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Penal

Please Leave Your Shotguns at Home: Chapter 700 Prohibits Openly Carrying Long Guns on California Streets

Roman Edwards

Code Sections Affected

Business and Professions Code §§ 7574.14, 7582.2 (amended); Penal Code §§ 16505, 26366.5, 26390, 26391, 26400, 26405 (new), §§ 626.92, 16520, 16750, 16850, 17295 (amended). AB 1527 (Portantino); 2012 STAT. Ch. 700.

I. INTRODUCTION

At first they gathered at local Starbucks cafes, men with handguns holstered on their hips.¹ They were members of California's emerging Open Carry Movement, taking advantage of the fact that nowhere in the over 950 California state laws regulating firearms² was there any prohibition against openly carrying an unloaded firearm in public.³ Alarmed members of the public called the police, who had to respond to these potentially dangerous situations.⁴ The situation gave rise to many concerns: gun-control advocates worried about gun-related violence, police officers feared for their own safety, and city administrators struggled to budget for the unnecessary expenditure of police resources.⁵ The legislature responded by passing a ban on the open carry of unloaded handguns in public.⁶

Undeterred, open-carry activists put away their banned handguns and gathered in protest at shopping malls⁷ and beaches—this time carrying shotguns and rifles.⁸ The exploitation of this legal loophole exacerbated the open carry

1. Ian Urbina, *Locked, Loaded, and Ready to Caffeinate*, N.Y. TIMES (Mar. 7, 2010), <http://www.nytimes.com/2010/03/08/us/08guns.html> (on file with the *McGeorge Law Review*).

2. *California Firearm-Related Bills Expected on Third Reading Tomorrow*, NAT'L RIFLE ASS'N INST. FOR LEG. ACTION (May 20, 2012), <http://nra.org/legislation/state-legislation/2012/5/california-firearm-related-bills-expected-on-third-reading-tomorrow.aspx?s=&st=10469&ps=> (on file with the *McGeorge Law Review*).

3. Patrick McGreevy, *Gun Control Bill in Gov. Brown's Hands*, L.A. TIMES (Sept. 17, 2011), <http://articles.latimes.com/2011/sep/17/local/la-me-guns-20110917> (on file with the *McGeorge Law Review*).

4. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 144, at 9–10 (June 7, 2011).

5. *Id.*

6. CAL. PENAL CODE § 26350 (West 2012) (enacted by 2011 Cal. Stat. ch. 725).

7. Alan Lopez, *Open-Carry Advocates Rally with Rifles, Long Guns in San Leandro*, CONTRA COSTA TIMES (Oct. 23, 2011), http://www.contracostatimes.com/news/ci_19172976 (on file with the *McGeorge Law Review*).

8. Jeff McDonald, *Open-Carry Activists Protest New Law*, SAN DIEGO UNION-TRIB. (Oct. 22, 2011), <http://www.utsandiego.com/news/2011/oct/22/open-carry-activists-protest-new-law/> (on file with the *McGeorge Law Review*).

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problem.⁹ Long guns are more intimidating and deadlier than handguns, and therefore caused greater public concern and prompted a heavier police response.¹⁰ The legislature passed Chapter 700 to close this loophole and put a stop to openly carrying any firearms in public.¹¹

II. LEGAL BACKGROUND

A. Statutory Background

Prior to 2012, California law was silent on open carry of unloaded firearms in public.¹² Existing law prohibits carrying a loaded firearm,¹³ a concealed firearm,¹⁴ or a firearm in a motor vehicle (other than to transport it in a locked container).¹⁵ There are also restrictions on who can possess a firearm¹⁶ and where it can be possessed.¹⁷

Assembly Bill (AB) 144 enacted Section 26350 of the Penal Code, which made it a misdemeanor to openly carry an unloaded handgun.¹⁸ However, California law was still silent as to the open carry of firearms other than handguns.¹⁹

B. Constitutional Background

The Second Amendment to the United States Constitution provides that “the right of the people to keep and bear arms, shall not be infringed.”²⁰ In *District of Columbia v. Heller*, the United States Supreme Court held that this protects an individual’s right to possess a firearm.²¹ However, it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever

9. Letter from Cal. Police Chiefs Assoc., to Members of the Cal. Assembly (May 2, 2012) [hereinafter Police Chiefs Assoc. Letter] (on file with the *McGeorge Law Review*).

