

## KNIVES AND THE SECOND AMENDMENT

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*This Article is the first scholarly analysis of knives and the Second Amendment. Under the Supreme Court's standard in District of Columbia v. Heller, knives are Second Amendment "arms" because they are "typically possessed by law-abiding citizens for lawful purposes," including self-defense.*

*There is no knife that is more dangerous than a modern handgun; to the contrary, knives are much less dangerous. Therefore, restrictions on carrying handguns set the upper limit for restrictions on carrying knives.*

*Prohibitions on carrying knives in general, or of particular knives, are unconstitutional. For example, bans of knives that open in a convenient way (e.g., switchblades, gravity knives, and butterfly knives) are unconstitutional. Likewise unconstitutional are bans on folding knives that, after being opened, have a safety lock to prevent inadvertent closure.*

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## INTRODUCTION

Although Second Amendment cases and scholarship have focused on guns, the Second Amendment does not protect the right to keep and bear firearms. The Amendment protects “arms,” of which firearms are only one category. Only about half of U.S. households possess a firearm, and many of those households have only one or two firearms.<sup>4</sup> In contrast, almost every household possesses several knives, not including table knives. This Article analyzes Second Amendment protection for the most common “arm” in the United States—the knife.

Part I explains the differences among various types of edged weapons. It covers bayonets, swords, folding knives, automatic knives, switchblades, gravity knives, butterfly knives, and the targets of knife control in the nineteenth century, namely Bowie knives and Arkansas Toothpicks. After a review of the knives, Part II provides criminological data in support of the intuitively obvious proposition that knives are less dangerous than guns. Part III then analyzes the important nineteenth century jurisprudence involving Bowie knives and Arkansas Toothpicks. Part IV concludes the background review for why knives, as weapons, are constitutionally protected arms and argues that the Second Amendment protects knives generally, thus including all of the knives discussed in the earlier parts (with the possible exception of the now-obscure Arkansas Toothpick).

Part V considers the various standards of review that have been used for Second Amendment cases after the Supreme Court’s standard-setting decision in *District of Columbia v. Heller*. Applying even the weakest relevant standard of review, intermediate scrutiny, it seems clear that some knife laws are unconstitutional, namely: bans on knives that open in a convenient manner, such as switchblades, gravity knives, and butterfly knives; bans on folding knives that have a safety lock; and laws that restrict carrying knives more stringently than carrying handguns. Part VI of this Article bolsters the argument that knives are constitutionally protected arms and describes some of the more oppressive, and likely unconstitutional, knife control laws in various states and cities.

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4. *Variable Owngun: Have Gun in Home*, GENERAL SOCIAL SURVEY, <http://www3.norc.org/GSS+Website/Browse+GSS+Variables/Subject+Index/> (follow “G” hyperlink; then follow “Guns” hyperlink; then follow “Ownership” hyperlink; then follow “HAVE GUN IN HOME” hyperlink) (last visited Aug. 20, 2013) (when asked if they had a gun in their home, 44.3 percent of those polled said yes, 54.9 percent no, and 0.8 percent refused to answer); GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 54 (1991).

## I. KNIVES BY TYPE

In the movie *Crocodile Dundee* (1986), when the hero is threatened by a New York City criminal with a switchblade, he says, “That’s not a knife” and then pulls out a much larger blade and says, “*That’s* a knife!”<sup>5</sup> Defining the different types of knives is a necessary first step because so much of the history of laws regulating knives is built around distinguishing which types of knives were regulated. Even so, the definition of many knife terms, as used in legislation and common parlance, is very unclear.

For modern general usage of the word knife, Wiktionary.com is a good guide. The website offers three definitions:

1. A utensil or a tool designed for cutting, consisting of a flat piece of hard material, usually steel or other metal (the blade), usually sharpened on one edge, attached to a handle. The blade may be pointed for piercing.
2. A weapon designed with the aforementioned specifications intended for slashing and/or stabbing and too short to be called a sword. A dagger.<sup>6</sup>
3. Any blade-like part in a tool or a machine designed for cutting, such as the knives for a chipper.<sup>7</sup>

This Article will ignore the third definition, which relates to the knives or blades in machines, such as wood-chippers. For the first definition (tools and utensils) and the second definition (short weapons), the physical description is the same; only the purpose of the knife is different. This Article focuses on “knife” as used in both the first and second definitions. In practice, most knives are suitable as tools and as weapons, but, of course, the reason that the Second Amendment is relevant to knives is their use as a weapon, which the first two definitions, and not the third, cover.

This Part presents an overview of knife use, the different types of knives, and how they are distinguished for legal and functional purposes. In addition, it details how many of the legal distinctions

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5. Actually, the knife in the movie was a prop, and there was no real knife like it. In response to consumer demand, one company has started making a real knife that is a near-replica of the movie knife. See Fletcher Knives, *Crocodile Dundee Knife Finally in Production!!!!*, BLADEFORUMS.COM (May 1, 2010, 9:10 AM), <http://www.bladeforums.com/forums/showthread.php/737272-Crocodile-Dundee-knife-finally-in-production!!!!>. Of course, in New York City, carrying either of those knives is illegal. See N.Y.C., N.Y., ADMIN. CODE § 10-133 (2010).

6. In the interest of precision, it should be noted that a “dagger” is a type of knife; all daggers are knives, but most knives are not daggers.

7. *Knife*, WIKTIONARY, <http://en.wiktionary.org/wiki/knife> (last updated July 11, 2013, 10:19 PM).

between different types of knives are based on perception, rather than objective definitions related to public safety or the nature of the right to keep and bear arms.

### A. Knives as Tools

By far the most frequent use of a knife is as a tool. As the Oregon Supreme Court observed in 1984 while summarizing the history of knives in America, “[i]t is clear, then, that knives have played an important role in American life, both as tools and as weapons. The folding pocketknife, in particular, since the early 18th century has been commonly carried by men in America and used primarily for work, but also for fighting.”<sup>8</sup>

The twentieth century, the penknife was an essential accessory for every student or literate adult.<sup>9</sup> As the name suggests, the penknife was used for cutting and slitting a quill or sharpening a pencil.<sup>10</sup> Even after the steel pen rendered the quill obsolete, the term persisted for any small, folding pocketknife.<sup>11</sup> Schoolchildren frequently carried penknives, as is attested by the knife’s frequent appearance in elementary school readers of the nineteenth century.<sup>12</sup> Of course, the penknife was also often used for the many other common purposes of knives.

Knives are important tools in many activities, such as hunting, where they are used by sportsman to fillet a fish or skin an animal. Many occupations continue to rely upon utility knives, such as

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8. State v. Delgado, 692 P.2d 610, 614 (Or. 1984).

9. See SIMON MOORE, PENKNIVES AND OTHER FOLDING KNIVES 25–27 (1988); see also JOHN MASON, MASON’S FIRST HOME & SCHOOL READER 75–76 (1874); CHARLES W. SANDERS, THE SCHOOL READER: THIRD BOOK 58 (50th ed. 1846).

10. See MOORE, *supra* note 9, at 25.

11. *Id.* at 27.

12. See, e.g., RICHARD EDWARDS & J. RUSSELL WEBB, ANALYTICAL THIRD READER 161 (1867); MASON, *supra* note 9, at 75–76; LEWIS B. MONROE, THE FOURTH READER 39–40 (1872); SANDERS, *supra* note 9, at 58. As an anecdotal example of this, one of the authors has carried a pocketknife every day of his life since third grade in 1955. He has never given a moment’s thought to the legality of this common practice.

roofers,<sup>13</sup> electricians,<sup>14</sup> and construction workers.<sup>15</sup> Knives are often part of combination tools that many Americans carry with them, such as Swiss Army knives and Leatherman Multi-Tools. However, knives with even the most utilitarian purposes, such as box cutters (with a one inch blade), can be used as weapons, as the hijackers demonstrated on 9/11.<sup>16</sup>

### *B. Bayonets*

A bayonet is designed to be mounted on the muzzle of a firearm.<sup>17</sup> Historically, some bayonets were just thrusting weapons with a point and without a sharpened edge.<sup>18</sup> Over the last century, bayonets have become shorter, shrinking from the size of a short sword to the size of a typical knife,<sup>19</sup> and modern bayonets have sharpened edges. Post-World War II designs evolved to recognize the more frequent use of the bayonet as a tool—for example, for opening ration cases or for use as a handheld weapon.<sup>20</sup> As a result, the

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13. See, e.g., BLACK & DECKER, *THE COMPLETE GUIDE TO ROOFING & SIDING* 58 (Brett Martin et al. eds., 2004). See *United States v. Irizarry*, 509 F. Supp. 2d 198 (E.D.N.Y. 2007), for details of a prosecution of a person that started when a police officer noticed that the defendant was carrying a “Husky Sure-Grip Folding Knife,” which the defendant used at the direction of his employer “for cutting sheet rock.” *Id.* at 199–203.

14. See, e.g., GREG FLETCHER, *RESIDENTIAL CONSTRUCTION ACADEMY: HOUSE WIRING* 67 (2004) (describing use of a knife by electricians for opening boxes, stripping insulation, and as a substitute screwdriver for small screws).

15. See, e.g., MYRON R. FERGUSON, *DRYWALL: PROFESSIONAL TECHNIQUES FOR GREAT RESULTS* 51 (Matthew Teague & Jessica DiDonato eds., 4th ed. 2012).

16. *Box Cutters Found on Other September 11 Flights*, CNN.COM (Sept. 24, 2001), <http://archives.cnn.com/2001/US/09/23/inv.investigation.terrorism/>.

17. Note that a rifle with a bayonet on it and without ammunition is functionally equivalent to a Roman spear or javelin. Both are arms.

18. See J.H. Bill, *Sabre and Bayonet Wounds; Arrow Wounds*, in 2 *THE INTERNATIONAL ENCYCLOPEDIA OF SURGERY* 101, 101 (John Ashhurst, Jr., ed., 1882) (discussing the nature of bayonet wounds and explaining that the edges of such wounds reflect the unsharpened nature of the edges).

19. See STEPHEN BULL, *ENCYCLOPEDIA OF MILITARY TECHNOLOGY AND INNOVATION* 36 (2004). Older bayonets, such as the World War I version designed for the Springfield 1903-A3 rifle, were thinner, lighter, seventeen-inch versions of the Roman gladius sword and could be used as a short sword. Military fashion in bayonets continued to evolve so that hundreds of thousands of these bayonets were cut down to eight inches in length for use during World War II on the M1 Garand rifle. See MARTIN J. BRAYLEY, *BAYONETS: AN ILLUSTRATED HISTORY* 228-35, 249 (2004); ANTHONY CARTER, *THE BAYONET: A HISTORY OF KNIFE AND SWORD BAYONETS 1850–1970*, at 115, 121 (1974).

20. See, e.g., JOHN BURGESS, *THE WAR COMES TO ME: AN AUTOBIOGRAPHIC HISTORY OF WORLD WAR II* 45 (2007) (use of bayonet to open C-rations); HONDON B. HARGROVE, *BUFFALO SOLDIERS IN ITALY: BLACK AMERICANS IN WORLD WAR II* 136 (1985) (concerning use of bayonets and knives as handheld weapons in combat).

blade design became shorter, wider, and thicker, playing multifaceted roles for the late-twentieth-century soldier.<sup>21</sup>

Although anything with a blade can be used as an offensive or defensive arm, World War II saw the introduction of the M4 bayonet, which was specifically designed to be useful as a handheld weapon.<sup>22</sup> In the post-Cold War era, bayonets were designed to serve not only as fighting knives but also as wire cutters, box cutters, or improvised pry bars.<sup>23</sup>



U.S. M9 BAYONET<sup>24</sup>

### C. Swords

A sword is “[a] long-bladed weapon having a handle and sometimes a hilt and designed to stab, cut or slash.”<sup>25</sup> There is no precise distinction between a short sword and a long knife (such as a long bayonet). Indeed, the long, sharpened-edged bayonets of the late nineteenth and early twentieth centuries were called “sword bayonets.”<sup>26</sup> An 1881 dictionary observed a change in social customs: a sword is “a blade of steel, having one or two edges, set in a hilt, and used with a motion of the whole arm. . . . In the [eighteenth] century every gentleman wore a sword; now the use of the weapon is almost confined to purposes of war.”<sup>27</sup>

A person can look at a pocketknife, then look at a medieval broad sword with a forty-eight-inch blade, and readily identify which is the “knife” and which is the “sword.” However, for intermediate blade length, the distinction is not so clear. What about a

21. See BULL, *supra* note 19, at 36 (discussing changing nature of the bayonet post-World War II).

22. See BRAYLEY, *supra* note 19, at 232; CARTER, *supra* note 19, at 121.

23. See BRAYLEY, *supra* note 19, at 249; BULL, *supra* note 19, at 36; FRED J. PUSHIES, WEAPONS OF DELTA FORCE 64 (2002).

24. From author Cramer’s personal collection.

25. *Sword*, WIKTIONARY, <http://en.wiktionary.org/wiki/sword> (last updated July 11, 2013, 12:22 PM).

26. See B.E. Sargeaunt, *The History of the Bayonet*, 44 J. MILITARY SERVICE INST. U.S. 251, 255–56 (1909).

27. THOMAS WILHELM, A MILITARY DICTIONARY AND GAZETTEER 565 (rev. ed. 1881).

fixed blade knife with a fourteen-inch blade or an eighteen-inch machete?

As a Second Amendment issue, the knife/sword distinction is not particularly important. If the Second Amendment protects one, it protects the other.<sup>28</sup> This Article concentrates on knives, but most of the analysis applies equally to swords.

#### *D. Folding Knives*

Many state and local regulations distinguish between fixed blade knives and folding knives,<sup>29</sup> possibly because of the misguided assumption that a fixed blade knife is a weapon whereas a folding knife is just a tool. Of course, many utility knives, such as those used for linoleum installation and wood veneering, are fixed blade, as are many sportsmen's knives and virtually all kitchen cutlery.<sup>30</sup>

Some folding knife laws make further distinction between knives that lock open and those that do not; some statutes put folding knives that lock in the same category as fixed blade knives.<sup>31</sup> Legislators may think that a locking, folding knife can be used as a weapon, whereas a folding knife that does not lock is a tool. The reason for this view is simplistic: a locking knife will not close on your hand when it meets resistance in a fight. While this is true, a locking knife also will not close on your hand when it meets resistance when used as a tool. The lock prevents the blade from closing on your fingers; this is equally important when roofing a house and when fighting for your life. The distinction between folding knives that lock and those that do not is therefore not a sound basis upon which to make distinctions of what is a weapon and what is a tool.

Furthermore, most folding knives possess the very useful feature that they can be opened with one hand, which is particularly advantageous when the other hand is otherwise occupied. The traditional

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28. Just as handguns and long guns are both Second Amendment arms.

