

# Knives and the Second Amendment

---

By David B. Kopel,<sup>1</sup> Clayton E. Cramer<sup>2</sup> & Joseph Edward Olson<sup>3</sup>

*This article is a working draft that will be published in 2013 in the University of Michigan Journal of Law Reform*

*Abstract: This Article is the first scholarly analysis of knives and the Second Amendment. Knives are clearly among the “arms” which are protected by 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.*

*Bans of knives which open in a convenient way (bans on switchblades, gravity knives, and butterfly knives) are unconstitutional. Likewise unconstitutional are bans on folding knives which, after being opened, have a safety lock to prevent inadvertent closure.*

*Prohibitions on the carrying of knives in general, or of particular knives, are unconstitutional. There is no knife which is more dangerous than a*

---

<sup>1</sup> Adjunct Professor of Advanced Constitutional Law, Denver University, Sturm College of Law. Research Director, Independence Institute, Denver, Colorado. Associate Policy Analyst, Cato Institute, Washington, D.C. Kopel is the author of 15 books and over 80 scholarly journal articles, including the first law school textbook on the Second Amendment: NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, & MICHAEL P. O’ SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (Aspen Publishers, 2012). [www.davekopel.org](http://www.davekopel.org).

<sup>2</sup> Adjunct History Faculty, College of Western Idaho. Cramer is the author of CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999) (cited by Justice Breyer in McDonald v. Chicago, 130 S.Ct. 3020, 3132), and ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE (2006), as well as co-author of, among other articles, Clayton E. Cramer & Joseph Edward Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL’Y 511 (2008) (cited by Justice Scalia in District of Columbia v. Heller, 128 S. Ct. 2783, 2795 (2008)) and Nicholas J. Johnson and George A. Mocsary, *“This Right is Not Allowed by Governments that are Afraid of the People”: The Public Meaning of the Second Amendment When the Fourteenth Amendment was Ratified*, 17 GEORGE MASON L. REV. 823 (2010) (cited by Justice Alito in McDonald v. Chicago, 130 S.Ct. at 3040 n. 21, 3041 n. 25, 3043). Cramer’s website is <http://www.claytoncramer.com>.

<sup>3</sup> Professor of Law, Hamline University School of Law, A.B. University of Notre Dame, J.D. (distinction) Duke University, LL.M. University of Florida. Co-author of Clayton E. Cramer & Joseph Edward Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL’Y 511 (2008).

The authors thank Eugene Volokh, Robert Dowlut, and Rhonda L. Thorne Cramer for their comments and suggestions.

*modern handgun; to the contrary, knives are much less dangerous. Therefore, restrictions on the carrying of handguns set the upper limit for restrictions on knife carrying.*

## **I. 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. In this Article, we analyze Second Amendment protection for the most common “arm” in the United States—the knife.

Only about half of U.S. households possess a firearm, and many of those households have only one or two firearms. In contrast, almost every household possesses at least several knives, not even counting table knives.

Part II of this Article describes some of the more oppressive knife control laws in various states and cities that might be unconstitutional, if the Second Amendment applies to knives.

Part III explains the differences among various types of edged weapons. We cover bayonets, swords, folding knives, automatic knives, switchblades, gravity knives, butterfly knives and the targets of knife control in the 19<sup>th</sup> century: Bowie knives and Arkansas toothpicks.

In Part IV, we argue that knives in general, and all of the knives discussed previously (with the possible exception of the now-obscure Arkansas toothpick) are protected by the Second Amendment.

Part V analyzes the important 19<sup>th</sup> century cases involving Bowie knives and Arkansas toothpicks.

Criminological considerations are the topic of Part VI, which provides the data for the intuitively obvious conclusion that knives are less dangerous than guns.

Part VII considers the various standards of review that have been used for Second Amendment cases post-*Heller*. Applying even the weakest relevant standard of review, intermediate scrutiny, it seems clear that some knife laws are unconstitutional, namely: bans on knives which open in a convenient manner (switchblades, gravity knives, and butterfly knives); bans on folding knives which have a safety lock; and laws which restrict the carrying of knives more stringently than the carrying of handguns.

## **II. Some Knife Laws that May be Unconstitutional**

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 little idea of the extent to which knives are often subject to startlingly severe laws. These laws frequently concern carrying, but may also forbid manufacture, sale, purchase or even possession in one's home. 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 in as to what is legal, and where, can be confusing.