10. Interview with Ron Cottingham, President, Peace Officers Research Assoc. of Cal., Sacramento, Cal. (May 30, 2012) [hereinafter Cottingham Interview] (notes on file with the *McGeorge Law Review*).

11. CAL. PENAL CODE § 26400 (enacted by Chapter 700).

12. Interview with Phillip Horner, Legislative Asst. to Assemblymember Anthony Portantino, Sacramento, Cal. (May 30, 2012) [hereinafter Horner Interview] (notes on file with the *McGeorge Law Review*).

13. PENAL § 25850(a) (West 2012) (formerly section 12031).

14. *Id.* § 25400 (formerly section 12025(a)).

15. *Id.* § 25505 (formerly section 12026.1(a)).

16. *See id.* § 29800 (formerly section 12021(a)) (convicted felons); *see also* CAL. WELF. & INST. CODE § 8100 (West 2010) (mental patients).

17. *See* PENAL § 171c (West 1999) (state buildings); *see also id.* § 626.9 (West 2010) (school grounds).

18. *Id.* While banning open carry of handguns, the law contained 116 exemptions for situations under which it remains lawful to do so. *Id.*

19. Horner Interview, *supra* note 12.

20. U.S. CONST. amend. II.

21. 554 U.S. 570, 595 (2008).

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purpose.”²² In *Heller*, the Court overturned a restrictive District of Columbia law that amounted to an outright ban on handgun ownership, yet recognized that longstanding laws banning guns in schools or government buildings, or restricting the possession of firearms by felons or mentally ill persons did not violate the Second Amendment.²³ In light of this ruling, the California Fourth District Court of Appeal upheld California’s prohibition against carrying a loaded firearm in public because it is “narrowly tailored to reduce . . . unlawful *public* shootings,” and “does not burden . . . ‘the right of law-abiding . . . citizens to use arms in defense of hearth and home’”²⁴ In 2010, the United States Supreme Court overturned a law banning handguns in the Chicago suburb of Oak Park, ruling that the Fourteenth Amendment incorporates the Second Amendment and makes it applicable to the states.²⁵

III. CHAPTER 700

Chapter 700 enacts Section 26400 of the Penal Code, which makes it a misdemeanor for a person to carry “an unloaded firearm that is not a handgun in an incorporated city or city and county”²⁶ This includes shotguns, rifles, and any other firearms “not capable of being concealed upon the person.”²⁷ The new law provides for thirty-three exemptions or exceptions to the ban for a variety of persons and situations, including exemptions for police officers, retired police officers, security guards, hunters, target shooters, and exceptions for parades, gun shows, movie sets, and persons in “grave danger.”²⁸

IV. ANALYSIS

Chapter 700 closes a loophole that was left by AB 144, but also eliminates a previously existing, nonsensical distinction which allowed a person to lawfully carry an unloaded firearm and ammunition but prohibited carrying the same firearm if said ammunition has been inserted.²⁹ However, in doing so, it adds to the growing field of California gun-control legislation which risks restricting firearms to an unconstitutional degree.³⁰ Furthermore, foreclosing the ability of

22. *Id.* at 626.

23. *Id.* at 626–27.

24. *People v. Flores*, 169 Cal. App. 4th 568, 576–77, 86 Cal. Rptr. 3d 804, 808–09 (4th Dist. 2008) (quoting *Heller*, 554 U.S. at 652).

25. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

26. CAL. PENAL CODE § 26400 (enacted by Chapter 700).

27. *See id.* § 16640(a) (West 2012) (defining “handgun”).

28. *See id.* § 26405 (enacted by Chapter 700) (detailing each exemption to newly enacted section 26400).

29. *See infra* Part IV.A (discussing why, in some situations, there is no practical distinction between a loaded and unloaded firearm as defined by the law).