29. *E.g.*, KAN. STAT. ANN. § 21-6301(2) (2012) (prohibiting concealed carry of "a dagger . . . dangerous knife, straight-edged razor, [or] stiletto," but exempting "an ordinary pocket knife with no blade more than four inches in length").

30. *See, e.g.*, MIKE BURTON, VENEERING: A FOUNDATION COURSE 28 (rev. ed. 2006).

31. *Compare* CAL. PENAL CODE § 171b (West 2013) (locking folding knives and fixed blade knives where blade exceeds four inches prohibited in government buildings), *and id.* § 626.10(a) (fixed blade knives where the blade exceeds two and one half inches and locking folding knives, regardless of blade length, prohibited on primary and secondary school grounds), *with id.* § 626.10(b) (locking folding knives allowed on college campuses regardless of length, while fixed blade knives longer than two and one half inches prohibited on college campuses).

tall ships motto, “[o]ne hand for yourself and one for the ship,”<sup>32</sup> presents an obvious application for such a knife. Similarly, a rancher holding an animal’s lead with one hand can use the other to open a knife and free the beast from an entanglement. This feature shows that folding knives, whether locking or not, can as easily be viewed as tools as they can be viewed as weapons.

In addition to distinctions between folding and fixed blade knives, precisely how the knife opens makes a great deal of difference in many state laws. For example, if the blade is opened by inserting a thumb into a small indentation, hole, or post near the top of the blade and pushing, then it is legally unrestricted in almost all jurisdictions.<sup>33</sup> If, after the thumb has begun pushing on the indentation to open the blade, a spring helps finish the job, then the knife is called an “assisted opening” (AO) knife.<sup>34</sup> Popular models of AO knives include the Kershaw Leek, Benchmade Torrent, and Buck Rush.<sup>35</sup> These knives are legally unrestricted under federal law and most state laws.

Suppose instead that the knife has a button in the handle, and when the button is pushed, a spring then pushes the blade open automatically. Then, the knife is called a “switchblade,” which is one type of “automatic knife.”<sup>36</sup> Under federal law and a minority of state laws, automatic knives face far greater restrictions.<sup>37</sup>

### *E. Automatic and Gravity Knives*

An automatic knife is biased towards opening via a spring; some type of latch or lock must keep the blade retained in the handle until needed. For example, when the switchblade knife is folded, the internal spring is always pressuring the blade towards opening. The blade is restrained by a latch or lock. When the user presses a button, the latch or lock is released. The blade automatically springs open and typically locks in the open position.

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32. THE OXFORD DICTIONARY OF PROVERBS 146 (Jennifer Speake & John Simpson eds., 5th ed. 2008).

33. See *infra* notes 40–41, 50–52 and accompanying text.

34. See Actuating Opening System for Folding Knife, U.S. Patent No. 8,359,753 (filed Jan. 30, 2008).

35. See, e.g., *Kershaw Assisted Openers & SpeedSafe Knives*, KERSHAW KNIVES DIRECT, <http://www.kershawknivesdirect.com> (follow “Assisted Openers” hyperlink under “Categories”) (last visited Aug. 20, 2013).

36. See *Commonwealth v. Lawson*, 977 A.2d 583, 583 n.2 (Pa. Super. Ct. 2009) (explaining that automatic knives are forms of switchblades).

37. See, e.g., 15 U.S.C. § 1241(b) (2006); 18 PA. CONS. STAT. ANN. § 908 (West 2013); HAW. REV. STAT. § 134–52 (2011).



A second automatic knife is the “out the front” knife (OTF). An OTF is not a folding knife.<sup>38</sup> When the button is pushed, the blade is pushed out the front of the handle by the spring. A third automatic knife is the gravity, or inertia, knife. This knife has no spring; the weighting of the blade and the absence of a bias towards closure are such that, as soon as a lock is released, gravity (if the tip of the knife blade is facing down) or a modest amount of centrifugal force will cause the blade to move into the open position.<sup>39</sup> Then, the blade must be manually locked into the open position or else it will slide back into the handle as soon as any force is applied (e.g., during cutting or thrusting).

Thus, there are three types of knives that are particularly easy to open with one hand: switchblade, out the front, and gravity. Of these, the first two are properly called “automatic knives.” However, poorly written statutes create confusion about the definitions. The 1958 Federal Switchblade Act (FSA) limits the importability and interstate commerce of “switchblades.”<sup>40</sup> Many state and local laws copy the federal definition.<sup>41</sup> Unfortunately, the federal definition of “switchblade” includes out the front knives, gravity knives, and real switchblades.<sup>42</sup>

Automatic knives were first produced in the 1700s,<sup>43</sup> with the earliest custom made for wealthy customers.<sup>44</sup> By the mid-nineteenth century, factory production of automatic knives made them affordable for ordinary consumers.<sup>45</sup> During World War II, American paratroopers were issued switchblade knives “in case they [became] injured during a jump and needed to extricate themselves from

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38. See JERRY AHERN, ARMED FOR PERSONAL DEFENSE 77–78 (2010) (explaining how an “out the front” knife works).

39. See N.Y. PENAL LAW § 265.00(5) (2013). Gravity knives can be either out-the-front or side-openers. See RICHARD V. LANGSTON, THE COLLECTOR’S GUIDE TO SWITCHBLADE KNIVES 30 (2001).

40. 15 U.S.C. § 1242 (1958). Another statute prohibits possession of switchblade knives in territories, overseas, or in “Indian country,” except for “any individual who has only one arm” and who uses a blade less than three inches in length. *Id.* §§ 1243–44. Some state laws prohibiting possession or carrying of switchblades also exempt any “one-armed person” from these prohibitions. *E.g.*, MICH. COMP. LAWS ANN. § 750.226a (West 2004).

41. *E.g.*, HAW. REV. STAT. § 134-52 (2011).

42. 15 U.S.C. § 1241(b) (1958). By interpretation, some state laws also cover butterfly knives, which are discussed *infra* Part I.F.

43. See LANGSTON, *supra* note 39, at 5–6.

44. See *id.* (“For the most part, these old (going back to the 1700s) mostly European (e.g., English, German, Spanish) knives were hand-produced custom pieces for the very rich, not factory made.”).

45. See *id.* One of the first U.S. factories was the Waterville Cutlery Company, founded in 1843 in Waterbury, Connecticut. *Id.* at 7.

their parachutes.”<sup>46</sup> The switchblade enabled them to cut themselves loose with only one hand.<sup>47</sup>

In the 1950s, there was great public concern about juvenile delinquency.<sup>48</sup> This concern was exacerbated by popular motion pictures of the day, such as *Rebel Without a Cause* (1955), *Crime in the Streets* (1956), *12 Angry Men* (1957), and *The Delinquents* (1957), as well as the very popular Broadway musical *West Side Story*. These stories included violent scenes featuring the use of automatic knives by fictional delinquents. Partly because of Hollywood’s sensationalism, the public associated the switchblade with the juvenile delinquent, who would flick the knife open at the commencement of a rumble with a rival gang or some other criminal activity. This was an important part the origin of the many statutes imposing special restrictions on switchblades.<sup>49</sup>

Recently, there have been two attempts to blur the distinction between automatic knives and non-automatic knives. In 2009, U.S. Customs and Border Protection issued a new regulatory interpretation of the Federal Switchblade Act that would treat most one-hand opening folding knives as automatics.<sup>50</sup> This new interpretation contradicted decades of previous Customs interpretation of the federal switchblade statute and would have covered the non-automatic, assisted opening knives, which have an indentation, hole, or stud to assist opening as opposed to a button that activates a spring.<sup>51</sup> The proposed new interpretation caused such an uproar that Congress

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46. United States v. Irizarry, 509 F. Supp. 2d 198, 204 (E.D.N.Y. 2007).

47. *Id.*

48. For a general analysis of the interaction between concerns about mass media and its perceived effects on juvenile delinquency in the 1950s, see JAMES GILBERT, *A CYCLE OF OUTRAGE: AMERICA’S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S* (1986), and FRANKIE Y. BAILEY & DONNA C. HALE, *POPULAR CULTURE, CRIME, AND JUSTICE* (1998). For a differing point of view emphasizing a failure to understand teenage culture, see David Matza & Gresham M. Sykes, *Juvenile Delinquency and Subterranean Values*, 26 AM. SOC. REV. 712 (1961).

49. See GILBERT, *supra* note 48, at 160 (stating that switchblade laws were passed as a result of concerns over juvenile delinquency); THOMAS DOHERTY, *TEENAGERS AND TEENPICS: JUVENILIZATION OF AMERICAN MOVIES* 40 (rev. ed. 2002) (discussing the media focus on juvenile delinquency and switchblades).

50. See U.S. Customs & Border Prot., *Proposed Revocation of Ruling Letters and Revocation of Treatment Relating to the Admissibility of Certain Knives with Spring-Assisted Opening Mechanisms*, CUSTOMS BULL. & DECISIONS, May 22, 2009, at 5.

51. See *id.* A federal switchblade is a knife which “opens automatically . . . by hand pressure applied to a button or other device in the handle of the knife,” or where gravity or inertia allows the blade to slide out of the handle. See 15 U.S.C. § 1241(b) (2006). New York State law refers to “centrifugal force” (not inertia) in the state definition. N.Y. PENAL LAW § 265.00(5) (2013). Both statutes are attempting to describe the same kind of knife.

quickly revised the federal statute to make it clear that non-automatic folding knives with a bias towards closure are not within the federal definition of “switchblade.”<sup>52</sup>

As detailed below, Manhattan District Attorney Cyrus Vance, Jr. has been doing something similar with the New York State switchblade and gravity knife statute.<sup>53</sup> He has been bringing criminal cases against persons who possess, carry, or sell non-automatic folding knives with a bias towards closure and charging them with violation of the state’s ban on gravity knives and switchblades. These prosecutions are abusive. Unfortunately, many persons or businesses charged under the statute have lacked the resources to fight the charges by bringing in expert witnesses who can explain knife mechanics to the court.<sup>54</sup> Thus, there have been many out-of-court settlements with retailers, from whom Vance’s office has pocketed significant amounts of money.<sup>55</sup>

Partly because of Vance’s prosecutions, some state legislatures are proactively preventing similar abuses. These legislatures have repealed their decades-old ban on switchblades, gravity knives, or other banned knives such as dirks, daggers, and stilettos.<sup>56</sup> Other legislatures have enacted preemption statutes that eliminate local

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52. See Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, sec. 562, § 4, 123 Stat. 2142, 2183 (2009) (codified at 15 U.S.C. § 1244 (2012)).

53. See Press Release, N.Y. Cnty. Dist. Attorney’s Office, District Attorney Vance Announces Major Investigation of Illegal Knives in New York (June 6, 2010), available at <http://www.kniferights.org/VancePressRelease062010.pdf>; *Knife Rights Contests DA’s Claims, Tactics in Knife Retailer Shakedown*, KNIFE RIGHTS, [http://www.kniferights.org/index.php?option=com\\_content&task=view&id=113&Itemid=1](http://www.kniferights.org/index.php?option=com_content&task=view&id=113&Itemid=1) (last visited Oct. 3, 2013). Cf. *United States v. Irizarry*, 509 F. Supp. 2d 198, 209 (E.D.N.Y. 2007) (case arising from a police search of a workman who was seen carrying a Husky Sure-Grip Folding Knife).

54. *Manhattan District Attorney Shakes Down Honest Knife Retailers*, KNIFE RIGHTS, [http://www.kniferights.org/index.php?option=com\\_content&task=view&id=113&Itemid=1](http://www.kniferights.org/index.php?option=com_content&task=view&id=113&Itemid=1) (last visited Oct. 3, 2013). For a civil rights lawsuit based on the Vance prosecutions, see Complaint, *Knife Rights, Inc. v. Vance*, 2011 WL 7567075 (S.D.N.Y. 2011) (No. 11 CV 3918). However, Vance has not exclusively targeted the legally defenseless. See Press Release, N.Y. Cnty. Dist. Attorney’s Office, *supra* note 53.

55. *Manhattan District Attorney Shakes Down Honest Knife Retailers*, *supra* note 54.

56. See H.R. 1665, 2010 Gen. Ct., Reg. Sess. (N.H. 2010) (removing all references to knives in section 159:16 of the New Hampshire Code, which prohibits the carrying of certain weapons); S. 489, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012) (repealing switchblade ban in section 571.020 of the Missouri Code); H.R. 2347, 62nd Leg., Reg. Sess. (Wash. 2012) (narrowing and clarifying definition of “spring-blade” knives in section 9.41.250 of the Washington Code); H.R. 2033, 2013 Leg., Reg. Sess. (Kan. 2013) (preempting local ordinances, plus repealing ban on switchblades, dirks, daggers, and stilettos); H.R. 33, 28th Leg., Reg. Sess. (Alaska 2013) (preempting local ordinances; repealing ban on switchblades); H.R. 1563, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013) (repealing ban on switchblades); H.R. 1862, 83d Leg., Reg. Sess. (Tex. 2013) (repealing ban on switchblades).

Narrowly defined, a stiletto has “one slender bayonet-type blade with the point area back to about one-third of the blade” and is partially or fully double-edged. Historically, it was particularly popular in Italy, France, Spain, and Germany. LANGSTON, *supra* note 39, at 26.

bans on switchblades and other local knife ordinances that are more restrictive than state law.<sup>57</sup>

#### F. Butterfly Knives

Butterfly knives, also known as balisongs, are sometimes named explicitly in state or local knife laws and are occasionally considered to fall within a state or local definition of “switchblade.”<sup>58</sup> A butterfly knife consists of two handle sections that, when the knife is closed, completely cover the blade.



A BUTTERFLY KNIFE OPEN AND CLOSED<sup>59</sup>

By holding one handle and rotating the other handle away from the closed position, it is possible to open the knife and bring the two handles together. The handles may then lock together, although not all do. In some states, the lock is the difference between

57. See S. 1015, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); *supra* note 54.

58. See, e.g., *State v. Riddall*, 811 P.2d 576, 578–80 (N.M. Ct. App. 1991) (holding that a balisong is a switchblade as defined by New Mexico statute); *People v. Quattrone*, 260 Cal. Rptr. 44, 44 (Cal. Ct. App. 1989) (holding that a balisong was a switchblade under California statute). *But see, e.g., Taylor v. McManus*, 661 F. Supp. 11, 14 (E.D. Tenn. 1986) (ruling that balisongs are not switchblades under federal law); *State v. Strange*, 785 P.2d 563, 566 (Alaska Ct. App. 1990) (ruling that balisongs are neither switchblades nor gravity knives); *People v. Mott*, 522 N.Y.S.2d 429, 430 (N.Y. Cnty. Ct. 1987) (ruling that balisongs are not gravity knives).

59. Photograph supplied by Knife Rights, Inc.

a legal and an illegal knife.<sup>60</sup> Many experts believe that a butterfly knife is the strongest and safest folding knife because the blade cannot fold closed inadvertently on the operator so long as the operator has a firm grasp on the handles.<sup>61</sup> In contrast, a lock-blade folding knife can experience a lock failure, although this is rare for well-constructed knives.