One reason for the anomaly is that almost all states have some form of legislative or judicial preemption for gun control; all (or at least many) gun controls are supposed to be uniform throughout the state, so local governments are greatly restricted in what, if any, gun control laws they may enact.<sup>4</sup> In contrast, only a few states have knife preemption, and those are recent enactments.<sup>5</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. He was charged with possession of a fixed blade knife.<sup>6</sup> (The blade of a fixed blade knife is solidly attached to handle; for example, typical kitchen cutlery is fixed blade. In contrast, the blade of a folding knife has a pivot allowing the blade to store by folding into the handle.) 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>7</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 the carrying of a fixed blade knife exempted, “A licensed hunter or licensed fisherman actively engaged in hunting and fishing activity including... travel related thereto.”<sup>8</sup> When Riggins started his travels, he had planned to go

---

<sup>4</sup> See STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK (2012).

<sup>5</sup> See ARIZ. REV. STAT. § 13-3120 (enacted 2010; first state to preempt knife laws); UTAH CODE § 10-8-47.5 (preemption for municipalities); UTAH CODE § 17-50-332 (preemption for counties) (both enacted in 2011); N.H. REV. STAT. ANN. § 159-26; GA. CODE ANN. § 16-11-136 (enacted 2012).

<sup>6</sup> SEATTLE, WASH., MUN. CODE §§ 12A.14.070 (1987), 12A.14.080 (1985), available at <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CHAP&s1=12A.14.h2.&Sect6=HITOFF&l=20&p=1&u=/~public/chap1.htm&r=1&f=G>.

<sup>7</sup> *Seattle v. Riggins*, 63 Wash. App. 313, 818 P.2d 1100 (1991).

<sup>8</sup> SEATTLE, WASH., MUNICIPAL CODE §12A.14.100(A) (1987).

fishing, and thus was within the “travel related thereto” exemption.

Another exemption protected, “Any person immediately engaged in an activity related to a lawful occupation which commonly requires the use of such knife, provided such knife is carried unconcealed...”<sup>9</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. 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>10</sup>

The appellate court held that Riggins did not fall within “any one of the three fairly broad exemptions” of Seattle’s knife ordinance, and the court was unwilling to recognize that a day that had started with Riggins’ knife exempted for a fishing trip had changed as his plans changed.<sup>11</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.<sup>12</sup>

Washington has a strong state constitutional guarantee of the right to keep and bear arms, and state appellate courts have often enforced this provision conscientiously, when the case involved a firearm. Yet the intermediate appellate court brushed off Riggins’ constitutional claim, gave the ordinance “every presumption of constitutionality” and upheld the Seattle ordinance under a mere “reasonable and substantial” test.<sup>13</sup>

The *Riggins* decision was in 1991, and involved only the state constitution. The *Riggins* approach is contrary to the approach that the U.S. Supreme Court would later outline for Second Amendment cases. According to the Supreme Court, broad bans on ownership or carrying (keeping and bearing) are *per se* unconstitutional.

Both *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010) struck down bans on possession of handguns without even needing to resort to a standard of scrutiny; the ban on handgun possession was so plainly contrary to the constitutional text that there was no need to proceed to levels of scrutiny.<sup>14</sup>

---

<sup>9</sup> *Id.*, § 12A.14.100(B) (1987).

<sup>10</sup> *Id.*, § 12A.14.100(C) (1987).

<sup>11</sup> *Riggins*, at 317.

<sup>12</sup> Had he carried the knife in a tool box or otherwise securely wrapped, he likewise would not have been criminally convicted.

<sup>13</sup> “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.” *Riggins*, at 317.

<sup>14</sup> *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

In 2012, the Seventh Circuit correctly applied the *Heller/McDonald* model to Illinois, which alone among the states, prohibits gun carrying in public places (with a few exceptions like the Seattle law, such as while hunting). Judge Richard Posner’s decision struck down the Illinois ban, without needing to get into three-tiered scrutiny.<sup>15</sup>

Alternatively, a future 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 which would have let 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>16</sup>