30. *See infra* Part IV.B (discussing how Chapter 700 further narrows the already limited scope of lawful

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Californians to carry unconcealed firearms for protection may ultimately lead to an increase in the issuance of more concealed carry permits which is perhaps a greater public safety risk than the one eliminated by this legislation.³¹ Nonetheless, the legislature has carefully crafted Chapter 700's numerous exceptions to address public safety concerns, while allowing for the legal carrying of firearms where legitimately needed.³²

A. *The Public Safety Perspective: Loaded Versus Unloaded Firearms, a Meaningless Distinction*

Prior to Chapter 700, California law distinguished between a loaded firearm and an unloaded firearm.³³ During events such as the rallies described above and other similar incidents involving the public open carrying of firearms, law enforcement personnel are summoned to the scene, often with very few details other than that armed persons are present in public.³⁴ The police must assume that they are dealing with a situation involving a loaded weapon, which creates a highly charged predicament that is dangerous to both the responding officer and the armed individual.³⁵ An unexpected movement by the gun carrier may be perceived as a threat to the officer resulting in the use of deadly force.³⁶ Similarly, the presence of these weapons in public places may invite vigilante action by well-intentioned citizens who misconstrue the situation.³⁷

Former Section 12031 of the Penal Code, chaptered in 1968, prohibited carrying a loaded firearm in public.³⁸ Because there is no way for a police officer or member of the public to tell whether a firearm is loaded by looking at it, there is no meaningful difference between a loaded and unloaded weapon for the purposes of determining its potential danger.³⁹ Furthermore, even in terms of its offensive threat, the distinction between loaded and unloaded is virtually indistinguishable.⁴⁰ The California Fourth District Court of Appeal held that “a

firearm use in California).

31. *See infra* Part IV.C (discussing how Chapter 700 may lead courts to order county officials to issue concealed carry permits more freely).

32. *See infra* Part IV.D (discussing how the thirty-three exceptions in Chapter 700 allow for many legitimate common uses for long guns to be carried).

33. CAL. PENAL CODE § 25850(a) (West 2012) (formerly section 12031).

34. Police Chiefs Assoc. Letter, *supra* note 9.

35. *Id.*

36. *Id.*

37. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1527, at 6 (Mar. 27, 2011).

38. PENAL § 25850(a) (formerly section 12031).

39. Cottingham Interview, *supra* note 10.

40. *See* badace, *load_in_2_sec*, YOUTUBE (Jan. 5, 2010), http://www.youtube.com/watch?v=_B8WEPRaNX8 (on file with the *McGeorge Law Review*) (showing individual inserting a magazine into an unloaded handgun and chambering a round in approximately two seconds); *see also* milleruf, *Challenge—Emergency Shotgun Reloads*, YOUTUBE (Mar. 13, 2010), <http://www.youtube.com/watch?v=Vi8pL6Geak&feature=>

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firearm is ‘loaded’ when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not ‘loaded’ if the shell or cartridge is stored elsewhere and not yet placed in a firing position.”⁴¹ Therefore, a firearm that is “legally” unloaded is made operable in seconds with an attached, holstered, or pocketed cartridge or magazine; this obfuscates the purpose of a legal distinction between a loaded and unloaded firearm.⁴²

B. Books, Buddha, and Bullets: Is Chapter 700 an Illegal Restriction of a Fundamental Constitutional Right?

While individuals who were part of California’s Open Carry Movement cited personal protection as their reason for carrying a firearm, the message of their public rallies was that bearing arms is a constitutional right to be exercised for its own sake, much the way free-speech rally participants gather to flex their First Amendment muscle.⁴³ The Court in *Heller* did clarify the existence of the individual’s right to bear arms, but the majority opinion also recognized that it was not an absolute right.⁴⁴ Just as the First Amendment would “not protect a man in falsely shouting fire in a theatre and causing a panic,”⁴⁵ the *Heller* Court explicitly stated that its ruling should “not cast doubt on” certain prohibitions on the carrying of certain types of weapons, in certain places, and by certain people.⁴⁶ *Heller* makes clear that a blanket restriction on firearm ownership is clearly unconstitutional and certain limited restrictions are clearly constitutional;⁴⁷ however, there does remain a large gray area in the middle.

California courts have interpreted this to mean that if these reasonable prohibitions are justified by public safety, then legislation “narrowly tailored” for this purpose passes constitutional muster.⁴⁸ However, the accumulation of “narrowly tailored” restrictions could eventually result in the functional equivalent of an outright ban on firearms, a proverbial death of the Second Amendment by a thousand cuts.⁴⁹ Chapter 700’s myriad exceptions likely preclude a cogent constitutional challenge to the law; however, in drafting future gun control legislation, the California Legislature should consider the overall impact on Second Amendment rights.

fvwrel (on file with the *McGeorge Law Review*) (showing loading of a shotgun from rounds attached to the stock in under a second).

