup> The court devoted just one sentence to the question of how banning assault weapons contributes to public safety.<sup>165</sup>

The dangers posed by some of the military-style features prohibited by the [New York and Connecticut] statutes—such as grenade launchers and silencers—are manifest and incontrovertible. As for the other enumerated military-style features—such as the flash suppressor, protruding grip, and barrel shrouds—New York and Connecticut have determined, as did the U.S. Congress, that the "net effect of these military combat features is a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns."<sup>166</sup>

This is an extraordinary conclusion, based on no facts at all; in fact, as this Article has shown, it is contrary to the facts. It remains to be seen whether the Supreme Court will ultimately give the issue a fairer examination.

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<sup>159</sup> *Id.*

<sup>160</sup> See *N.Y. State Rifle & Pistol Ass'n*, 2015 WL 6118288.

<sup>161</sup> *Id.* at \*12.

<sup>162</sup> *Id.* at \*11–15.

<sup>163</sup> *Id.* at \*9 (quoting *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011)).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at \*10.

<sup>166</sup> *Id.* (footnote omitted) (quoting Joint Appendix, No. 14-36-cv, at 733–34).

## CONCLUSION

So-called “assault weapons” are not machineguns or automatic-fire weapons, but are semiautomatics functionally identical to scores of firearms that are not classified as assault weapons. They do not fire more rapidly, do not fire more bullets, and do not fire higher caliber bullets than many other semiautomatic firearms not defined as assault weapons. Some of the features that qualify a semiautomatic as an assault weapon make the weapon more accurate or easier to transport and handle. It would be strange indeed for a policymaker or politician to announce support for less accurate and less easily used firearms.

The distinction between an assault weapon and a non-assault weapon is in the eye of the beholder, as evidenced by the varying definitions (e.g., one or two military-like or other—for whatever reason—suspect feature). There is also the question of whether and, if so, which pistols count as assault weapons. One might say that an assault weapon is a semiautomatic firearm that some people consider too scary-looking. While some of the support for banning assault weapons derives from the erroneous belief that they are machineguns, I suspect other support is based on the belief that, on account of misunderstanding due to the pejorative label, this is a winnable issue politically, and a step toward further gun controls.

Assault weapons are not “crime guns.” It has always been true that the vast majority (approximately ninety percent) of guns used to commit crimes are handguns.<sup>167</sup> Long guns and shotguns, and assault weapons even less so, are rarely used in drug crimes, gang crimes, or street crimes.<sup>168</sup> According to Christopher Koper, in the leading empirical study of assault weapons and crime, “the most common [assault weapons] 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 . . . study.”<sup>169</sup> However, even if it were true that assault weapons were disproportionately used in gun crimes, it would make no more sense to ban them for that reason than to ban a car model that disproportionately appears in drunk driving incidents. It defies common sense to believe that a criminal who could not obtain a particular assault weapon would stop committing gun crimes when there are hundreds of non-assault weapon models that would serve the same purpose. And that does not even take into account

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<sup>167</sup> ZAWITZ, *supra* note 44.

<sup>168</sup> See Beckett, *supra* note 13.

<sup>169</sup> KOPER, *supra* note 103, at 15.

the possibility of unlawfully obtaining a grandfathered assault weapon or a prohibited assault weapon on the black market.

It is true that a firearm that shoots more bullets without having to be reloaded poses a somewhat greater risk of more casualties in a mass shooting event than a firearm that has to be reloaded with a new clip or magazine after fewer shots are fired. However, it is not true that assault weapons necessarily fire more bullets without the need for reloading than non-assault weapons; many non-assault weapons can also accommodate large-capacity detachable magazines. Moreover, the majority of mass murders, however defined, have been perpetrated with non-assault weapons,<sup>170</sup> including the 2007 Virginia Tech massacre, which resulted in thirty-two fatalities.<sup>171</sup> Indeed, it is not uncommon for rampage killers to use several different guns or to carry many fully loaded magazines.<sup>172</sup>

Finally, for readers who still favor banning so-called assault weapons, there remain difficult questions of feasibility and cost. The AR-15 accounts for approximately twenty-five percent of weapons sales annually.<sup>173</sup> Perhaps as many as ten million assault weapons are now held by civilians in the United States.<sup>174</sup> Millions more would flow into civilian hands were Congress to again consider a federal ban. Would these ten million assault weapons be grandfathered as assault weapons under New York's SAFE Act? If not, how would the new AWB be enforced? What problems would be generated by a black market in assault weapons?