## B. California

Carry a knife in California? You can carry a fixed blade knife on college campuses there, if the blade is not longer than 2 ½ inches. Folding knives are unrestricted by state law on college campuses.<sup>17</sup> (Some campuses may have more restrictive rules.) On primary and secondary school grounds, the law is the same for fixed blades (banned if more than 2 ½ inches). But all folding knives are banned, regardless of blade length, if the blade can lock open.<sup>18</sup> On the other hand, you can carry a knife with a fixed blade up to four inches into a government building. You can also carry a folding knife with a blade up to four inches, but *only if* the blade locks open.<sup>19</sup>

*Heller* affirmed the permissibility of special restrictions on arms carrying in “sensitive places, such as schools and government buildings.” So presuming that California can legally enact some special restrictions on knife carrying in those places, the actual restrictions are irrational. There is no possible reason why lock-blade folders are okay, and non-locking folders are banned in one location, whereas just the opposite is the rule in another

---

home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,’ 478 F.3d, at 400, would fail constitutional muster.”); *McDonald v. 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.”)

<sup>15</sup> *Moore v. Madigan*, 702 F.3d 933 (7<sup>th</sup> Cir. 2012). *reh’g den.* 2013 WL 656749 (Feb. 22, 2013).

<sup>16</sup> *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lehr v. Robertson*, 463 U.S. 248, 266 (1983)

<sup>17</sup> CAL. PENAL CODE § 626.10(b) (2011).

<sup>18</sup> CAL. PENAL CODE § 626.10(a) (2011). 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 which lock open.

<sup>19</sup> CAL. PENAL CODE § 171b (2011).

location.

For carry in public places in general (not in the sensitive places), California law is at least coherent at the state level. You can openly carry any knife. You can concealed carry almost any folding knife. The one exception is that you cannot carry in any fashion, open or concealed, a switchblade with a blade longer than two inches.<sup>20</sup> Switchblades are discussed in Part III, *infra*.

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 inches or longer (with some exemptions).<sup>21</sup> Oakland similarly prohibits open carry of 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>22</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>23</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 subject of ongoing litigation.<sup>24</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 “any deadly or dangerous weapon capable of being so concealed.” 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>25</sup>

It does not matter whether the knife is actually carried concealed. The fact that the knife is *concealable* makes open carrying into a crime. The punishment for carry in the home is “a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both.”<sup>26</sup> In other words, carrying a carving knife (or even a paring knife) to the dining room table in the District

---

<sup>20</sup> CAL. PENAL CODE § 653k (2011).

<sup>21</sup> LOS ANGELES, CAL., MUNICIPAL 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.”)

<sup>22</sup> OAKLAND, CAL., MUNICIPAL CODE § 9.36.020 (2011).

<sup>23</sup> SAN FRANCISCO, CAL., MUNICIPAL CODE, § 1291 (2011).

<sup>24</sup> *Heller v. District of Columbia*, 670 F.3d 1244 (D.C.Cir. 2011) (remanding in part).

<sup>25</sup> D.C. CODE ANN. § 22-4504 (2011).

<sup>26</sup> D.C. CODE ANN. § 22-4515 (2011).

of Columbia appears to be a criminal offense.

Prosecutions for home carry of knives seem to be rare in D.C., because such carrying would rarely come to the attention of law enforcement. In *Heller*, the Supreme Court struck down a similar D.C. ban on the carrying of guns, which 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>27</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, if the Second Amendment applies to knives.

## D. New York

Glenn Reynolds' recent *Second Amendment Penumbra*s article argues that by analogy to the First Amendment, the doctrine of "chilling effect" should be applied to the right to keep and bear arms. While Reynolds' arguments concern firearms, they just as accurately apply to knife laws. Many restrictions and regulations adopted "During our nation's interlude of hostility toward guns in the latter half of the twentieth century" seem as though "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>28</sup>

One recent example of the chilling effect comes from New York City. Defendant John Irizarry was arrested in Brooklyn when a police officer noticed a folding knife sticking out of the defendant's pocket. The police officer decided (as it turns out, incorrectly) that this was a gravity knife,<sup>29</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 law, but also, "The widespread and lawful presence of an item in society undercuts the reasonableness of an

---

<sup>27</sup> *Heller*, *supra*.

<sup>28</sup> Glenn Harlan Reynolds, *Second Amendment Penumbra*s: *Some Preliminary Observations*, 85 SOUTHERN CALIFORNIA L. REV. 247, 251-02 (2012).