41. *People v. Clark*, 45 Cal. App. 4th 1147, 1153, 53 Cal. Rptr. 2d 99, 102 (4th Dist. 1996).

42. Cottingham Interview, *supra* note 10.

43. Lopez, *supra* note 7.

44. *Dist. of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

45. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

46. *Heller*, 554 U.S. at 626–27.

47. *Id.*

48. *People v. Flores*, 169 Cal App. 4th 568, 576–77, 86 Cal. Rptr. 3d 804, 808–09 (4th Dist. 2008).

49. *See Heller*, 554 U.S. 570 (holding that an outright ban on firearms is unconstitutional; it follows that a series of laws having the same effect in their totality might also be unconstitutional).

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C. *Unintended Consequences: Will Chapter 700 Result in More Concealed Firearms?*

Considering the significant opposition generated by last year's AB 144, the dissent to Chapter 700 has, by comparison, not been nearly as vociferous.⁵⁰ One offered explanation is that the issue is not as "sexy."⁵¹ A holstered handgun is, for some, a fashion accessory that carries an air of mystique.⁵² Carrying a long gun, on the other hand, besides being cumbersome, lacks the same cache.⁵³

A more intriguing explanation, however, may be the case law implications of the legislation, which may ultimately benefit gun-rights advocates.⁵⁴ In 2010, plaintiffs filed a lawsuit against the County of San Diego for what they viewed as Sheriff William Gore's overly restrictive issuance of concealed-carry permits.⁵⁵ The district court judge denied the plaintiffs' motion, in part because "nothing [under California law] restricts the open carry of unloaded firearms and ammunition ready for instant loading."⁵⁶ The passage of Chapter 700 has foreclosed this option and may give rise to an appeal of this ruling.⁵⁷ While undetected concealed firearms do not cause a public disturbance, they pose a greater threat to the police than visible holstered weapons.⁵⁸

D. *Thirty-Three Exemptions: Flexible Lawmaking or Unnecessary Legislation?*

One major criticism of Chapter 700 is the number of exemptions included in Chapter 700.⁵⁹ The National Rifle Association points out that the open carrying of long guns is an integral part of many outdoor recreational activities enjoyed by Californians, and that the need for so many exemptions only highlights this fact.⁶⁰ The California Rifle and Pistol Association is concerned that so many exemptions make enforcement of the law cumbersome.⁶¹ For example, one

50. Horner Interview, *supra* note 12.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1109 (S.D. Cal. 2010).

56. *Id.* at 1114.

57. *See generally id.* (discussing the modification of the law allowing the open carry of unloaded firearms).

58. *See ANTHONY PINIZZOTTO ET AL., VIOLENT ENCOUNTERS: A STUDY OF FELONIOUS ASSAULTS ON OUR NATION'S LAW ENFORCEMENT OFFICERS* 45 (2006) (showing that all of the firearms used in assaults on officers were carried concealed).

59. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1527, at 6 (Mar. 27, 2012).

60. Letter from Nat'l Rifle Assoc. of America Inst. for Legislative Action, to Cal. Assembly [hereinafter Letter from NRA] (on file with the *McGeorge Law Review*).

61. Letter from Cal. Rifle & Pistol Assoc., Inc., to Cal. Assembly [hereinafter Letter from CRPA] (on file with the *McGeorge Law Review*).

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exemption is for “licensed hunter[s] while engaged in hunting or while transporting that firearm when going to or returning from that hunting expedition.”⁶² However, no definition of a hunting expedition exists either in the bill or elsewhere in the Penal Code.⁶³ According to staff involved in drafting the legislation, the list of exemptions came about as a result of input from concerned constituents.⁶⁴ Their existence is, in fact, recognition of the importance of firearms in a number of lawful activities.⁶⁵

Voluminous rules do not necessarily negate their usefulness; the California Vehicle Code contains hundreds of rules governing the operation of motor vehicles, another dangerous (albeit invaluable) tool used by many Californians.⁶⁶ Last year’s handgun open-carry ban contained 116 exceptions.⁶⁷ Chapter 700 is not a blanket ban of firearms, but is limited to public areas in incorporated cities, cities, and counties.⁶⁸ It effectively addresses the issue of public alarm caused by the inappropriate presence of long guns in non-rural areas while protecting the rights of law-abiding gun owners.⁶⁹