An experienced operator can also flip the butterfly handle into the open position using only one hand. Like the switchblade, the butterfly knife's use in movies has given it an undeserved reputation as a criminal's weapon.<sup>62</sup> As with the switchblade, opening one is visually interesting and frightening to some persons unfamiliar with knives, creating a belief that it is an extremely dangerous weapon necessitating special legislative attention.<sup>63</sup>

All the knives described above are primarily tools, although they can also be used as weapons. Conversely, knives may be designed as weapons but used primarily as tools. A judge or juror's perception of the purpose of a knife may be quite different from the owner's or the designer's perception. The knives discussed below, however, are ones that some governments have historically believed to need special regulation or prohibition.

### *G. Bowie Knives and Arkansas Toothpicks*

America's first period of knife control was in 1837–1840, when the nation experienced a panic over the Bowie knife and the Arkansas Toothpick.<sup>64</sup> This Section discusses the knives' historical use, while the strange legal history of Bowie knives and Arkansas Toothpicks in the nineteenth century is detailed below in Part III.

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60. See, e.g., Taylor, 661 F. Supp. at 14–15 (holding that the required step of locking the knife into an open position takes it out of the category of automatic knives).

61. See *Paradox*, COLD STEEL, <http://www.coldsteel.com/Product/24P/PARADOX.aspx> (last visited Aug. 20, 2013) (“They are designed to rotate 180 degrees around the blade’s unique split tang and use strong opposing spring tension to lock the blade open or hold it firmly closed. Don’t worry about it taking two hands to get it into action, since once it’s opened it will never close inadvertently.”).

62. For a representative list of films in which balisongs are used, see *Balisongs in the Movies*, BALISONGCOLLECTOR.COM, <http://www.balisongcollector.com/movies.html> (last visited Aug. 20, 2013).

63. See Michael Burch, *Butterfly Knives Take Wing*, 28 KNIVES 26, 26, 30 (2008).

64. See CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC* 85–96, 105–12 (1999) (discussing the tragedies and breathless newspaper coverage associated with this panic).

The Bowie knife became famous when used by Colonel Jim Bowie at the “Sandbar Fight” by the lower Mississippi River on September 19, 1827.<sup>65</sup> Rezin Bowie, Colonel Jim’s brother, was the actual maker of the knife. He described his creation thusly: “The length of the knife was nine and a quarter inches, its width one and a half inches, single-edged, and blade not curved.”<sup>66</sup> According to Rezin, the knife was designed for bear hunting.<sup>67</sup> Based on the known details of Rezin’s knife, absolutely nothing about it was novel. Its fame soon made this style of knife in high demand and increasingly popular.<sup>68</sup>

Yet, the knife gained such popularity that many people use “Bowie knife” to describe knives that have curved blades or blades much longer than nine inches.<sup>69</sup> Today, a common description of the “Bowie knife” is a large fixed blade (almost always much longer than Rezin’s nine inch long blade), sharpened on one edge (per Rezin’s original model), with a relatively thick spine and a clip point.<sup>70</sup> This modern usage does not describe Rezin Bowie’s original knife. Ironically, it also does not describe the custom knives that professional cutlers later produced for Rezin or Jim Bowie.<sup>71</sup>

The problem of the Bowie knife’s notoriety as a fighting knife extends back to the first weeks after the Sandbar Fight. Newspaper and magazine reports of the event were often highly inaccurate.<sup>72</sup> The term “Bowie knife” entered the American vocabulary from these reports and then crossed the Atlantic. American and English manufacturers began using the term for a wide variety of large knives. Some knives had clip points, and others did not; some were straight, and others were curved; some were single-edged, and others were double-edged; some had crossguards, and others did not. There was also great variance in length. The only thing these knives had in common was that they were big, and all of them were considered particularly suitable for self-defense and hunting.<sup>73</sup> Historian Norm Flayderman, an expert in Bowie and other knives,

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65. See RAYMOND W. THORP, *BOWIE KNIFE* 6–8 (1948); NORM FLAYDERMAN, *THE BOWIE KNIFE: UNSHEATHING AN AMERICAN LEGEND* 285–89 (2004).

66. R.P. Bowie, *Letter to the Editor*, *PLANTER’S ADVOCATE*, Aug. 24, 1838, reprinted in MARRIAT, *I A DIARY IN AMERICA, WITH REMARKS ON ITS INSTITUTIONS* 291 (1839).

67. *Id.*

68. See FLAYDERMAN, *supra* note 65, at 491–92.

69. See *Seats v. State*, 33 Ala. 347, 348 (1859); J.R. EDMONDSON, *THE ALAMO STORY: FROM EARLY HISTORY TO CURRENT CONFLICTS* 122–23 (2000).

70. See Jim Woods, *How to Pick a Perfect Knife*, *POPULAR MECHANICS*, Aug. 1982, at 78, 78–80.

71. See FLAYDERMAN, *supra* note 65, at 491–92.

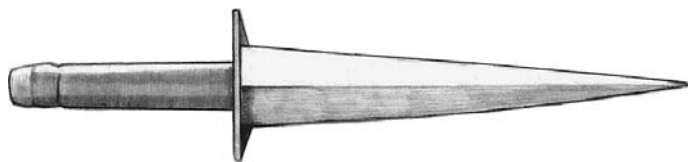
72. See *id.* at 289–91.

73. See *id.* at 490–92.

both antique and modern, concludes that “there is no one specific knife that can be exactly described as a Bowie knife.”<sup>74</sup>

Today, several states outlaw carrying a “Bowie knife” without defining the term.<sup>75</sup> Thus, today’s citizens who are subject to Bowie knife laws have no way of knowing whether they are forbidden to carry a straight knife that closely matches Rezin Bowie’s design or the curved knives that are commonly called “Bowie knives.” The state’s definition may even include a knife that is neither, but has the words “Bowie Knife” written on it.<sup>76</sup> The chilling effect of this vagueness is obvious.

The Arkansas Toothpick’s history is interwoven with that of the Bowie knife. There are some Mississippi tax receipts from the antebellum era, as well as some other writings, which expressly distinguish an “Arkansas Toothpick” from a “Bowie knife.”<sup>77</sup> Narrowly defined, Arkansas Toothpicks have triangular blades up to eighteen inches long, sharpened on both edges.<sup>78</sup>



ARKANSAS TOOTHPICK<sup>79</sup>

However, Flayderman concludes that “Arkansas Toothpick” was, in its predominant usage, simply another marketing term for “Bowie knife.”<sup>80</sup>

## II. CRIMINOLOGICAL CONSIDERATIONS: IS A KNIFE MORE DANGEROUS THAN A GUN?

Under the Supreme Court’s decision in *District of Columbia v. Heller*, handguns, as a general class, are protected by the Second

74. *Id.* at 490.

75. See ALA. CODE § 13A-11-50 (LexisNexis 2005); GA. CODE ANN. § 16-11-127.1 (2011); ME. REV. STAT. ANN. tit. 25, § 2001-A (2012); MISS. CODE ANN. § 97-37-1 (2012); N.C. GEN. STAT. § 14-269 (2011); OKLA. STAT. tit. 21, § 1272 (2011); R.I. GEN. LAWS § 11-47-42 (2012); TEX. PENAL CODE ANN. § 46.01 (West 2012); VA. CODE ANN. § 18.2-308 (2009).

76. See generally FLAYDERMAN, *supra* note 65, at 490.

77. *Id.* at 265–66.

78. See WILLIAM FOSTER-HARRIS, *THE LOOK OF THE OLD WEST* 120–22 (2007).

79. Drawing by Rhonda L. Thorne Cramer.

80. FLAYDERMAN, *supra* note 65, at 265–74.

Amendment.<sup>81</sup> This is so notwithstanding the frequent use of handguns in violent crimes, including homicide. *Heller* acknowledged that, even though handgun misuse represents a major public safety problem, “[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>82</sup> If handguns may not be prohibited, in spite of the clear public safety concerns, then a category of arm that is less dangerous clearly may not be prohibited, either.

Are knives more dangerous than guns? Quite the opposite. In 2010, “[k]nives or cutting instruments” were used in 13.1 percent of U.S. murders, behind firearms (67.5 percent) and handguns specifically (46.2 percent), but ahead of blunt objects (4.2 percent), shotguns (2.9 percent), and rifles (2.8 percent).<sup>83</sup> The thirteen percent includes *all* knives, including steak knives, butcher knives, linoleum knives, and other “cutting instruments,” such as screwdrivers (sharpened and otherwise), straight razors, and other instruments made into weapons by the inventiveness of criminals.<sup>84</sup>

Robberies for which the FBI has detailed information are overwhelmingly committed with firearms (47.9 crimes/100,000 people), not knives or other cutting instruments (9.1/100,000).<sup>85</sup> Knives and other cutting instruments are actually in last place in the FBI statistics for robbery, even behind “other weapon.”<sup>86</sup> Similarly, in the category of aggravated assault, sharp objects are in last place for weapon type (47.9/100,000 people), behind firearms (51.8), personal weapons (69.0), and other weapons (83.3).<sup>87</sup>

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81. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (“The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ would fail constitutional muster.”) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

82. *Id.* at 2822 (“We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution.”)

83. See *Crime in the United States 2010, Expanded Homicide Data Table 11*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl11.xls> (last visited Aug. 20, 2013). For some homicides, the type of firearm is unknown, which is why the “firearm” figure is higher than the figures for handguns, rifles, and shotguns added together.

84. See *id.*

85. *Crime in the United States 2010, Table 19*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl19.xls> (last visited Aug. 20, 2013).

86. *Id.*

87. *Id.*



Unsurprisingly, data show that gunshots are more lethal than knife wounds. Harwell Wilson and Roger Sherman's 1960 study of hospital admissions for abdominal wounds found that abdominal stabbing cases ended in death 3.1 percent of the time, while 9.8 percent of abdominal gunshot wounds were lethal.<sup>88</sup> An examination of 165 family and intimate assaults (FIA) in Atlanta, Georgia in 1984 found similar results. Firearms-associated FIAs were three times more likely to result in death than "FIAs involving knives or other cutting instruments."<sup>89</sup>

Another study examined all penetrating traumas ("firearm or stabbing injury") in New Mexico that "presented to either the state Level-1 trauma center or the state medical examiner" from 1978 to 1993.<sup>90</sup> This study found that, although nonfatal injury rates were similar for firearms and stabbing (34.3 per 100,000 persons per year for firearms, 35.1 per 100,000 persons per year for stabbing), firearm fatality rates were much higher than for knives: 21.9 vs. 2.7.<sup>91</sup> In other words, thirty-nine percent of firearm penetrating traumas were fatal, compared to 7.1 percent of knife penetrating traumas. Thus, firearm injuries were 5.5 times more likely to result in death than were knife injuries. Not all of the penetrating traumas in New Mexico were criminal attacks. Fifty-five percent of the penetrating deaths were suicides, and four percent of the penetrating deaths were accidents. There was insufficient information to determine the breakdown of weapon type by category.<sup>92</sup>

Knives in general are far less regulated than firearms. There are no mandatory background checks, no prohibitions on interstate sales (except for switchblades),<sup>93</sup> and no serial number requirements. The least expensive knives are considerably less expensive than the cheapest firearms.<sup>94</sup> Only about half of American homes

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88. Harwell Wilson & Roger Sherman, *Civilian Penetrating Wounds of the Abdomen*, 153 ANNALS SURGERY 639, 640 (1961).

89. Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3043 (1992).

90. Cameron Crandall et al., *Guns and Knives in New Mexico: Patterns of Penetrating Trauma, 1978-1993*, 4 ACAD. EMERGENCY MED. 263, 263 (1997).

91. *Id.*

92. *Id.* at 264. As for the remaining firearm deaths classified as "homicide," about six to twelve percent of them were probably justifiable homicides committed with firearms by persons who were not law enforcement officers. This is calculated by multiplying the 7.1-12.9 percent of civilian legal defensive homicides by the percentage of those homicides committed with firearms. KLECK, *supra* note 4, at 114, 148. It is unknown whether a similar percent of the knife homicides were justifiable.

93. See 15 U.S.C. § 1242 (2006).

94. Searching Amazon.com on September 29, 2012 found more than 298 matches for "combat knife" under 25 dollars, and 114 matches under 10 dollars. By comparison, even the cheapest single-shot .22 rifles (which would only be used by *very* stupid criminals) at the

have a gun, but almost every home has several knives, including tools, steak knives, and butcher knives. At the same time, these easily obtained arms are used far less often than firearms for murder, robbery, and aggravated assault. Thus, knives are far less dangerous than guns. Any public safety justification for knife regulation is necessarily less persuasive than the public safety justification for firearms regulation.

### III. BOWIE KNIVES AND THE NINETEENTH CENTURY CASES

During the nineteenth century, Bowie knives were commonly present in many areas of the United States. Contemporary sources leave no question that Bowie knives, Arkansas Toothpicks, and similar knives were a common part of American life until well after the Civil War—and not just for decoration, hunting, or slicing tough cuts of meat.<sup>95</sup> “[F]or those crossing the plains,” such knives were “a necessity.”<sup>96</sup> An account of Gold Rush California describes how masquerade balls in California would generally have “No weapons admitted” signs at the entrance.<sup>97</sup> An observer tells us that:

[I]t was worth while to go, if only to watch the company arrive, and to see the practical enforcement of the weapon clause. . . . Most men draw a pistol from behind their back, and very often a knife along with it; some carried their bowie-knife down the back of the neck, or in their breast; demure, pious looking men . . . lifted up the bottom of their waistcoat, and revealed the butt of a revolver; others, after having already disgorged a

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Cabela’s website on the same date was \$99.99. The cheapest repeating .22 rifle, the Mossberg 702 Plinkster, was \$139.99.

95. A few representative articles of the period illustrating the widespread violence associated with edged weapons (along with many other deadly weapons) include: *Scenes at New Orleans*, THE LIVING AGE, Oct.–Dec. 1852, at 528; *Editor’s Easy Chair*, 11 HARPER’S NEW MONTHLY MAG. 411, 411–12 (1855); MARRYAT, *supra* note 66, at 106–10; *Colonel Bowie and his Knife*, TEMPLE BAR, July 1861, at 120; GEORGE COMBE, 2 ON THE UNITED STATES OF NORTH AMERICA 93–95 (1841); AMERICAN ANTI-SLAVERY SOCIETY, AMERICAN SLAVERY AS IT IS 202–05 (1839). Among the well-known authors whose writings about America during this period included mention of Bowie knives were: CHARLES DICKENS, AMERICAN NOTES (1842) and GREAT EXPECTATIONS (1861); OLIVER WENDELL HOLMES, AUTOCRAT OF THE BREAKFAST TABLE (1857) (Americans are the “Romans of the modern world . . . our army sword is the short, stiff pointed gladius of the Romans; and the American bowie knife is the same tool, modified to meet the daily want of civil society.”); JULES VERNE, FROM THE EARTH TO THE MOON (1st English ed. 1873) (1865); Bret Harte, *The Outcasts of Poker Flat*, OVERLAND MONTHLY, Jan. 1869; MARK TWAIN, ROUGHING IT (1872); *all cited in* FLAYDERMAN, *supra* note 65, at 72–73.