<sup>29</sup> The precise definition of a "gravity knife" is discussed in Part III, *infra*. Irizarry's knife was plainly not a gravity knife.

officer's belief that it represents contraband.”<sup>30</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. The manufacturer of a competing but very similar knife reported that it sold 1,765,091 units nationally in 2006.<sup>31</sup> While 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.

The courts ruled for Irizarry, you would think New York City government would have learned its lesson. Not so. Manhattan District Attorney Cyrus Vance Jr. in 2010 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.” 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 DA.<sup>32</sup>

The specific claimed violations involved gravity knives or switchblades. Again, as in the *Irizarry* case, Home Depot pointed out that, “These are common knives” often used in construction and home improvement projects.<sup>33</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 DA Vance’s settlement for carrying a Benchmade 3 inch folding knife, on the allegation that it was a “gravity knife.”<sup>34</sup>

While charges were eventual dropped against Copeland, because his lawyer was able to show that Copeland is a serious artist, and used the knife in his work for cutting canvas, 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>35</sup>

---

<sup>30</sup> United States v. Irizarry, 509 F.Supp.2d 198, 209 (E.D.N.Y. 2007).

<sup>31</sup> *Id.* at 203-04.

<sup>32</sup> Manhattan County District Attorney’s Office, “District Attorney Vance Announces Major Investigation of Illegal Knives in New York,” June 6, 2010, <http://manhattanda.org/press-release/district-attorney-vance-announces-major-investigation-illegal-knives-new-york>, last accessed February 9, 2013.

<sup>33</sup> 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=0](http://www.nytimes.com/2010/06/18/nyregion/18knives.html?_r=0), last accessed February 9, 2013.

<sup>34</sup> Melissa Grace, “Artist furious for being busted on weapons possession over a pocket knife he uses for work,” (N.Y.) DAILY NEWS, January 26, 2011, <http://www.nydailynews.com/new-york/artist-furious-busted-weapons-possession-pocket-knife-work-article-1.155163#ixzz2KSct0Z5z>, last accessed February 9, 2013.

<sup>35</sup> *Id.*



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, Pennsylvania” went on a field trip to the Metropolitan Museum of Art. In a subway station, a plainclothes police officer grabbed him by the arm because Baltzer’s pocket knife clip was visible.<sup>36</sup> Unlike Copeland, Baltzer was convicted, 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>37</sup>

### III. 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 really big blade and says, “*That’s* a knife!”<sup>38</sup> (Of course, in New York City, the carrying of either of those knives is illegal.) 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 what types of knives were regulated.

At least for modern general usage, Wiktionary.com is a good guide. The website offers three definitions for “knife”: “1. A utensil or a tool designed for cutting, consisting of a flat piece of hard material, usually steel or other

---

<sup>36</sup> New York City’s Administrative Code has the unusual requirement that all knives be carried concealed. N.Y. CITY ADMIN. CODE § 10-133. 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.

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>, last accessed February 9, 2013.

<sup>37</sup> *Id.*

<sup>38</sup> 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 which is a near-replica of the movie knife. <http://www.bladeforums.com/forums/showthread.php/737272-Crocodile-Dundee-knife-finally-in-production!!!!>

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. 3. Any blade-like part in a tool or a machine designed for cutting, such as the knives for a chipper.”

For purposes of this article, we can ignore definition number 3, which involves the knives or blades in machines, such as in wood-chippers. We can also point out that the physical definition for number 1 (tools or utensils) is exactly the same as for definition number 2 (short weapons).

Finally, in the interest of precision, we point out that a “dagger” (an example given in definition number 2) is a type of knife; all daggers are knives, but most knives are not daggers.

## A. Bayonets

A bayonet is designed to be mounted on the muzzle of a firearm.<sup>39</sup> Some old-fashioned bayonets were just thrusting weapons with a point; they did not have a sharpened edge. In contrast, modern bayonets have sharpened edges. Over the previous century, bayonets also got shorter, shrinking from the size of a short sword to the size of a typical knife.<sup>40</sup>

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 as a handheld weapon. As a result, the blade design became shorter, wider, and thicker in view of the bayonet’s multitasking role for the late twentieth century soldier.

Although anything with a blade can be used as an offensive or defensive arm, World War II saw the introduction of the M3 fighting knife, a bayonet which was specifically designed to be usable as a hand-held weapon. In the Vietnam-era, the bayonets were designed to not only be usable as fighting knives, but also to be handy as a wire cutter, box cutter, or improvised pry bar.