In addition, apparently ignored by proponents of an AWB is the fact that assault weapons can easily be assembled, even in New York today, by purchasing parts for weapons separately. Indeed, many firearms aficionados customize their firearms by purchasing grips, barrels, and attachments separately.<sup>175</sup> Thus, a New York resident, even after the SAFE Act, would have no difficulty constructing her own assault weapon. Since sale and possession of parts is not banned, an

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<sup>170</sup> See Alberto Cuadra et al., *Weapons and Mass Shootings*, WASH. POST (Sept. 9, 2014), <http://www.washingtonpost.com/wp-srv/special/national/weapons-and-mass-shootings>.

<sup>171</sup> See *Virginia Tech Shootings Fast Facts*, CNN (Apr. 13, 2015, 11:42 AM), <http://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts>.

<sup>172</sup> See, e.g., Meghan Keneally, *Umpqua Community College Shooter Armed with 6 Guns and Flak Jacket*, ABC NEWS (Oct. 2, 2015, 4:07 PM), <http://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts>.

<sup>173</sup> See Bob Cesca, *The Year of the AR-15*, DAILY BANTER (Dec. 13, 2013), <http://thedailybanter.com/2013/12/the-year-of-the-ar-15>.

<sup>174</sup> See Boyle, *supra* note 37.

<sup>175</sup> See, e.g., B. Gil Horman, *Building a Custom AR-15 at Home*, AM. RIFLEMAN (Oct. 31, 2014), <http://www.americanrifleman.org/articles/2014/10/31/building-a-custom-ar-15-at-home>.

individual could purchase the lower receiver, collapsible stock, or pistol grip online or from a retailer.<sup>176</sup>

The costs of enforcing an assault weapons ban are also substantial. In New York, many SAFE Act protestors burned registration forms and promised not to register their assault weapons.<sup>177</sup> Moreover, a number of New York State sheriffs immediately announced that they would not enforce the SAFE Act’s assault weapons ban, and most New York counties passed anti-SAFE Act resolutions.<sup>178</sup> Of course, opposition and impediments to enforcement would be much greater in states with higher rates of firearms ownership; jury nullification would be a serious risk.

In short, not only has the twenty-five year drive to ban semiautomatic versions of fully-automatic military rifles not been successful, it has also stimulated demand for assault weapons.<sup>179</sup>

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<sup>176</sup> See, e.g., *ATF Answers Questions on 80 Percent Lower Receiver Blanks*, AMMOLAND (Nov. 7, 2014), <http://www.ammoland.com/2014/11/atf-answers-questions-on-80-receiver-blanks/#ixzz3oNTlcoa>.

<sup>177</sup> See sources cited *supra* note 145. In April 2015, a state court judge ruling in a Freedom of Information Law suit ordered the New York State Police to release statistics on assault weapon registrations under the SAFE Act. *Robinson v. Cuomo*, No. 5118-14 (N.Y. Sup. Ct. Apr. 30, 2015), <http://renzullilaw.com/files/NY%20Data%20Release%20Order%281%29.pdf>. The data showed that 23,847 people registered 44,485 assault weapons. This appears to be a very low compliance rate. Law enforcement officials estimate that there may be as many as one million assault weapons in New York State. Indeed, Connecticut, with one-fifth the population of New York, has registered 50,000 assault weapons in the same time period; this registration rate is also said to be low. See *Only 44,000 Assault Weapons Registered to Comply with NY Safe Act*, SYRACUSE.COM (June 23, 2015, 12:42 PM), [http://www.syracuse.com/state/index.ssf/2015/06/only\\_23000\\_people\\_registered\\_assault\\_weapons\\_to\\_comply\\_with\\_ny\\_safe\\_act.html](http://www.syracuse.com/state/index.ssf/2015/06/only_23000_people_registered_assault_weapons_to_comply_with_ny_safe_act.html).

<sup>178</sup> See sources cited *supra* note 145; see also *All But Two Upstate Counties Have Passed Resolutions Opposing the SAFE Act*, SCOPE NY, [http://scopeny.org/Counties\\_oppose\\_NYSAFE.html](http://scopeny.org/Counties_oppose_NYSAFE.html) (last visited Oct. 4, 2015).