96. FLAYDERMAN, *supra* note 65, at 88.

97. J.D. Borthwick, *Three Years in California*, 2 HUTCHINGS’ ILLUSTRATED CAL. MAG. 169, 171 (1857).

pistol, pulled up the leg of their trousers, and abstracted a huge bowie-knife from their boot; and there were men, terrible fellows, no doubt, but who were more likely to frighten themselves than any one else, who produced a revolver from each trouser pocket, and a bowie knife from their belt. If any man declared that he had no weapon, the statement was so incredible that he had to submit to be searched.<sup>98</sup>

During the 1850s, because of conflict in the Territory of Kansas between free soil and pro-slavery settlers, anti-slavery groups in New England sent arms to the free soilers, including rifles, revolvers, and Bowie knives.<sup>99</sup>

An important reason that the Bowie knife was typically possessed for self-defense was that it was, in some respects, superior to firearms. The black gunpowder used in the early and mid-nineteenth century was vulnerable to atmospheric moisture. At close quarters, a single-shot firearm has obvious limitations for self-defense. The widespread adoption of the metallic cartridge in the late 1850s, and the Colt's multi-shot revolvers in the 1840s, solved some of these problems, though it was not until the mid-1860s that medium caliber (.38 or larger) firearms with metallic cartridges became common. Before then, the Bowie knife often had a better chance than the handgun of stopping a criminal attacker; at least, a prudent defender would often want to carry a Bowie as a back-up arm.<sup>100</sup>

About a decade after the first appearance of the Bowie knife, some southern states began passing laws against the knife. Alabama imposed a one hundred dollar tax on the transfer of any Bowie knife or Arkansas Toothpick<sup>101</sup>—the equivalent of at least \$5,000 in today's money.<sup>102</sup> In 1837, Tennessee prohibited carrying such

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98. *Id.*

99. See FLAYDERMAN, *supra* note 65, at 106 (citing WILLIAM ELSEY CONNELLEY, *THE LIFE OF PRESTON B. PLUMB, 1837–1891* (1913)) (three-term U.S. Senator from Kansas recalls receiving a shipment including 250 Bowie knives); David B. Kopel, *Beecher's Bibles*, in 1 *GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW* 58 (Gregg Lee Carter ed., 2d ed. 2012).

100. See FLAYDERMAN, *supra* note 65, at 485–87.

101. An Act To Suppress the Use of Bowie Knives, no. 11, 1837 Ala. Acts Called Sess. 7 (1837).

102. The price of gold in 1840 was fixed at \$20.67 per ounce. *STATISTICAL ABSTRACT OF THE UNITED STATES* 863 (1942). As of June 2, 2013, gold price was \$1,387 per ounce, a 6,710 percent increase. See *GOLDPRICE*, <http://goldprice.org/>. While gold price change alone is not a completely effective measure of price inflation because of changes in production efficiencies, it is at least a good starting point for a proxy.

knives.<sup>103</sup> An attempt to add pistols to the 1838 Tennessee bill failed.<sup>104</sup>

This attempt to regulate knives produced several nineteenth century cases involving Bowie knives.<sup>105</sup> These cases mostly followed the Tennessee Supreme Court's 1840 case, *Aymette v. State*,<sup>106</sup> which was wrong on its facts and later specifically repudiated by *Heller*.<sup>107</sup> The Tennessee Supreme Court in *Aymette* upheld the ban on the concealed carry of Bowie knives and Arkansas Toothpicks, holding that the Tennessee Constitution's guarantee of a right to keep and bear arms for the common defense "does not mean for *private defence*, but being armed, they may as a body, rise up to defend their just rights, and compel their rulers to respect the laws."<sup>108</sup> According to *Aymette*, the Bowie knife was not suitable for "civilized warfare" but was instead favored by "assassins" and "ruffians."<sup>109</sup> Significantly, the

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103. An Act to Suppress the Sale and Use of Bowie Knives and Arkansas Tooth Picks in this State, ch. 137, 22 Tenn. Gen. Assemb. Acts 200 (1838).

The Bowie knife was also banned in Arkansas. The ban was repealed on February 5, 1973 in "emergency" legislation, which declared that knife manufacturing "has brought much favorable publicity to this State, that the prohibitions placed upon the sale of Bowie knives are unneeded . . . [and] that that immediate removal of such restrictions would have a favorable impact upon the economy of this state. Therefore an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety . . . ." FLAYDERMAN, *supra* note 65, at 280.

104. *Tennessee Legislature*, DAILY REPUBLICAN BANNER (Nashville), Jan. 13, 1838, at 2.

105. One of the first problems encountered by the anti-Bowie laws was vagueness. In *Haynes v. State*, the Tennessee Supreme Court dealt with the complaint that the statute was vague and overbroad. 24 Tenn. (5 Hum.) 120, 122 (1844). The Tennessee statute applied to "any Bowie knife or knives, or Arkansas tooth picks, or any knife or weapon that shall in form, shape or size resemble a Bowie knife or any Arkansas tooth pick . . ." Ch. 137, 22 Tenn. Gen. Assemb. Acts 200.

The defendant, Stephen Haynes, was charged in Knox County with carrying "concealed under his clothes, a knife in size resembling a bowie-knife." At trial, the witnesses disagreed about whether Haynes's knife was a Bowie knife. Some said that it was too small and too slim to be a Bowie knife and would properly be called a "Mexican pirate-knife." The jury found Haynes innocent of wearing a Bowie knife but guilty on a second charge "of wearing a knife in size resembling a bowie-knife." *Haynes*, 24 Tenn. (5 Hum.) at 120–21.

The Tennessee Supreme Court agreed that the legislature could not declare "war against the name of the knife" alone. A strict application of the letter of the law might well result in some injustices: "for a small pocket-knife, which is innocuous, may be made to resemble in form and shape a bowie-knife or Arkansas tooth-pick" and would thus be illegal. The court concluded that the law must be construed "within the spirit and meaning of the law" and relied on the judge and jury to make this decision as a matter of fact. *Haynes*, 24 Tenn. (5 Hum.) at 122–23.

106. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

107. *See* District of Columbia v. Heller, 554 U.S. 570, 613 (2008).

108. *Aymette*, 21 Tenn. (2 Hum.), at 157–58 (1840).

109. *See id.* at 158–60. The entire decision in *Aymette* is guided by Tennessee's narrow arms provision: "[T]he words that are employed must completely remove that doubt. It is declared that they may keep and bear arms for their *common defence*." *Id.* at 158. The opinion repeatedly ties the right solely to the "common defence."

Tennessee Constitution's guarantee, unlike the Second Amendment, contains the qualifying phrase, "for their common defence," which the U.S. Senate considered and rejected for the Second Amendment.<sup>110</sup>

The other major nineteenth century Bowie knife precedent, which is not part of the *Aymette* line, comes from Texas. In 1859, the Texas Supreme Court, in *Cockrum v. State*, ruled that, under the Texas Constitution's right to arms and the Second Amendment, "[t]he right to carry a bowie-knife for lawful defense is secured, and must be admitted."<sup>111</sup> At the same time, the court upheld enhanced punishment for manslaughter perpetrated with a Bowie knife.<sup>112</sup> The court elaborated on the Bowie knife:

It is an exceeding destructive weapon. It is difficult to defend against it, by any degree of bravery, or any amount of skill. The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least. The sword may be parried. With these weapons men fight for the sake of the combat, to satisfy the laws of honor, not necessarily with the intention to kill, or with a certainty of killing, when the intention exists. The bowie-knife differs from these in its device and design; it is *the instrument of almost certain death*.<sup>113</sup>

A plausible explanation for this perception of the Bowie knife as "the instrument of almost certain death" is that it made a bloody mess of a person because of the size of its blade. This is especially true when compared to a pen-knife or dagger, but even more so when compared to a bullet (which had almost surgical, cosmetic consequences during the low velocity, black powder era). Hence, the Bowie Knife was a relatively gruesome weapon.<sup>114</sup>

Additionally, the judicial and legislative fear of Bowie knives may have come from concerns about poor people or people of color. As

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*Aymette* is the urtext for the "civilized warfare" interpretation of the right to keep and bear arms, by which all persons have a right to own arms, but only arms which are useful for militia purposes. For a sympathetic treatment of the nineteenth century's "civilized warfare" cases, see Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 642-50 (2012).

110. S. JOURNAL, 1st Cong., 1st Sess. 129 (1789).

111. *Cockrum v. State*, 24 Tex. 394, 402 (1859).

112. *Id.* at 403.

113. *Id.* at 402-03 (emphasis added).

114. Even modern high velocity bullets, while producing large hydrostatic expansions within a person, produce exit wounds only two to three times the diameter of the entry wound. See Martin L. Fackler, *Wound Profiles*, WOUND BALLISTICS REV., Fall 2001, at 25 (examining damage in living tissue measured in experiments at the Letterman Army Institute of Research, Wound Ballistics Laboratory).

the defendant's attorney argued before the Texas Supreme Court in *Cockrum*:

A bowie-knife or dagger, as defined in the code, is an ordinary weapon, one of the cheapest character, accessible even to the poorest citizen. A common butcher-knife, which costs not more than half a dollar, comes within the description given of a bowie-knife or dagger, being very frequently worn on the person. To prohibit such a weapon, is substantially to take away the right of bearing arms, from him who has not money enough to buy a gun or a pistol.<sup>115</sup>

Some other state supreme court decisions picked up where *Aymette* left off, holding that some knives are not militia arms. In *English v. State*, the Texas Supreme Court apparently forgot the *Cockrum* decision and justified a ban on “the carrying of pistols, dirks [a short dagger], and certain other deadly weapons” by arguing that these are not arms of the militia: “The terms dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives, belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline.”<sup>116</sup> *English* cites no authority for its claim with respect to the military use of the knives of various sorts, and the claim appears to be false.<sup>117</sup> Similar to *Aymette*, *English* recognized that bayonets and swords, unlike the knives in question, were “arms” protected by the Second Amendment.<sup>118</sup>

Similarly, the West Virginia Supreme Court of Appeals in *State v. Workman* held that the arms protected by the Second Amendment:

must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels,

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115. *Cockrum*, 24 Tex. at 395–96.

116. *English v. State*, 35 Tex. 473, 473, 477 (1872).

117. *Id.* at 477–78. For use of the bowie knife as a militia arm, see *infra* notes 124–28 and accompanying text.

118. *English*, 35 Tex. at 476 (“The word ‘arms’ in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine . . . .”)

and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.<sup>119</sup>

*Heller* held that *Aymette* “erroneously, and contrary to virtually all other authorities,” read the right to keep and bear arms as limited to the threat to overthrow a tyrannical government.<sup>120</sup> *Heller* repudiated *Aymette* and its progeny, *English* and *Workman*. Moreover, even if *Heller* had adopted *Aymette*’s rule that there is an individual right to own all militia-suitable arms, the Bowie knife is a militia arm. It may not have been standard equipment for the Tennessee militia in 1840, but there is plenty of evidence of its militia use in the rest of the United States.

The Republic of Texas won its independence from Mexico at the Battle of San Jacinto on April 21, 1836. At the decisive phase of the battle, the 700 Texas volunteers were storming the Mexican breastworks. The fighting was hand-to-hand. The Texans had broken their rifles by using them as clubs against the standing army of the Mexican dictator, Antonio Lopez de Santa Anna Perez de Lebron. The Texans next fired their pistols, but had no time to reload. The Texans, “then drawing forth their bowie-knives, literally cut their way through dense masses of living flesh.”<sup>121</sup> The Mexican army, “unused to this mode of combat with huge Bowie-knives and the buts [sic] of guns, precipitately gave way; and while the shouts of Goliad and the Alamo rung in their ears, nearly one-half of the Mexican army was laid asleep in . . . death.”<sup>122</sup> In an eighteen-minute battle, Texas became a nation.<sup>123</sup>

Bowie knives were most clearly militia arms during the Civil War:

The Mississippi Riflemen . . . [i]n addition to their rifle, . . . carried a sheath-knife, known as the bowie-knife. . . . This is a formidable weapon in a hand-to-hand fight, when wielded by men expert in its use, as many were in the Southwestern States,

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119. *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891).

120. *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008).

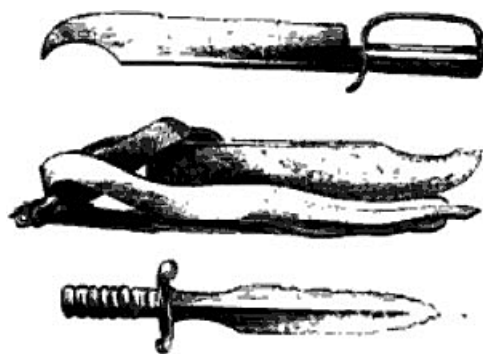
121. CHARLES EDWARDS LESTER, SAM HOUSTON AND HIS REPUBLIC 97 (1846), *quoted in* FLAYDERMAN, *supra* note 65, at 59.

122. EDWARD STIFF, THE TEXAN EMIGRANT 324–25 (1840), *quoted in* FLAYDERMAN, *supra* note 65, at 64. Goliad was the site of another battle, where Santa Anna had murdered 280 American prisoners.

123. *See generally* STEPHEN L. MOORE, EIGHTEEN MINUTES: THE BATTLE OF SAN JACINTO AND THE TEXAS INDEPENDENCE CAMPAIGN (2003).

where it was generally seen in murderous frays in the streets and bar-rooms.<sup>124</sup>

Other Mississippi militiamen were “armed with the rifles, shot-guns, and knives which they had brought from their homes.”<sup>125</sup> As further evidence of the prevalence of Bowie knives among Civil War soldiers, below are contemporary drawings of crudely made daggers and Bowie knives that were “in common use among the insurgent troops from the Mississippi region.”<sup>126</sup>



WEAPONS OF THE INSURGENTS.

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While the then-Southwest (Mississippi, Louisiana, Arkansas, and Texas) was the Bowie knife’s original territory, the knife was ubiquitous on both sides of the Civil War, carried by soldiers from every part of the nation.<sup>128</sup> The claims of *Aymette* and *Workman* that knives were not militia arms are clearly erroneous.

124. BENSON J. LOSSING, 1 PICTORIAL HISTORY OF THE CIVIL WAR IN THE UNITED STATES OF AMERICA 479 n.2 (1866).

125. *Id.* at 541 n.2.