V. CONCLUSION

The legislature passed Chapter 700 to address a very specific public safety need that arose when individuals decided to exploit a legal loophole in a disruptive manner, resulting in police action.⁷⁰ The open carry of long guns has been a lawful act in California since the State’s inception, but the actions of a few individuals highlighted a need to prohibit it.⁷¹ While gun control laws generate

62. CAL. PENAL CODE § 26405(j) (enacted by Chapter 700).

63. Letter from CRPA, *supra* note 61.

64. Horner Interview, *supra* note 12.

65. *Id.*

66. See generally CAL. VEH. CODE (West 2000), which spans five volumes and contains over 40,000 code sections. Despite this seemingly burdensome regulation, California has over twenty-six million licensed drivers operating over thirty-million registered vehicles. CAL. DEP’T OF MOTOR VEHICLES, STATISTICS FOR PUBLICATION (Apr. 2012), available at dmv.ca.gov/about/profile/official.pdf (on file with the *McGeorge Law Review*). However, it is still a safer place to drive than much of the nation. *California Traffic Safety Report Card*, CAL. OFF. OF TRAFFIC SAFETY (Feb. 16, 2012), http://www.ots.ca.gov/OTS_and_Traffic_Safety/Report_Card.asp (on file with the *McGeorge Law Review*) (showing that the number of motor vehicle fatalities in California is at its lowest since statistics were first kept in 1975, and the rate of fatalities per mile driven is well below the national average).

67. PENAL § 26350 (West 2012). For a more detailed examination of last year’s handgun open carry bill and its numerous exceptions, see Hunter Starr, *Pandora’s Lock-Box: Is the Legislature Locking Handguns in a Box, or Unleashing Concealed Weapons?*, 43 MCGEORGE L. REV. 779 & 787 n.89 (2012).

68. Horner Interview, *supra* note 12.

69. *Id.*

70. *E.g.*, *Open-Carry Supporters Rally with Long Guns in PB*, 10 NEWS.COM (Oct. 23, 2011), <http://www.10news.com/news/29561571/detail.html> (on file with the *McGeorge Law Review*); *Open Carry Advocates Protest at Concord Mall*, KCBS (Dec. 15, 2011), <http://sanfrancisco.cbslocal.com/2011/12/15/open-carry-advocates-protest-at-concord-mall/> (on file with the *McGeorge Law Review*).

71. *E.g.*, Ronald Dam, *Open Carry Meets for Pizza Amid Protests*, MANHATTAN BEACH PATCH (Jan. 21,

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controversy because some see them as an erosion of their constitutional rights,⁷² California lawmakers have conservatively passed gun laws specifically in response to public safety concerns.⁷³

Although opponents (ironically) have criticized the myriad of exceptions contained in Chapter 700 (and its handgun-related predecessor), it is the existence of these exceptions that narrowly focuses the bill's impact.⁷⁴ These exceptions tailor the bill to address the open carry of firearms in public areas, while preserving the right for legitimate and sanctioned situations and uses.⁷⁵ By providing for the limited carrying of firearms by hunters, target shooters, security and law enforcement personnel, homeowners (on their own property), those who qualify to obtain concealed carry permits, and others, Chapter 700 strikes a fair balance between public safety and order and the rights of individual gun owners.⁷⁶

2011), <http://manhattanbeach.patch.com/articles/open-carry-meets-for-pizza-amid-protests#video-4551008> (on file with the *McGeorge Law Review*); Douglas Morino, 'Open-Carry' Activist Packs Heat to Make a Point in Redondo Beach, DAILY BREEZE (May 22, 2012), http://www.dailybreeze.com/news/ci_20676105/open-carry-activist-packs-heat-make-point-redondo (on file with the *McGeorge Law Review*).

72. See Letter from NRA, *supra* note 60 (pointing out that gun restriction is a violation of Second Amendment rights)

73. See CAL. PENAL CODE § 25850(a) (West 2012) (formerly section 12031) (enacted in response to protestors brandishing loaded guns at the State Assembly; *id.* § 26350 (enacted in response to public gatherings of individuals carrying exposed handguns); *id.* § 26400 (enacted by Chapter 700) (enacted in response to public gatherings of protestors carrying long guns).

74. *Id.*

75. Horner Interview, *supra* note 12.

76. See PENAL § 26400 (enacted by Chapter 700) (establishing a wide variety of exceptions for traditionally legitimate uses).