<sup>179</sup> See, e.g., ROTH & KOPER, *supra* note 6, at 5. As New Orleans Mayor, Mitchell Landrieu, put it: “[w]e spent a . . . whole bunch of political capital yelling and screaming about assault weapons, . . . [a] zero sum political fight about a symbolic weapon.” Beckett, *supra* note 13.

## APPENDIX

*Use of Assault Weapons in Mass Shootings*

Deciding how to define mass shooting events is a daunting challenge. To begin, are we interested in all mass *killings* or just mass killings by means of firearms? The 9/11 World Trade Center murders and the Boston Marathon murders, for example, did not involve firearms. Since this Article focuses on whether it makes sense to ban so-called assault weapons, we ought to focus only on firearms incidents. But other studies, which have a different purpose, might sensibly cast a wider net.

Given that we are interested in mass murder by firearms, what counts as “mass”? Any line will be arbitrary. We could say, for example, that we are only interested in incidents where more than five or more than ten people are killed. That sounds more like mass murder than an incident in which “just” two or three people are killed. But in counting the number of victims, should we count non-fatalities as well as fatalities? Does an incident where a person shoots ten bullets into a crowd, killing one and wounding three count as a mass murder? Does the shooter get counted in the number of fatalities? Do casualties attributable to law enforcement responders count?<sup>180</sup>

Does the shooter’s motivation matter? Are we only interested in random shootings, or should we also count incidents where the shooter targeted particular victims, such as relatives, fellow employees, business associates, or neighbors? Suppose one or more victims were specifically targeted, but others were randomly chosen? Does a robbery where two or three victims are killed qualify for the list?

No matter what definition is chosen, it is difficult to obtain reliable information. We almost certainly know from media accounts about every “really big” incident (e.g., more than ten fatalities). Even there, though, we might not find out about incidents where ten people *might have been killed* had it not been for an intervention that stymied the shooter. As the number of fatalities required for the list gets smaller, we

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<sup>180</sup> For a sophisticated effort to create a database of “public mass murders,” see JEROME P. BJELOPERA ET AL., CONG. RESEARCH SERV., PUBLIC MASS SHOOTINGS IN THE UNITED STATES: SELECTED IMPLICATIONS FOR FEDERAL PUBLIC HEALTH AND SAFETY POLICY (2013), [http://journalistsresource.org/wp-content/uploads/2013/03/MassShootings\\_CongResServ.pdf](http://journalistsresource.org/wp-content/uploads/2013/03/MassShootings_CongResServ.pdf). The Congressional Research Service defines the phenomenon it set out to identify as shootings occurring in relatively public places involving four or more deaths in less than one day, not including the shooter; moreover, the shooter has to choose his victims indiscriminately, thereby ruling out felony murders and familicide. *Id.* at 3–6; see also *Mass Shootings in America*, STAN. U. LIBR., <https://library.stanford.edu/projects/mass-shootings-america> (last visited Oct. 4, 2013).

cannot be definitively sure that our list is comprehensive. Not every incident where two or three people are killed, much less merely wounded, will be reported by the media.

After the Sandy Hook massacre, the Connecticut General Assembly’s Office of Legislative Assembly Research (OLR) sought to compile a database of all multiple shooting fatality incidents in order to assess the prevalence of assault weapons in such events. This database shows that multiple firearm killings are mostly perpetrated with semiautomatic non-assault pistols. Assault weapons were used, either by themselves or in addition to non-assault weapons, in “only” seven of forty-nine incidents on OLR’s list.<sup>181</sup> And, of course, the definition of assault weapon varies considerably from jurisdiction to jurisdiction and agency to agency.