126. *Id.*

127. *Id.* Other accounts referencing soldiers carrying Bowie knives, without apparently being in violation of military discipline, include COMTE DE PARIS, 1.3 HISTORY OF THE CIVIL WAR IN AMERICA 271 (Louis F. Tasistiro trans., 1875); JAMES R. GILMORE, PERSONAL RECOLLECTIONS OF ABRAHAM LINCOLN AND THE CIVIL WAR 110–11 (1899); D.M. KELSEY, DEEDS OF DARING BY BOTH BLUE AND GRAY 300 (1883); WM. H. RUSSELL, THE CIVIL WAR IN AMERICA 175 (1861); SAMUEL M. SCHMUCKER, THE HISTORY OF THE CIVIL WAR IN THE UNITED STATES: ITS CAUSE, ORIGIN, PROGRESS AND CONCLUSION 987 (1865); SAMUEL M. SCHMUCKER, 1 A HISTORY OF THE CIVIL WAR IN THE UNITED STATES; WITH A PRELIMINARY VIEW OF ITS CAUSES 188 (1863); John G. Walker, *Jackson’s Capture of Harper’s Ferry*, in 2 BATTLES AND LEADERS OF THE CIVIL WAR 604, 607 (Robert Underwood Johnson & Clarence Clough Buel eds., 1887).

128. See FLAYDERMAN, *supra* note 65, at 125–68.



## IV. KNIVES AS CONSTITUTIONALLY PROTECTED ARMS

This Part explains how knives are protected by the Second Amendment. Section A points out that the Second Amendment is for “arms,” not just for “firearms.” Being a militia-suitable arm is sufficient, but not necessary, for the Second Amendment to apply, and Section B details the history of knives as militia arms. *Heller’s* determination that handguns are within the scope of the Second Amendment was mainly based on the fact that handguns are useful for self-defense; Section C shows that knives are also useful for self-defense. Courts that have interpreted the Second Amendment have recognized the enormous technological improvements in firearms since 1791. In contrast, as Section D explains, the knives of today are not very different from the knives of 1791. Accordingly, Second Amendment protection of modern knives is especially clear. Part E argues that, under modern Second Amendment doctrine, the right to carry knives in public places for lawful self-defense must at least be co-extensive with the right to carry handguns.

A. *Which Arms does the Constitution Protect?*

According to *District of Columbia v. Heller*, the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation.”<sup>129</sup> *Heller* ruled that “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms,” with “arms” defined (pursuant to a Founding Era dictionary) as “any thing that a man . . . takes into his hands, or useth . . . to cast at or strike another.”<sup>130</sup>

As a starting point, all knives seem to be within the scope of the Second Amendment, just as all firearms are. Like firearms, a knife can be carried by an individual and used as a weapon. Of course, some knives, like some firearms, are better suited to this purpose than others, but all knives and all firearms can be possessed, carried, and used in case of confrontation. The *Heller* opinion, however, excludes some types of arms from Second Amendment protection: “weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>131</sup>

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129. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

130. *Id.* at 581–82 (quoting T. CUNNINGHAM, 1 A NEW AND COMPLETE LAW DICTIONARY (1764)).

131. *Id.* at 625. For an application, see *People v. Yanna*, 824 N.W.2d 241, 242, 245 (2012) (holding unconstitutional a state law “which prohibits possession of Tasers and stun guns by

*Heller* makes it clear that the protected arms are not solely those that are suitable for militia use. The right to bear arms “did not refer only to carrying a weapon in an organized military unit” but also included doing so as part “of the natural right of defense.”<sup>132</sup> By this reasoning, any weapon that could be used for either militia duty or for private self-defense qualifies as an “arm.” Although militia use is not necessary to show that something is a Second Amendment “arm,” militia use is sufficient to do so. Knives are indisputably militia arms.

### B. Knives as Militia Arms

Knives have long been part of American military equipment. The federal Militia Act of 1792 required all able-bodied free white men between eighteen and forty-five to possess, among other items, “a sufficient bayonet.”<sup>133</sup> This establishes both that knives were common *and* were arms for militia purposes. Colonial militia laws required that men (and sometimes all householders, regardless of sex) own not only firearms but also bayonets or swords; the laws sometimes required carrying swords in non-militia situations, such as when going to church.<sup>134</sup> In New England, the typical choice for

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private individuals; Tasers, “while plainly dangerous, are substantially less dangerous than handguns,” which *Heller* found protected).

132. *Heller*, 554 U.S. at 585.

133. Militia Act, ch. 33, 1 Stat. 271 (1792).

134. For laws of the colonies of New Hampshire, New Haven, New Jersey, New Plymouth, New York, North Carolina, Rhode Island, and Virginia, see: An Act for the Regulating of the Militia, N.H. May 13, 1718, in ACTS AND LAWS, PASSED BY THE GENERAL COURT OR ASSEMBLY OF HIS MAJESTIES PROVINCE OF NEW-HAMPSHIRE IN NEW-ENGLAND 91 (B. Green 1726) (requiring that all soldiers and householders have “a good Sword or Cutlash”); RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN, FROM 1638 TO 1649, at 25–26 (Charles J. Hoadly ed., Case, Tiffany & Co. 1857) (requiring everyone that bears arms have “a sworde”); *id.* at 131, 201 (all males aged sixteen to sixty must have “a sword”); AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 78 (2d ed., Honeyman & Co. 1881) (1752) (every male aged sixteen to sixty must have “a sword and belt”); THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 115 (William Brigham ed., Dutton and Wentworth 1836) (every Sunday, one quarter of the men, on a rotating basis, must carry arms to church; along with a gun and ammunition, carrying a “sword” was required); 1 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 50 (Berthold Fernow ed., Weed, Parsons & Co. 1887) (militiamen must have a good gun and bayonet); An Act for the Better Regulating the Militia of this Government, N.C. 1715, in 23 THE STATE RECORDS OF NORTH CAROLINA 29 (Walter Clark ed., Nash Bros. 1904) (a fine for those not appearing with a “well-fixed sword” when ordered); An Act for the Better Regulating of the Militia, in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS MADE FROM THE FIRST SETTLEMENT IN 1636 TO 1705, reprinted in THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1647–1719 at 57, 106–07 (John D. Cushing ed., 1977) (“a Sword or Bayenet”); ACTS AND LAWS, OF HIS MAJESTIES COLONY OF RHODE-ISLAND, AND PROVIDENCE PLANTATIONS IN AMERICA 87, reprinted in THE

persons required to own a bayonet or a sword was the sword because most militiamen fulfilled their legal obligation to possess a firearm by owning a “fowling piece” (an ancestor to the shotgun, particularly useful for bird hunting), and these firearms did not have studs upon which to mount a bayonet.<sup>135</sup>

Well after the nation’s founding, knives continued to be an important tool for many American soldiers. During World War II, American soldiers, sailors, and airmen wanted and purchased fixed blade knives, often of considerable dimensions.<sup>136</sup> At least in some units, soldiers were “authorized an M3 trench knife, but many carried a favorite hunting knife.”<sup>137</sup> The Marine Corps issued the Ka-Bar fighting knife.<sup>138</sup> As one World War II memoir recounts, “[t]his deadly piece of cutlery was manufactured by the company bearing its name. The knife was a foot long with a seven-inch-long by one-and-a-half-inch-wide blade. . . . Light for its size, the knife was beautifully balanced.”<sup>139</sup> Vietnam memoirs report that Ka-Bar and similar knives were still in use, but “not everybody is issued a Ka-Bar knife. There are not enough to go around. If you don’t have one, you must wait until someone is going home from Vietnam and gives his to you.”<sup>140</sup> Even today, some Special Forces units regularly carry combat knives.<sup>141</sup>

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EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1647–1719 at 135, 223 (John D. Cushing ed., 1977) (“one good Sword, or Baionet”); An Act for the Better Supply of the Country with Armes and Ammunition, Act 4, Va. Apr. 1684, in 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 13 (William Waller Hening ed., Samuel Pleasants 1812) (soldiers must furnish themselves with “a sword, musquet and other furniture fitt for a soldier”); An Act for the Better Regulation of the Militia, ch. 2, Va. Nov. 1738, in 5 THE STATUTES AT LARGE, *supra*, at 16–17 (militiamen who are “horse-men” must have a sword or cutlass).

135. See CLAYTON E. CRAMER, *ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* 97–98 (2006).

136. See Walter E. Burton, *Knives for Fighting Men*, *POPULAR SCIENCE*, July 1944, at 150, 150, 153.

137. GORDON L. ROTTMAN, *U.S. SPECIAL WARFARE UNITS IN THE PACIFIC THEATER 1941–45*, at 27 (2005).

138. To be precise, “Ka-Bar” is only one manufacturer of post-WWII fighting knives. “Ka-Bar” is sometimes used in a generic sense, in the same way some people call any cola soda a “Coke.”

139. E.B. SLEDGE, *WITH THE OLD BREED: AT PELELIU AND OKINAWA* 21 (Presidio Press 2007) (1981).

140. See, e.g., JOHN CORBETT, *WEST DICKENS AVENUE: A MARINE AT KHE SANH* 149 (2003).

141. See, e.g., PUSHIES, *supra* note 23, at 63–64.

*C. Protection Beyond Militia Arms*

The Second Amendment does not protect solely militia arms. As *Heller* points out, those in the Founding Era valued firearms in part because they were useful “for self-defense and hunting.”<sup>142</sup> Thus, knives that are useful for self-defense or hunting are also within the scope of the Second Amendment.<sup>143</sup>

In the past, some states imposed special restrictions on certain types of knives while leaving swords alone.<sup>144</sup> Often, the particular knives singled out for extra restrictions were those that could open most easily, likely because legislatures feared that such knives would be used offensively.<sup>145</sup>

The distinction, however, does not make much sense. Guns can be used offensively or defensively. The very characteristic that makes a gun so useful for defense—the ability to project force at a distance, rather than in close contact—also makes the gun particularly dangerous as an offensive weapon. The difference between offensive and defensive is not the type of gun but the intent of the user and the circumstances of use. The same is true for anything with a blade; the characteristics that make any particular bladed instrument handy for self-defense will also make it usable for offense. Again, the user, not the instrument, is the difference.

The question of whether knives qualify as a type of arm suitable for self-defense seems almost trivial. Knives are self-evidently useful for self-defense. Indeed, almost every type of knife would be useful for self-defense against an attacker armed with fists or other personal weapons, a knife, or an impact weapon such as a billy club.<sup>146</sup> Although a knife is most definitely not an ideal defensive weapon against an attacker armed with a handgun, at very close range, as is the case with many crimes of violence, it would generally be more effective than barehanded defense or begging for mercy.

In some situations, a knife might not be the best choice for self-defense because to use it requires one to be inches from the attacker. Nonetheless, it can be an effective deterrent to attack for

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142. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

143. A knife that is useful for hunting does not have to be a knife that is useful for taking the animal; a knife that can be used to clean the meat off the animal would also qualify.

144. *E.g.*, An Act to Suppress the Sale and Use of Bowie Knives and Arkansas Tooth Picks in this State, ch. 137, 22 Tenn. Gen. Assemb. Acts 200 (1838) (banning carrying or purchasing Bowie knives and Arkansas Toothpicks, but affecting no other weapon).

145. *See supra* Part I.E–F.

146. There are specialized knives whose blades are surrounded such that they can be used to cut rope or seat belts but are essentially useless as a stabbing weapon. Butter knives are also useless for self-defense. A ban on them would not violate the Second Amendment because they are only useful as tools.

the same reason that a firearm is; the attacker must decide whether the risk of being seriously injured or killed justifies continuing the attack. In at least some situations, the attacker will see the knife and remember an urgent appointment elsewhere.

Some schools of self-defense instruction, such as Michael Janich's Martial Blade Concepts, specialize in teaching defensive knife use.<sup>147</sup> Many people, including police officers carrying defensive handguns, also carry a backup defensive knife, in case the handgun malfunctions or runs out of ammunition.<sup>148</sup> The Ka-Bar TDI Law Enforcement knife is designed for this purpose, with a small fixed blade and a distinctive angled grip made for carrying on a belt.<sup>149</sup>

A knife may also be the best or only available defensive choice for persons who, for a variety of reasons, may choose not to own a firearm. Most knives are substantially cheaper than the cheapest firearm. The poorest Americans are also the most at risk of being victims of crime.<sup>150</sup> A ten-dollar knife may be an option where a \$130 used rifle is not.

Similarly, a person who chooses a knife for self-defense may live in an area where firearms (even after the *McDonald v. Chicago* decision, which incorporated the Second Amendment against state and local government<sup>151</sup>) are more strictly regulated than knives. For example, a knife that can be bought and taken home right away provides at least some protection during the period of days, weeks, or months that it may take to get government permission to own a firearm.

A person may also be reluctant to own a firearm out of concern that he may be unable to adequately secure it from his children. Although knives are still dangerous, a parent may conclude that the danger of a knife is sufficiently self-evident to a child, and that it represents a very minor risk compared to a firearm. While many people keep their guns in a safe or lockbox, almost every home has

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147. See MARTIAL BLADE CONCEPTS: PRACTICAL PERSONAL-DEFENSE SKILLS FOR TODAY'S WORLD, <http://www.martialbladeconcepts.com/Home.aspx> (last visited Aug. 20, 2013).

148. See, e.g., Greg Ellifritz, *Should Police Officers Carry Fixed Blade Knives?*, ACTIVE RESPONSE TRAINING (Feb. 4, 2013), <http://www.activeresponsetraining.net/should-police-officers-carry-fixed-blade-knives>; Randall, *Police Knives: Carrying and Training*, BLUE SHEEPDOG.COM, <http://www.bluesheepdog.com/police-knives/> (last visited Aug. 20, 2013).

149. *TDI Law Enforcement Knife*, KA-BAR, <http://www.kabar.com/knives/detail/76> (last visited Aug. 20, 2013).

150. See PATSY KLAUS & CATHY MASTON, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1995, at 21 tbl.14 (2000) (victimization rates by annual family income: 75.0/1,000 for those from families with income below \$7,500, dropping consistently in every income category to 37.7/1,000 for those at \$75,000 per year and above).

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

several kitchen knives lying in drawers or in a block on the kitchen counter.

The fact that knives in general may be less effective for self-defense than handguns does not generally strip knives of Second Amendment protection. Whether a particular arm is the ideal choice for self-defense does not affect whether that arm is constitutionally protected. In *Heller*, Dick Heller owned a .22 caliber revolver, which is about the weakest self-defense firearm possible.<sup>152</sup> The Court upheld Mr. Heller's right to own the gun, despite the fact that a higher caliber handgun would be more effective at stopping an attacker.<sup>153</sup> Likewise, a folding knife with a three-inch blade is not as powerful a defensive arm as a sword or a handgun. The Second Amendment protects individual discretion to choose which defensive arm is most suitable for the individual, based on his or her particular circumstances.