---

<sup>39</sup> Note that an out of ammunition rifle with a bayonet on it is functionally equivalent to a Roman spear or javelin. Both are arms.

<sup>40</sup> Older bayonets, such as the World War I version designed for the Springfield 1903-A3 rifle, was a thinner, lighter, seventeen-inch version of the old Roman army 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.



U.S. M9 BAYONET

## B. Swords

A sword is “A long-bladed weapon having a handle and sometimes a hilt and designed to stab, cut or slash.”<sup>41</sup> So 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 19th and early 20th century were called “sword bayonets.”<sup>42</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>43</sup>

A person can look at a pocketknife, and then look at a medieval broad sword with a 48-inch blade, and the person can 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 fixed blade knife with a 14-inch blade? An 18-inch machete?

As a Second Amendment issue, the knife/sword distinction is not particularly important. If one is protected by the Second Amendment, so is the other. (Just as handguns and long guns are both Second Amendment arms.) So while this Article concentrates on knives, most of the analysis applies equally to swords.

## C. Tools and “Offensive weapons”

In the past, some states imposed special restrictions on certain types of knives, while leaving swords alone. Often, the particular knives singled out for extra restrictions were those which could open most easily.

But the distinction does not make much sense. Guns can be used for offense or defense. The very characteristic that makes a gun so useful for

---

<sup>41</sup> <http://en.wiktionary.org/wiki/sword>.

<sup>42</sup> 44 JOURNAL OF THE MILITARY SERVICE INSTITUTE OF THE UNITED STATES 255-256 (1908).

<sup>43</sup> THOMAS WILHELM, A MILITARY DICTIONARY AND GAZETTEER: COMPRISING ANCIENT AND MODERN MILITARY TECHNICAL TERMS 565 (1881).

defense—the ability to project force at a distance, rather than in close contact—also make the gun particularly dangerous as an offensive weapon. The difference between offensive and defensive is not the 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.

One important difference, however, between knives and guns is the former's much greater frequency of use as a tool.

It is true that firearms are not always used as weapons (against humans or animals). The vast majority of the rounds of ammunition that are fired in this country are in the course of target shooting. There, the gun is a sporting device used to attempt to accurately move an object over a distance, towards a target. In this regard, the gun is used like a golf club.

Knives, though, are not used for sports nearly so frequently. (Let's presume that all the fencing weapons, including the saber, are not normally considered knives, because of their length.) But knives, unlike guns, are frequently used as tools. Indeed, that is by far their most frequent use.

In a pinch, you might use an unloaded gun as an improvised hammer, but that doesn't happen very often. Knives are pervasively used as tools.

As the Oregon Supreme Court observed in 1984, summarizing the history of knives in America, "It 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>44</sup>

Into the twentieth century, the penknife was an essential accessory for every student or literate adult. As the name suggests, the penknife was used for cutting and slitting a quill or sharpening a pencil. Even after the steel pen rendered the quill obsolete, the term persisted for any small, folding pocket knife.<sup>45</sup> Schoolchildren frequently carried penknives, as is attested by the knife's frequent appearance in elementary school readers of the nineteenth century.<sup>46</sup> Of course, said penknife was also often used for the many other common purposes of knives.

Knives today are important tools for sportsmen, for filleting a fish or skinning an animal. Many occupations continue to rely upon utility knives,

---

<sup>44</sup> State v. Delgado, 692 P.2d 610 (Or. 1984).

<sup>45</sup> SIMON MOORE, PENKNIVES AND OTHER FOLDING KNIVES 25-27 (2008).

<sup>46</sup> RICHARD EDWARDS & J. RUSSELL WEBB, ANALYTICAL THIRD READER 161 (1867); LEWIS BAXTER MONROE, THE FOURTH READER 39-40 (1872); CHARLES WALTON SANDERS, THE SCHOOL READER: THIRD BOOK 58 (1841); JOHN MASON, MASON'S FIRST HOME & SCHOOL READER 75-76 (1874). One of the authors has carried a pocket knife every day of his life since 3<sup>rd</sup> grade in 1955. He has never given a moment's thought to the legality of this common practice.

such as roofing,<sup>47</sup> electricians,<sup>48</sup> and construction.<sup>49</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>50</sup> For the same reason that a knife can be used as an offensive weapon, it can also be used as a defensive weapon.