If assault weapons are a special problem because by accommodating large capacity magazines, they do not need to be reloaded until at least ten, and maybe as many as twenty or thirty, shots are fired, then we ought to be most, or only, interested in shooting incidents where more than ten rounds are fired. Ten or fewer shots could be fired by non-assault weapons. Unfortunately, the OLR list counts dead bodies, not expired shots.<sup>182</sup>

According to the list of multiple fatality shootings from 1999–2013 compiled by OLR, there were seven incidents where a shooter killed ten or more people: Sandy Hook; Aurora; Fort Hood; Binghamton Immigration Center; Virginia Tech; Momentum Securities; and Columbine High School.<sup>183</sup> An assault weapon was used exclusively at Sandy Hook and as one of multiple firearms at Aurora. The two Columbine shooters used several different weapons, none of which qualify as assault weapons. The shooter at the Binghamton Immigration Center used pistols and a shotgun. The rest of the incidents were perpetrated with non-assault pistols and revolvers.<sup>184</sup> These data

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<sup>181</sup> JANET L. KAMINSKI LEDUC, CONN. GEN. ASSEMBLY, WEAPONS USED IN MASS SHOOTINGS (2013), <https://www.cga.ct.gov/2013/rpt/2013-R-0057.htm>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* USA Today has posted a list and a map online of all “mass killings” in the United States reported in the news since 2006, updated in real time. It includes multiple shootings with four or more victims, not including the killer. It does not report information on the type of weapon used. See *Explore the Data on U.S. Mass Killings Since 2006*, USA TODAY (Dec. 2, 2013, 11:09 AM), <http://www.usatoday.com/story/news/nation/2013/09/16/mass-killings-data-map/2820423>. On this very comprehensive list, from January 1, 2013 until June 17, 2015, there is only one incident with ten or more fatalities. The largest number of fatalities occurred in Washington, D.C. in September 2013. *Id.* In April 2014, at Fort Hood, Texas, Ivan Lopez killed three and wounded sixteen before killing himself. He used a semiautomatic pistol. See Ray Sanchez & Ben Brumfield, *Fort Hood Shooter Was Iraq Vet Being Treated for Mental Health Issues*, CNN (Apr. 4, 2014, 7:05 PM), <http://www.cnn.com/2014/04/02/us/fort-hood-shooter-profile>.

<sup>184</sup> LEDUC, *supra* note 181.

certainly do not establish a close relationship between assault weapons and mass shooting events.

There have been several high profile mass murders since Connecticut's OLR completed its report. In May 2014, a shooter near the campus of University of California, Santa Barbara killed six (three by stabbing) and wounded fourteen with two semiautomatic non-assault pistols.<sup>185</sup> In June 2015, a shooter killed nine at a Charleston Church using a semiautomatic non-assault pistol.<sup>186</sup> In July 2015, a shooter using an assault weapon killed four marines in Chattanooga, Tennessee.<sup>187</sup> Also in July 2015, a shooter in a Lafayette, Louisiana movie theater used a semiautomatic non-assault pistol to kill two moviegoers and wound nine.<sup>188</sup> Most recently, in October 2015, a shooter carrying six firearms killed a professor and eight students at Umpqua Community College in Roseburg, Oregon. None of the shooter's firearms qualify as assault weapons.<sup>189</sup>

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<sup>185</sup> See Rosanna Xia, Kate Mather & Matt Stevens, *Guns Used in Isla Vista Rampage Were Legally Purchased, Registered*, L.A. TIMES (May 24, 2014, 7:21 PM), <http://www.latimes.com/local/lanow/la-me-ln-sla-me-ln-guns-recovered-at-shooting-20140524-story.html>.

<sup>186</sup> See Ben Brumfield, *Charleston Racist Shooter Roof Wanted an AR-15; Had Magazines, Accessory*, CNN (June 26, 2015, 11:58 AM), <http://www.cnn.com/2015/06/26/us/charleston-church-shooting-main>.

<sup>187</sup> See Catherine E. Shoichet & Gary Tuchman, *Chattanooga Shooting: 4 Marines Killed, a Dead Suspect and Questions of Motive*, CNN (July 17, 2015, 11:42 AM), <http://www.cnn.com/2015/07/16/us/tennessee-naval-reserve-shooting>.

<sup>188</sup> See Campbell Robertson, Richard Pérez-Peña & Alan Blinder, *Lafayette Shooting Adds Another Angry Face in the Gunmen's Gallery*, N.Y. TIMES (July 24, 2015), <http://www.nytimes.com/2015/07/25/us/lafayette-theater-shooting-john-houser.html>.

<sup>189</sup> See Hope Racine, *What Kind of Guns Did the Oregon Shooter Use? Chris Harper Mercer Was Found with More Than One Weapon*, BUSTLE (Oct. 2, 2015), <http://www.bustle.com/articles/114435-what-kind-of-guns-did-the-oregon-shooter-use-chris-harper-mercercer-was-found-with-more>.