#### D. Technological Changes

*Heller* explicitly rejected the notion that the Second Amendment protects only the types of arms that were in existence in 1789, when Congress sent the Second Amendment to the states for ratification.<sup>154</sup> Claiming that the Second Amendment only protects 1789 guns is like saying that the First Amendment protects only the hand cranked printing press and not television. On the other hand, if a particular firearm model is a modern equivalent of a 1789 flintlock rifle, musket, or 1789 handgun, then it is clear that such a firearm is within the Second Amendment's scope.

Virtually every modern knife is comparable to the knives of 1789. Knives and other edged weapons were at least as common in English and U.S. society in the eighteenth century as they are today, appearing frequently in a variety of contexts. They were commonly

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152. *Compare .22 Results in fps*, BALLISTICS BY THE INCH, <http://www.ballisticsbytheinch.com/22.html> (last visited Aug. 20, 2013), *with .25 Auto Results in fps*, BALLISTICS BY THE INCH, <http://www.ballisticsbytheinch.com/25auto.html> (last visited Aug. 20, 2013).

153. *District of Columbia v. Heller*, 554 U.S. 570, 629–31 (2008) (upholding Heller's right to possess a handgun in his home); *see also* Jorge Amselle, *Choosing the Best Caliber for Self-Defense*, AMERICAN RIFLEMAN (May 4, 2011), <http://www.americanrifleman.org/articles/best-caliber-self-defense/> (“[The .38 special] cartridge is considered by many experts to be the minimum necessary for adequate personal protection.”); Paul W. Abel, *Calibers for Defense*, SHOOT-N-IRON PRAC. SHOOTING & TRAINING ACAD., <http://www.shoot-n-iron.com/calibers-for-defense.asp> (last visited Aug. 22, 2013) (“I personally do not recommend either [.32 or .25 calibers] for defensive purposes. Both calibers are lacking in velocity and bullet expansion.”).

154. *See Heller*, 554 U.S. at 582.

sold, carried, used as tools,<sup>155</sup> and occasionally misused as offensive weapons.<sup>156</sup>

While modern knives are made of superior materials, from a functional perspective knives have advanced far less since 1789 than have firearms, printing presses, or the myriad of other technologies whose constitutional protections are indisputable.<sup>157</sup> Even the switchblade is old; the first spring-ejected blades appeared in Europe in the late eighteenth century.<sup>158</sup>

Gun prohibition advocates have long argued that modern firearms are far more deadly than single-shot, muzzle-loading firearms of 1789 and thus do not enjoy the protections of the Second Amendment.<sup>159</sup> They lost that argument in *Heller*.<sup>160</sup> There is no similar argument with respect to knives. While firearms have changed from single-shot to multi-shot, the knives of 2013 have exactly one blade, just like the knives of 1789.

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155. See, e.g., W. LUDLAM, AN INTRODUCTION AND NOTES, ON MR. BIRD'S METHOD OF DIVIDING ASTRONOMICAL INSTRUMENTS 6 (1786) (for making astronomical instruments); PHILIP LUCKOMBE & WILLIAM CASLON, A CONCISE HISTORY OF THE ORIGIN AND PROGRESS OF PRINTING 351 (1770) (used in setting type); TEMPLE HENRY CROKER ET AL., 3 THE COMPLETE DICTIONARY OF ARTS AND SCIENCES, "Tanning Engines" (describing the machine used for tanning leather).

156. See, e.g., King v. Hardy, in THE PROCEEDINGS IN CASES OF HIGH TREASON, UNDER A SPECIAL COMMISSION OF OYER AND TERMINER 303–05 (1794) (a merchant in London describing his sale of knives with springs that hold them open; "they lay in my show glass, and in the window for public sale."); King v. Chetwynd, NO. 8 PART 3 THE PROCEEDINGS ON THE KING'S COMMISSIONS OF THE PEACE, AND OYER AND TERMINER 313 (1743) (a dispute over a slice of a cake led to an assault involving a pocket knife); *Particulars of Margaret Nicholson's Attempt to Assassinate His Majesty*, 10 THE EUROPEAN MAG., AND LONDON REV. 117 (1786) (describing Margaret Nicholson's attempt on King George III's life).

157. See Clayton E. Cramer & Joseph Edward Olson, *Pistols, Crime and Public*, 44 WILLETTE L. REV. 699, 716–22 (2008) (comparing firearms to other advancing technologies which enjoy constitutional protections).

158. TIM ZINSER ET AL., SWITCHBLADES OF ITALY 7–8 (2003).

159. See *Heller*, 554 U.S. at 582 ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment.").

160. *Id.* ("We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001), the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

*E. The Scope of the Right to Keep and Bear Knives*

*Heller* addressed not only the right to keep a gun in the home but also the right to *bear* arms. Although *Heller* allows carry bans in “sensitive places,” the opinion recognized a general right to carry.<sup>161</sup> Some lower courts have resisted *Heller*’s language about the right to carry, and the issue may need another Supreme Court case for a final resolution.<sup>162</sup>

Today, in forty-two states, adults who pass a fingerprint-based background check and a safety training class can obtain a permit to carry a handgun for lawful protection.<sup>163</sup> As a practical matter, the right to bear arms is already in effect in these states. In some states, these licenses are specifically for concealed *handguns* and do not allow the licensee to carry a concealed knife.<sup>164</sup> The reason for this peculiar situation is that these laws were enacted with the support of the National Rifle Association and other gun rights activist groups that were concerned about the right to carry firearms and did not pay attention to other arms, such as knives.<sup>165</sup> A few years ago, Knife Rights—the first proactive organization dedicated to

161. See *id.* at 584 (“At the time of the founding, as now, to ‘bear’ meant to ‘carry.’ When used with ‘arms,’ however, the term has a meaning that refers to carrying for a particular purpose—confrontation.”) (citations omitted).

162. See, e.g., *Smith v. U.S.*, 20 A.3d 759, 764 (D.C. 2011) (affirming the conviction of a Washington, D.C. police officer, wrongfully terminated and awaiting reinstatement, who was arrested for carrying a handgun within the District); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 820 (D.N.J. 2012) (“The Second Amendment does not protect an absolute right to carry a handgun for self-defense outside the home, even if the Second Amendment may protect a narrower right to do so for particular purposes under certain circumstances.”); *Richards v. County of Yolo*, 821 F. Supp. 2d 1169, 1174 (E.D. Cal. 2011) (“Based upon this, *Heller* cannot be read to invalidate Yolo County’s concealed weapon policy, as the Second Amendment does not create a fundamental right to carry a concealed weapon in public.”). But see *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (overturning a ban on carrying in any form, open or concealed); *People v. Aguilar*, 2013 IL 112116 (Second Amendment is violated by a general ban on bearing arms).

163. Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995); O’Shea, *supra* note 109, at 598–601. With the exception of California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island, all the other states have an objective process by which most law-abiding adults can obtain a permit to carry, or do not need a permit. See generally BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, STATE LAWS AND PUBLISHED ORDINANCES — FIREARMS (31st ed. 2011), available at <https://www.atf.gov/files/publications/download/p/atf-p-5300-5-31st-edition/2010-2011-atf-book-final.pdf>.

164. Oregon is fairly typical in prohibiting concealed carry of any knife “that projects or swings into position by force of a spring or by centrifugal force [or] any dirk [or] dagger,” OR. REV. STAT. § 166.240 (2011), but allows concealed carry of a *firearm* if licensed, *id.* §§ 166.250, .291. Idaho, by comparison, prohibits carrying “any dirk, dirk knife, bowie knife, dagger, pistol, revolver or any other deadly or dangerous weapon” unless the carrier is licensed to carry a concealed *weapon*. IDAHO CODE ANN. § 18-3302(7) (2013).

165. See *About NRA-ILA*, NRA-ILA, <http://www.nraila.org/about-nra-ila.aspx> (last visited Aug. 20, 2013).



knives—was created.<sup>166</sup> Had such an organization existed when these concealed carry laws were enacted, inclusion of knives would have been more likely.

Given the current understanding of the Second Amendment and the criminological evidence discussed above, if a state government decides that a particular individual is responsible enough to carry a concealed, loaded handgun in public places throughout the state, the state cannot forbid that person from carrying a concealed knife.

## V. STANDARDS OF REVIEW

Post-*Heller* courts are using a wide variety of analytical tools to evaluate Second Amendment claims. Sometimes, a statute is so flagrantly unconstitutional that there is no need to formulate a multi-step test.<sup>167</sup> A law that prohibits activity “near” the core right of self-defense (such as a ban on target ranges) may receive “not-quite strict scrutiny.”<sup>168</sup> Alternatively, a court might apply the “history and tradition” test.<sup>169</sup> Some courts have used intermediate scrutiny, particularly for laws that involve persons who have already demonstrated themselves to be more likely than most to misuse a firearm.<sup>170</sup> This Part tests some knife laws against the weakest possible relevant standard, intermediate scrutiny.<sup>171</sup> Although intermediate scrutiny is not the correct standard in all cases, these analyses are telling because if a knife control fails intermediate scrutiny, then it will fail all of the more rigorous standards as well.

As *U.S. v. Skoien* states, “[i]n its usual formulation, [the intermediate scrutiny] standard of review requires the government to establish that the challenged statute serves an important governmental interest and the means it employs are substantially related

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166. See Richard Grant, *Move Over, NRA. Meet the Knife Lobby*, MOTHER JONES (Nov./Dec. 2012), <http://www.motherjones.com/politics/2012/12/knife-rights-second-amendment>.

167. See, e.g., *Moore*, 702 F.3d at 942 (holding a near-complete ban on bearing arms unconstitutional).

168. See, e.g., *Ezell v. City of Chicago*, 651 F.3d 684, 708–09 (7th Cir. 2011) (granting a preliminary injunction against a ban on firing ranges).

169. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1274–75 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (suggesting that restrictions be analyzed under an approach based on text, history, and tradition).

170. See, e.g., *United States v. Skoien*, 614 F.3d 638, 641–44 (7th Cir. 2010) (en banc) (applying something similar to intermediate scrutiny to a ban on possessing firearms for persons convicted of domestic violence misdemeanors).

171. Rational basis is not available because a fundamental right is involved. See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

to the achievement of that interest.”<sup>172</sup> Courts have repeatedly held that, under intermediate scrutiny, it is not enough for the government to assert that it has a legitimate public interest.<sup>173</sup> In *Turner Broadcasting System, Inc. v. FCC*, the Court ruled that, under intermediate scrutiny, the government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>174</sup>

This Part applies intermediate scrutiny to three particular types of knife laws: laws that ban possessing certain knives in the home (Section A), laws that allow carrying knives for some purposes but not for self-defense (Section B), and laws that allow carrying handguns but not knives (Section C). The Article argues that all three types of laws fail intermediate scrutiny.

#### A. Home Possession

Criminal prosecutions for home possession of knives are rare, for the obvious reason that only in unusual circumstances would such possession come to the attention of law enforcement. Nevertheless, the statutes on home possession violate the Second Amendment because law-abiding persons are not able to possess certain knives in their homes. Most jurisdictions that have a ban on home possession of a certain knife also forbid the sale of such a knife, thus making it doubly impossible for a law-abiding person to have the knife at home.

Justifying a ban on home possession or the sale or transfer of a constitutionally protected arm requires the government to offer more than “impressionistic observations” in order to pass intermediate scrutiny.<sup>175</sup> The government must also demonstrate that replacing the banned category of knives with some other, equally dangerous arm would not easily defeat the ban. For example, a ban on revolvers with two-inch barrels would have no public safety benefit if semiautomatic pistols of similar dimensions remained legal. As long as the purchase and possession of a ten-inch Wusthof Chef’s

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172. *U.S. v. Skoien*, 587 F.3d 803, 805 (7th Cir. 2009), *vacated en banc*, 614 F.3d 638 (7th Cir. 2010).

173. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661–66 (1994) (“This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress’ factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.”).

174. *Id.* at 664.

175. *See State v. Delgado*, 692 P.2d 610, 612 (Or. 1984).

Knife is legal, can any knife ban actually produce a genuine reduction in injuries? Thus, bans on the home possession of switchblades, gravity knives, Bowie knives, and so on are probably unconstitutional.

### *B. Carrying for Limited Purposes*

Lower courts still disagree about the scope of the Second Amendment right to bear arms, and the issue may eventually be decided by the Supreme Court.<sup>176</sup>

Even before the Supreme Court directly recognized that the Second Amendment protects a right to keep and bear arms for personal as well as collective uses, there were still other constitutional limits on carry bans. In the 1995 case *City of Akron v. Rasdan*, the Ohio Court of Appeals upheld a city ordinance banning the carrying of knives “having a blade two and one-half inches in length or longer” against claims of overbreadth and vagueness, but ruled that the ordinance went too far in prohibiting “an *unreasonable* amount of activity that is inherently innocent, harmless, and useful. The most obvious examples of this type of innocent activity include carving, hunting, fishing, camping, scouting, and other recreational activities in which carrying a knife is an integral and often essential part of that activity.”<sup>177</sup>

This is an accurate but not comprehensive list. One particularly important item is missing: self-defense. Because knives with blades of longer than two and one-half inches are among Second Amendment “arms” post-*Heller* and especially post-*McDonald*, *Rasdan* must be read as protecting a right to carry such knives for lawful defense of self and others. The *Rasdan* court distinguished the Akron ordinance from ordinances that were upheld in decisions such as *City of Seattle v. Riggins* and *People v. Ortiz* because the laws in those other states provided “a sufficient number of exceptions to criminal liability” to qualify as “reasonable exercises of the police power.”<sup>178</sup>

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176. See, e.g., *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (holding that a near-complete ban on carrying firearms in public is unconstitutional), *reh'g denied*, 708 F.3d 901 (7th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (holding that a statute requiring applicants show a special need for self-protection before being granted a license to carry did not violate Second Amendment), *cert. denied*, 133 S. Ct. 1806 (2013) (denying petition despite seven amicus briefs in support, including a brief from twenty states).

177. *City of Akron v. Rasdan*, 663 N.E.2d 947, 950–53 (1995).

178. *Id.* at 953 (citing *City of Seattle v. Riggins*, 818 P.2d 1100, 1104 (Wash. Ct. App. 1991); *People v. Ortiz*, 479 N.Y.S.2d 613, 619 (N.Y. Crim. Ct. 1984)).

Notably, the *Rasdan* court was using the rational basis standard, but, after *Heller* and *McDonald*, rational basis does not suffice.<sup>179</sup> If there is going to be a general ban, with exceptions for permissible purposes for carrying (e.g., while hunting or hiking), then there must be an exception that encompasses lawful self-defense. It is possible that laws which set forth conditions for lawful defensive carry, such as a licensing system, might be evaluated under intermediate scrutiny,<sup>180</sup> but a law which categorically outlaws defensive carry is necessarily unconstitutional.<sup>181</sup>

### C. Bans on Carrying Certain Knives but not Handguns

As detailed below in Part VI, some state or local laws allow carrying one knife of a certain blade length while forbidding carrying another knife that has the same blade length, based on whether the knife is a folder or a fixed blade, is a folder that can or cannot be locked, or is a folder that is opened with one mechanism rather than another. To meet even the intermediate standard of scrutiny, laws making such distinctions must be based on clear evidence that these features are a public safety problem, rather than mere conjecture.<sup>182</sup> Given that *Heller* tells us that a handgun ban cannot pass intermediate scrutiny,<sup>183</sup> it seems very doubtful that any of the distinctions in the above paragraph can pass intermediate scrutiny.