If the Second Amendment protects knives, it is not because knives are frequently used by electricians and roofers. The Second Amendment does not protect voltage meters or nails. The Second Amendment protects arms.

## D. One-hand openers

One important division is between folding knives and fixed blade knives. Many state and local regulations treat fixed blade knives differently from folding knives.<sup>51</sup> The inaccurate assumption may be that a fixed blade knife is a weapon, while 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, not to mention virtually all kitchen cutlery.<sup>52</sup>

Among folding knives, some laws distinguish between those that lock open, and those that do not; some statutes put folding knives that lock in the same category as fixed blade knives.<sup>53</sup> The legislators think that a locking

---

<sup>47</sup> BRETT MARTIN, COMPLETE GUIDE TO ROOFING & SIDING: INSTALL, FINISH, REPAIR, MAINTAIN 58 (2004). See Irizarry, *supra* at 201-03 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 defendant used at the direction of his employer "for cutting sheet rock."

<sup>48</sup> GREGORY W. 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).

<sup>49</sup> MYRON R. FERGUSON, DRYWALL: PROFESSIONAL TECHNIQUES FOR GREAT RESULTS 51 (4th ed. 2012).

<sup>50</sup> *Box Cutters Found on Other September 11 Flights*, CNN, Sept. 24, 2001, <http://archives.cnn.com/2001/US/09/23/inv.investigation.terrorism/>.

<sup>51</sup> *E.g.*, KAN. STAT. ANN. § 21-4201(2) (2009) prohibits concealed carry of "a dagger... dangerous knife, straight-edged razor, stiletto" but exempts "an ordinary pocket knife with no blade more than four inches in length."

<sup>52</sup> MIKE BURTON, VENEERING: A FOUNDATION COURSE 28-29 (rev. ed. 2006).

<sup>53</sup> CAL. PENAL CODE § 171b (2011) (locking folding knives and fixed blade knives where blade exceeds four inches prohibited in government buildings); CAL. PENAL CODE § 626.10(a) (2011) (fixed blade knives where the blade exceeds 2 ½" and locking folding knives, regardless of blade length prohibited on primary and secondary school grounds); CAL. PENAL CODE § 626.10(b) (2011) (but locking folding knives allowed on college campuses regardless of length, while fixed blade knives longer than 2 ½" prohibited on college campuses).

folding knife can be used as a weapon, while a folding knife that does not lock is a tool. The reason is simplistic: a locking knife will not close on your hand when it meets resistance in a fight. This is true. But the 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 important when roofing a house and when fighting for your life. Laws that discriminate against locking blade folding knives needlessly endanger the common knife user.

## 1. **Folding Knives**

For a folding knife, a very useful feature is the ability to open it with one hand. Such knives have a great many legitimate purposes, of which the most obvious is where only one hand is available to hold the knife, and the other is occupied. The traditional tall ships motto, “One hand for yourself and one for the ship”<sup>54</sup> presents an obvious application for such a knife; so does a rancher holding an animal’s lead with one hand, while opening a knife to free the beast from an entanglement with the other hand.

In many state laws, precisely how the knife opens makes a great deal of difference. Let’s say that in or on the blade of a folded knife, there is a small indentation, hole, or post near the top of the blade. To open the knife, you put your thumb in the indentation, hole, or stud, and push the blade into the open position. As a general matter under American law, that’s fine.

Suppose instead that the knife has a button in the handle, and when you push the button, a spring then pushes the blade open automatically. Then, we have a “switchblade,” which is one type of “automatic knife.” Accordingly to federal law, and a minority of state laws, automatic knives are uniquely bad.

## 2. **Automatic and Gravity Knives**

An automatic knife is biased towards opening via a spring; some type of latch or lock keeps the blade retained in the handle until needed. For example, in the switchblade knife, when the knife is folded, the internal spring is always pressuring the blade towards opening. The only thing that restrains the blade is a latch or lock; when the user presses a button the latch or lock is released, and so the blade then automatically springs open, and typically locks in the open position.

Another type of automatic knife is the “out the front” knife (OTF). An OTF is not a folding knife. When the button is pushed, the blade is pushed out the front of the handle by the spring.

---

<sup>54</sup> JENNIFER SPEAKE & JOHN SIMPSON, OXFORD DICTIONARY OF PROVERBS s.v. “One Hand” (2008).