If there is a right to carry handguns, then a ban on carrying a knife longer than X inches must be based on evidence that such a knife is more dangerous than a handgun. Given the quality of twenty-first century handguns, this is an impossible showing. Any rule of interpretation that allowed more restrictive laws for the

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179. See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

180. See, e.g., *Kachalsky* (2d Cir. 2012).

181. See, e.g., *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *People v. Aguilar*, No. 112116, 2013 WL 112116 (Ill. Sept. 12 2013).

182. In cases on commercial speech and in other First Amendment contexts, the Supreme Court has similarly held that “conjecture” does not satisfy the government interest requirement. See, e.g., *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 392 (2000) (“We have never accepted mere conjecture as adequate to carry a First Amendment burden.”); *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (noting that the government’s “burden is not satisfied by mere speculation or conjecture,” but only by “demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree”).

183. *Heller*, 554 U.S. at 628–29 (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ would fail constitutional muster.”).

bearing of edged weapons than for firearms cannot qualify as alleviating “these harms in a direct and material way” and thus fails intermediate scrutiny.<sup>184</sup>

Besides lethality, there are some other ways in which knives are less dangerous than handguns. A gunshot fired in self-defense may pass through the criminal and hit an innocent bystander, or a defensive shot may miss the criminal and hit a bystander. The same is true for criminal misuse of guns.<sup>185</sup> These risks occur not only in public places but also from shots fired within a residence. In contrast, a knife used for self-defense has no risk to innocent bystanders similar to a stray bullet.

Because knives are less dangerous than handguns, which may legally be carried, any law that regulates the possession or carrying of knives, even the biggest and scariest knives (for those persons who find them scary), is indefensible under intermediate scrutiny. At the least, intermediate scrutiny requires an “important” government interest;<sup>186</sup> it is difficult to see how the government could even have a rational interest, let alone an important interest, in preventing the carrying of knives by people who can lawfully carry handguns.

## VI. EXAMPLES OF KNIFE LAWS THAT POSE CONSTITUTIONAL PROBLEMS

State and local knife laws are often bewilderingly complex, and, as a result, it is very easy for a person with no criminal intent to break these laws. Prosecutors and police do not treat the severe state and local laws as relics of the nineteenth century. Instead, the laws are often vigorously enforced today against persons who are not engaged in *malum in se* behavior.

The enormous political attention on gun regulation means that most Americans have relatively little idea of the extent to which knives are subject to startlingly severe laws. These laws frequently concern carrying but may also forbid manufacture, sale, purchase,

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184. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994); *People v. Yanna*, 824 N.W.2d 241, 244–45 (Mich. App. 2012).

185. See, e.g., Lawrence W. Sherman et al., *Stray Bullets and “Mushrooms”: Random Shootings of Bystanders in Four Cities, 1977–1988*, 5 J. QUANTITATIVE CRIMINOLOGY 297, 297 (1989) (There was a “rapid increase in both bystander woundings and killings since 1985 in all four cities. . . . [But] total bystander deaths appear to comprise less than one percent of all homicides in these cities.”); H. Range Hutson et al., *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 NEW ENG. J. MED. 324, 325 (1994) (“Among the victims who had firearms injuries, 122 (28 percent) had no gang affiliation . . .”).

186. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

or even possession in one's home of a knife. In many respects, the variations in state and local knife regulation are far more curious and unexpected than the variations in gun regulation. Even within a particular state, the variations of what and where something is legal can be confusing.

One reason for the anomaly is that almost all states have some form of legislative or judicial preemption for gun control.<sup>187</sup> Thus, in many states, local governments are greatly restricted in what, if any, gun control laws they may enact, and gun laws are supposed to be uniform within the state.<sup>188</sup> In contrast, only a few states have knife preemption, and those are recent enactments.<sup>189</sup>

### A. Washington

Washington is one of the many states without knife preemption. Leslie Riggins was arrested in 1988 in Seattle while waiting for a bus because he had a knife in a sheath on his belt.<sup>190</sup> He was charged with possession of a fixed blade knife.<sup>191</sup> Riggins explained that he originally intended to go fishing with his brother outside of Seattle, but because of a change of plans, Riggins had “ended up using the knife to assist in roofing his brother's house.”<sup>192</sup>

Riggins might well have had reason to believe that he was within his rights to carry the knife. One part of the Seattle ordinance prohibiting carrying a fixed blade knife exempted “[a] licensed hunter or licensed fisherman actively engaged in hunting and fishing activity including . . . travel related thereto.”<sup>193</sup> When Riggins started his travels, he had planned to go fishing and thus was within the “travel related thereto” exemption.<sup>194</sup> Another exemption protected “[a]ny person immediately engaged in an activity related to a

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187. *Firearms Preemption Laws*, NRA-ILA (Dec. 16, 2006), <http://www.nraila.org/news-issues/fact-sheets/2006/firearms-preemption-laws.aspx?s=Preemption&st=&ps=>.

188. See STEPHEN P. HALBROOK, 2 FIREARMS LAW DESKBOOK app. A (2010).

189. See Act of Apr. 29, 2010, ch. 204, 2010 Ariz. Sess. Laws 1005 (codified at ARIZ. REV. STAT. ANN. § 13-3120 (2012)) (first state to preempt knife laws); Restrictions on Political Subdivisions Regarding the Regulation of Knives, ch. 272, 2011 Utah Laws 1092 (codified at UTAH CODE ANN. §§ 10-8-47.5, 17-50-332 (2012)); An Act Relative to State Authority Over Firearms and Ammunition, ch. 139, 2011 N.H. Laws 141 (codified at N.H. REV. STAT. ANN. § 159:26 (2012)); Act of May 2, 2012, act 753, 2012 Ga. Laws (codified at GA. CODE ANN. § 16-11-136 (2012)).

190. *City of Seattle v. Riggins*, 818 P.2d 1100, 1101 (Wash. Ct. App. 1991), *rev'd*, 846 P.2d 1394 (Wash. Ct. App. 1993).

191. SEATTLE, WASH., MUN. CODE § 12A.14.080(B) (2013).

192. *Riggins*, 818 P.2d at 1101.

193. MUN. CODE § 12A.14.100(A).

194. See *Riggins*, 818 P.2d at 1101.

lawful occupation which commonly requires the use of such knife, provided such knife is carried unconcealed.”<sup>195</sup> Here is where Riggins ended up in trouble. Earlier in the day, Riggins had been using the knife for such a purpose (roofing his brother’s house), but by the time he returned home by bus, he was no longer *immediately* engaged in that activity.<sup>196</sup> At this point, his only hope for an exemption from the “dangerous knife” carrying ban would have been “carrying such knife in a secure wrapper or in a tool box.”<sup>197</sup>

The state appellate court held that Riggins did not fall within “any one of the three fairly broad exemptions” to Seattle’s knife ordinance, and the court was unwilling to recognize that a day that had started with Riggins’s knife exempted for a fishing trip had changed as his plans changed.<sup>198</sup> Nothing in the *Riggins* decision suggests that Riggins had engaged in any behavior that was either dangerous or criminal. Had Riggins gone fishing with his brother and, at the end of the day, been returning home by bus, there would have been no criminal conviction.

Washington has a strong state constitutional guarantee of the right to keep and bear arms, and the Washington State Supreme Court has enforced this provision conscientiously when the case has involved a firearm.<sup>199</sup> However, the intermediate appellate court brushed off Riggins’s constitutional claim, gave the ordinance “every presumption . . . of constitutionality,” and upheld the Seattle ordinance under a mere “reasonable and substantial” test.<sup>200</sup>

The *Riggins* decision was in 1991 and involved only the state constitution. Both *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010) struck down bans on the possession of handguns without even needing to resort to a standard of scrutiny; the ban on handgun possession in those cases was so plainly contrary to the constitutional text that there was no need to proceed to choosing a

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195. MUN. CODE § 12A.14.100(B).

196. See *Riggins*, 818 P.2d at 1101, 1104 (“Riggins has failed to show that his conduct falls within one of the ordinance’s exemptions.”).

197. MUN. CODE § 12A.14.100(C).

198. See *Riggins*, 818 P.2d at 1102, 1104, *rev’d on other grounds*, 846 P.2d 1394 (Wash. Ct. App. 1993).

199. See, e.g., *State v. Rupe*, 683 P.2d 571, 594–97 (Wash. 1984) (ordering defendant’s ownership of an AR-15 excluded from penalty phase of murder trial because of chilling effect on right to keep and bear arms).

200. *Riggins*, 818 P.2d at 1102–03 (“Where legislation tends to promote the health, safety, morals, or welfare of the public and bears a reasonable and substantial relationship to that purpose, every presumption will be indulged in favor of constitutionality.”), *rev’d on other grounds*, 846 P.2d 1394 (Wash. Ct. App. 1993).

level of scrutiny.<sup>201</sup> The *Riggins* approach to the Washington Constitution's protections is therefore contrary to the approach that the U.S. Supreme Court outlined for Second Amendment cases since, according to the Supreme Court, broad bans on ownership or carrying (keeping and bearing) are *per se* unconstitutional. Were *Riggins* to come before the Washington Supreme Court today, it would almost certainly strike down Seattle's overly broad ban on carrying such knives. An example of the federal approach to broad bans after *Heller/McDonald* occurred in 2012 when the Seventh Circuit correctly applied the *Heller/McDonald* model to Illinois, which was the only state to prohibit defensive gun carrying in public places.<sup>202</sup> Because the ban was *per se* unconstitutional, Judge Richard Posner's decision struck down the Illinois ban without needing to get into three-tiered scrutiny.<sup>203</sup> The Washington State Supreme Court would be obligated not simply to consider the constitutionality of the Seattle ordinance with respect to the Washington State Constitution, but with the much more demanding standards of *McDonald*.

Alternatively, a future Washington state court might simply apply the *Riggins* "substantial" test (which echoes the language of intermediate scrutiny) with some genuine rigor and ask whether there was any substantial relation to public safety in an ordinance that would have let a future defendant similarly situated to *Riggins* carry his knife home in one way after a day of fishing but required that he carry it in a different way after a day of roofing. As in any case involving heightened scrutiny (strict or intermediate), the burden of proof would be on the government.<sup>204</sup> Depending on how the Supreme Court finally decides what standard of scrutiny to apply to the Second Amendment, an appeal to the Second Amendment

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201. See *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster."); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.").

202. See 720 ILL. COMP. STAT. 5/24-1 (2011), *invalidated by* *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *People v. Aguilar*, No. 112116, 2013 WL 112116, at \*5–8 (Ill. Sept. 12 2013) (Striking down a comprehensive ban on carrying loaded firearms in public places and by someone who was hardly an upstanding citizen: "That said, we cannot escape the reality that in this case, we are dealing not with a reasonable regulation but with a comprehensive ban.").

203. See *Madigan*, 702 F.3d at 941–42.

204. See, e.g., *Craig v. Boren*, 429 U.S. 190, 196–204 (1976).



might produce a similar result to *Riggins*, or strike down the Seattle ordinance.

### B. California

Can a person legally carry a knife in California? He can carry a fixed blade knife on California's college campuses if the blade is not longer than two-and-one-half inches.<sup>205</sup> Folding knives are unrestricted by state law on college campuses,<sup>206</sup> though some campuses may have more restrictive rules. On primary and secondary school grounds, the law is the same for fixed blades as on college campuses (banned if more than two-and-one-half inches), but all folding knives are banned, regardless of blade length, if the blade can lock open.<sup>207</sup> On the other hand, a person can carry a knife with a fixed blade up to four inches into a government building.<sup>208</sup> He can also carry a folding knife into a government building with a blade up to four inches, but *only if* the blade does not lock open.<sup>209</sup>

*Heller* affirmed the permissibility of special restrictions on arms carrying in "sensitive places, such as schools and government buildings."<sup>210</sup> However, even presuming that California can legally enact some special restrictions on knife carrying in those places, the actual restrictions are irrational. There is no reason why lock-blade folders are allowed and non-locking folders are banned in one location while just the opposite is the rule in another location.

For carrying in public places in general (not in sensitive places), California law is at least coherent at the state level. A person can openly carry any knife. He can concealed carry almost any folding knife. The one exception is that he cannot carry a switchblade with a blade longer than two inches in any fashion, open or concealed.<sup>211</sup>

However, California has no preemption for knife laws, and some California cities, such as Los Angeles, Oakland, and San Francisco, have their own, more restrictive (and inconsistent) ordinances. Los Angeles prohibits open carry of knives with blades that are three

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205. See CAL. PENAL CODE § 626.10(b) (West 2013).

206. See *id.*

207. *Id.* § 626.10(a). A folder that does not lock open is more dangerous because the blade might fold in unexpectedly and cut a hand. Persons who are familiar with knife safety therefore usually prefer to carry folders that lock open.

208. See *id.* § 171b(3).

209. *Id.*

210. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

211. CAL. PENAL CODE § 21510 (West 2012).

inches or longer (with some exemptions).<sup>212</sup> Similarly, Oakland prohibits carrying knives with blades three inches or longer, but also “any snap-blade or spring-blade knife” (older terms for switchblades), regardless of knife length.<sup>213</sup> San Francisco prohibits loitering while carrying a concealed knife with a blade three inches or more long, or carrying a concealed switchblade knife of any length.<sup>214</sup> Because of the complexity of California state laws and local ordinances, it would be very easy to unintentionally break the law while carrying a knife with no criminal intent.

### C. District of Columbia

The District of Columbia is already famous for its unusual and extreme firearms laws, some of which were struck down in *Heller* and others of which are the subjects of ongoing litigation.<sup>215</sup> The District is also the home of equally severe knife laws. D.C. law prohibits not only carrying a pistol without a license but also “any deadly or dangerous weapon capable of being so concealed.”<sup>216</sup> This prohibition applies not simply in public places; the statute adds an additional penalty for doing so “in a place other than the person’s dwelling place, place of business, or on land possessed by the person.”<sup>217</sup>

It does not matter whether the knife is actually carried concealed. The fact that the knife is *concealable* makes open carrying a crime. The punishment for carrying in the home is “a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both.”<sup>218</sup> In other words, carrying a carving knife (or even a paring knife) to the dining room table in the District of Columbia appears to be a criminal offense.

Prosecutions for home carry of knives seem to be rare in D.C., likely because such carrying would rarely come to the attention of

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212. LOS ANGELES, CAL., MUN. CODE § 55.10 (2012) (exemptions include “where a person is wearing or carrying a knife or dagger for use in a lawful occupation, for lawful recreational purposes, or as a recognized religious practice, or while the person is traveling to or returning from participation in such activity.”).

213. OAKLAND, CAL., MUN. CODE §§ 9.36.010–.020 (2012).

214. SAN FRANCISCO, CAL., MUN. POLICE CODE, art. 17 § 1291 (2012).

215. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1248–49 (D.C. Cir. 2011) (affirming basic registration requirements for rifles and a ban on many semi-automatic rifles and on detachable rifle magazines holding more than ten rounds, while remanding for further consideration of long gun registration period and of unusual registration requirements for all guns, such as fingerprinting, training, and periodic re-registration).

216. See D.C. CODE § 22-4504(a) (2012).

217. *Id.*

218. *Id.* § 22-4515.

law enforcement. In *Heller*, the Supreme Court struck down a similar D.C. ban on carrying guns that even prohibited a person who had a lawfully registered rifle in the home from carrying the gun from the bedroom into the kitchen in order to clean it.<sup>219</sup> Like the D.C. gun carry ban, the D.C. knife carry ban is grotesquely overbroad and a plain violation of the Second Amendment.

#### *D. New York*

Glenn Reynolds's recent article, *Second Amendment Penumbras*, argues that, by analogy to the First Amendment, the "chilling effect" doctrine should be applied to the right to keep and bear arms.<sup>220</sup> While Reynolds's arguments concern firearms, they just as accurately apply to knife laws. Many restrictions and regulations adopted "[d]uring our nation's interlude of hostility toward guns in the latter half of the twentieth century" suggest that:

the underlying goal is to discourage people from having anything to do with firearms at all. . . . At present, Americans face a patchwork of gun laws that often vary unpredictably from state to state, and sometimes from town to town. Travelers must thus either surrender their Second Amendment rights, or risk prosecution.<sup>221</sup>

One example of the chilling effect of knife regulation comes from New York City. Defendant John Irizarry was arrested in Brooklyn when a police officer noticed a folding knife sticking out of his pocket.<sup>222</sup> The police officer decided (as it turns out, incorrectly) that this was a gravity knife<sup>223</sup> and stopped Irizarry. Irizarry explained that he used the "Husky Sure-Grip Folding Knife" as part of his job, as did indeed turn out to be the case. The police officer arrested him anyway, leading to the discovery of a concealed pistol.

Irizarry sought to suppress the discovery of the pistol because the search was subsequent to an arrest for something that was not a crime. The federal court ruled in Irizarry's favor because the knife in question was not a gravity knife within the definition of New York

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219. See *District of Columbia v. Heller*, 554 U.S. 570, 630–31, 635 (2008).

220. Glenn Harlan Reynolds, *Second Amendment Penumbra*, 85 S. CAL. L. REV. 247, 251 (2012).

221. *Id.* at 251–52.

222. *United States v. Irizarry*, 509 F. Supp. 2d 198, 199 (E.D.N.Y. 2007).

223. The precise definition of a "gravity knife" is discussed *supra* Part III.E. Irizarry's knife was plainly not a gravity knife. See *id.* at 210.

law, but also because “[t]he widespread and lawful presence of an item in society undercuts the reasonableness of an officer’s belief that it represents contraband.”<sup>224</sup> The defendant’s Husky Sure-Grip Folding Knife is a proprietary product sold by Home Depot, which sold 67,341 units in 2006 in New York state alone.<sup>225</sup> The manufacturer of a competing but similar knife reported that it sold 1,765,091 units nationally in 2006.<sup>226</sup> Although the courts did eventually find in Irizarry’s favor, any observer of what happened would rightly conclude that carrying even a completely legal knife in New York City is looking for trouble with the police. These onlookers would therefore choose not to exercise their constitutional right to carry knives, meaning their conduct would be chilled.

The courts ruled for Irizarry, but the New York City government did not learn its lesson. In 2010, Manhattan District Attorney Cyrus Vance, Jr. threatened criminal charges against Home Depot, Ace Hardware, and a number of hardware, general, and sporting goods retailers for selling knives that the District Attorney characterized as “illegal knives.”<sup>227</sup> As a result of the threat of criminal prosecution and to avoid going to trial on charges, these retailers signed settlement agreements and turned over \$1.9 million to finance a so-called public education campaign and other anti-knife efforts by the District Attorney.<sup>228</sup>

The specific claimed violations in this instance involved gravity knives or switchblades. Again, as in the *Irizarry* case, Home Depot pointed out that “[t]hese are common knives” often used in construction and home improvement projects.<sup>229</sup> Some of the arrests associated with these “illegal knives” demonstrate that the definition of “gravity knife” under New York law is subject to abusive prosecution. New York police arrested the noted painter John Copeland a few months after District Attorney Vance’s aforementioned settlement with the chain stores for carrying a Benchmade three-inch folding knife, on the allegation that it was a “gravity knife.”<sup>230</sup>

Although charges were eventually dropped against Copeland because his lawyer was able to show that Copeland is a serious artist

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224. *Id.* at 209.

225. *Id.* at 203–04.

226. *Id.* at 204.

227. See Press Release, N.Y. Cnty. Dist. Attorney’s Office, *supra* note 53.

228. See *id.*

229. John Eligon, *14 Stores Accused of Selling Illegal Knives*, N.Y. TIMES (June 17, 2010), [http://www.nytimes.com/2010/06/18/nyregion/18knives.html?\\_r=1&](http://www.nytimes.com/2010/06/18/nyregion/18knives.html?_r=1&).

230. See Melissa Grace, *Artist Furious for Being Busted on Weapons Possession Over a Pocket Knife He Uses for Work*, DAILY NEWS (Jan. 26, 2011), <http://www.nydailynews.com/new-york/artist-furious-busted-weapons-possession-pocket-knife-work-article-1.155163#ixzz2KSCt0Z5z>.

and used the knife in his work for cutting canvas,<sup>231</sup> it does not take much effort to imagine the results if someone who lacked a national reputation or a well-paid attorney had been arrested under the same circumstances. Police arrested Copeland because they thought that they saw a knife in his pants pockets. There was no allegation of any criminal misuse.<sup>232</sup>

Another example of the zeal with which New York City enforces its knife laws—with no connection to criminal misuse—is the story of Clayton Baltzer. Baltzer’s “fine-arts class at Baptist Bible College & Seminary in Clarks Summit, Pa.” went on a field trip to the Metropolitan Museum of Art.<sup>233</sup> In a subway station, a plainclothes police officer grabbed Baltzer by the arm because his pocketknife clip was visible.<sup>234</sup> Unlike Copeland, Baltzer was convicted and sentenced to a \$125 fine and two days of community service. Baltzer has learned his lesson: “I don’t plan on visiting New York unless I have to.”<sup>235</sup>

#### *E. State Regulation of Switchblades*

One of the most important state supreme court decisions regarding knives is *State v. Delgado*.<sup>236</sup> There, the Oregon Supreme Court struck down Oregon’s ban on the manufacture, sale, transfer, carrying, or possession of switchblades on the grounds that it violated

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231. *Id.*

232. *See id.*

233. Jeb Phillips, *Bible-College Student’s Pocketknife Spoils Trip to New York City*, COLUMBUS DISPATCH (June 12, 2012), <http://www.dispatch.com/content/stories/local/2012/06/12/knife-trouble-in-a-new-york-minute.html>.

234. New York City’s Administrative Code has the unusual requirement that all knives be carried concealed. *See* N.Y.C., N.Y., ADMIN. CODE § 10-133 (2010). The officer interpreted the visibility of the clip as a violation of the law:

Baltzer has carried a pocketknife almost everywhere since he was a 14-year-old camp counselor. He clips it on his pocket so that the clip is visible, but the knife isn’t. He always uses two hands to open it, the way most people would a regular pocketknife. . . .

In Baltzer’s telling, the officer tried to flick it open and couldn’t. He handed it to another officer, who did flick it open after several tries.

Baltzer was arrested and charged with the highest degree of misdemeanor under New York law. He had another knife in his backpack, a fixed-blade one he used to whittle for kids at a special-needs camp in Pennsylvania. He forgot he had it in his bag. Police confiscated that one, too.

Phillips, *supra* note 233.

235. Phillips, *supra* note 233.

236. *State v. Delgado*, 692 P.2d 610 (Or. 1984).

the Oregon Constitution's "right to bear arms" provision.<sup>237</sup> The defendant, Joseph Delgado, "was walking with a companion on a public street. The two appeared disorderly to an officer nearby, and when the defendant reached up as he passed a street sign and tapped or struck it with his hand, the officer confronted both individuals and conducted a pat down search."<sup>238</sup> In the course of that search, officers found a switchblade knife concealed in Delgado's pocket, which he claimed that he carried for self-defense.<sup>239</sup>

The Oregon Supreme Court built upon a previous decision, *State v. Kessler*, which had recognized that "the term 'arms,' as contemplated by the constitutional framers, was not limited to firearms but included those hand-carried weapons commonly used for personal defense."<sup>240</sup> *Kessler* had recognized that possession of billy clubs was protected in one's home.<sup>241</sup> *Delgado* extended *Kessler's* decision and recognized that a switchblade knife was also a protected arm under the state's constitution.<sup>242</sup>

The state argued that the switchblade knife "is an offensive weapon used primarily by criminals."<sup>243</sup> The Oregon Supreme Court decided that the distinction between defensive and offensive weapons was unpersuasive because the characteristics of defensive and offense of weapons strongly overlap: "It is not the design of the knife but the use to which it is put that determines its 'offensive' or 'defensive' character."<sup>244</sup>

The Oregon Supreme Court also engaged in originalist analysis, observing that possessing and carrying pocketknives is deeply embedded in European and American history. The court wrote that "knives have played an important role in American life, both as tools and as weapons. The folding pocketknife, in particular, since the early 18th century has been commonly carried by men in America and used primarily for work, but also for fighting."<sup>245</sup>

What about the switchblade? The state had argued that the switchblade is fundamentally different from its historical ancestor, the folding pocketknife, which would have been known when the Oregon Constitution was drafted in 1859. The Oregon Supreme Court was not persuaded:

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237. *Id.* at 610.

238. *Id.* at 611.

239. *Id.*

240. *See id.* at 611 (citing *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980)).

241. *Kessler*, 614 P.2d at 100.

242. *Delgado*, 692 P.2d at 611, 614.

243. *Id.* at 612.

244. *Id.*

245. *Id.* at 613–14.

We are unconvinced by the state's argument that the switchblade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. . . . This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned.<sup>246</sup>

The Oregon Supreme Court noted that the 1958 Federal Switchblade Act was based on the theory that switchblades were "almost exclusively the weapon of the thug and the delinquent."<sup>247</sup> The *Delgado* court, however, observed that the relevant congressional testimony "offers no more than impressionistic observations on the criminal use of switch-blades."<sup>248</sup> The *Delgado* decision did not completely forbid the state from regulating the manner in which a switchblade might be carried. The state could prohibit the concealed carry of a switchblade; the complete prohibition on sale, transfer, manufacture, or possession, however, was unconstitutional.<sup>249</sup>

Unlike Oregon, some states continue to ban even the home possession of switchblades.<sup>250</sup> If switchblades are "typically possessed . . . for lawful purposes," then the bans are unconstitutional under *Heller*. Of course, in a state where switchblades are banned, everyone who owns a switchblade is, by definition, a criminal. Besides that, bans on the sale of switchblades will have made it impossible for law-abiding citizens to obtain them, so the switchblades will not be in "typical" use in that state. A law passed during a moral panic sixty years ago might thus end up trumping the Constitution because its prohibition has made that weapon "not typically possessed . . . for lawful purposes."<sup>251</sup>

We can see this problem in *Lacy v. State*, in which the Indiana Court of Appeals upheld a ban on the possession of automatic knives on the grounds that "switchblades are primarily used by

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246. *Id.* at 614.

247. *Id.* at 612 (quoting S. REP. NO. 85-1980 (1958), reprinted in 1958 U.S.C.C.A.N. 3435).

248. *Id.*

249. *See id.* at 614.

250. *E.g.*, COLO. REV. STAT. § 18-12-102 (2012) (possession of gravity or switchblade knives is a felony, even in one's home); TENN. CODE ANN. § 39-17-1302 (2012) (possession, manufacture, transportation, repair, or sale of a switchblade knife is a class A misdemeanor).

251. *See* *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

criminals and are not substantially similar to a regular knife or jack-knife.”<sup>252</sup> If they are illegal, then by definition they will be “primarily used by criminals,”<sup>253</sup> as any prohibited arm would be.

Lacy quotes *Crowley Cutlery Co. v. U.S.* to refute the Oregon Supreme Court’s position in *Delgado* that switchblade knives are not intrinsically different from other knives.<sup>254</sup> *Crowley* argued that switchblade knives “are more dangerous than regular knives because they are more readily concealable and hence more suitable for criminal use.”<sup>255</sup> It requires no expert testimony to demonstrate that this claim is incorrect. A switchblade knife’s handle, when closed, must be at least as long as the blade. In this respect, it is no different from any folding knife; the enclosure must be slightly longer than the blade. No switchblade knife can be any more concealable than its non-automatic counterpart.

Besides that, all one need do is look at states where switchblades are not banned, and one will see that switchblades are indeed typically possessed by law-abiding citizens for legitimate purposes.

#### CONCLUSION

Knives are among the “arms” protected by the Second Amendment. They easily fit with the Supreme Court’s *Heller* definition of protected arms, namely that they be usable for self-defense and typically owned by law-abiding citizens for legitimate purposes.

Statutes that ban or impose special restrictions based on how a knife opens, or on whether an opened knife can be locked open, cannot survive any form of heightened scrutiny analysis. Indeed, many laws regulating knives cannot even survive rational basis scrutiny. As we have previously observed, knives are among the arms that Americans have a right to bear, and their lower lethality relative to handguns means that there is not even a *rational basis* for laws that regulate carrying knives more restrictively than carrying handguns.

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252. Lacy v. State, 903 N.E.2d 486, 492 (Ind. Ct. App. 2009).

253. See *id.* at 488, 491–92.

254. *Delgado*, 692 P.2d at 614 (“We are unconvinced by the state’s argument that the switch-blade is so ‘substantially different from its historical antecedent’ (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally.”)

255. *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 278 (7th Cir. 1988). Note that the plaintiff’s suit had far more serious problems than the question of the criminal nature of switchblades. The Court of Appeals wrote: “this is not to say that the issue of the Switchblade Knife Act’s constitutionality necessarily is frivolous. It is the specific grounds articulated by *Crowley* that are frivolous, and make the suit frivolous.” *Id.* at 279.



This Article has not aimed to resolve definitively every question about knife laws in the United States. Rather, it has endeavored to provide a starting point for further study and to examine some of the prohibitions that may be most clearly unconstitutional under the Second Amendment. In a practical sense, the most frequent way that Americans exercise their Second Amendment rights is by owning and carrying knives. Knife rights are worthy of judicial protection and of further scholarly study.