Then there is the gravity or inertia knife. Here, there is 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 centrifugal force will cause the blade to move into the open position.<sup>55</sup> Then, the blade must be locked into the open position, or else it would slide back into the handle as soon as any force was applied (e.g., during cutting or thrusting).

So we have listed three types of knives which are particularly easy to open with one hand: switchblade, out the front, and gravity. Of these, the first two are properly called “automatic knives.”

But poorly-written statutes create confusion. The 1958 Federal Switchblade Act (FSA) limits the importability and interstate commerce of “switchblades.”<sup>56</sup>

Many state and local laws copy the federal definition. Unfortunately, the federal definition of “switchblade” includes out the front knives and gravity knives as well as real switchblades. (By interpretation, some of the state laws also cover butterfly knives, which are discussed *infra*.)

The practical reason why a person would want to own any “switchblade” (under the broad federal definition) is that she would want a knife that can be easily be opened with one hand.

Automatic knives were first produced in the 1700s.<sup>57</sup> The earliest automatic knives were custom made for wealthy customers. By the mid-19<sup>th</sup> century, factory production of automatic knives made them affordable to ordinary consumers.<sup>58</sup>

During World War II, American paratroopers were issued switchblade knives, “in case they become injured during a jump and needed to extricate themselves from their parachutes.” The switchblade enabled them to cut themselves loose with only one hand.<sup>59</sup>

In the 1950s, there was great public concern about juvenile delinquency. 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

---

<sup>55</sup> N.Y. PENAL L. § 265.00(5) (2011). Gravity knives can be either out-the-front or side-openers. RICHARD V. LANGSTON, *THE COLLECTOR’S GUIDE TO SWITCHBLADE KNIVES* 30 (2001).

<sup>56</sup> 15 U.S.C. 1241(b). Another statute prohibits possession of switchblade knives in territories, possessions, or “Indian country,” except for “any individual who has only one arm” and who uses a blade less than three inches in length. 15 U.S.C. §§ 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 § 750.226a (2011).

<sup>57</sup> LANGSTON at 6.

<sup>58</sup> *Id.* One of the first U.S. factories was the Waterville Cutlery Company, founded in 1843 in Waterbury, Connecticut. *Id.* at 7.

<sup>59</sup> Irizarry, at 204.

use of automatic knives by the fictional delinquents.

Partly because of Hollywood's sensationalism, the switchblade was associated in the public mind 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 is an important part the origin of the many statutes imposing special restrictions on switchblades.

There have been two recent attempts to blur the distinction between automatic knives and non-automatics. 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 if they were automatics.

This new interpretation contradicted decades of previous Customs interpretation of the federal switchblade statute, and would have covered non-automatic folding knives which have an indentation, hole, or stud to assist opening.<sup>60</sup> The proposed new interpretation caused such an uproar that Congress 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."

As detailed *infra*, Manhattan District Attorney Cyrus Vance, Jr., has been doing something similar with the New York State switchblade and gravity knife statute. 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. The prosecutions are flagrantly abusive. However, 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. Thus, there have been many out-of-court settlements from retailers from whom Vance's office has pocketed lots of money.

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>61</sup> Other legislatures have enacted

---

<sup>60</sup> 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. 15 U.S.C. § 1241(b). New York State law refers to "centrifugal force" (not inertia) in the state definition. N.Y. PENAL L. § 265.00(5) (2011). Both statutes are attempting to describe the same kind of knife.

<sup>61</sup> See N.H. H.B. 544 (2010) (repealing all state knife laws involving non-criminal uses of knives); Missouri S.B. 489 (2012) (repealing switchblade ban in Mo. Rev. Stat. § 571.020); Wash. H.B. 2347 (2012) (narrowing and clarifying definition of "spring-blade" knives in Wash. Rev. Code Ann. § 9.41-250).

Similar bills under consideration in 2013 are Vt. Bill H-128 (preemption); Kan. H.B.-2033 (preemption, plus repeal of ban on switchblades, dirks, daggers and stilettos); Tenn. S.B. 1015 & H.B. 0581 (preemption; repeal of ban on automatic knives; repeal of 4 inch blade limit); Ind. S.B. 181 (repeal of ban on automatic knives).



preemption statutes, which eliminate local bans on switchblades, and also eliminate other local knife ordinances more restrictive than state law.<sup>62</sup>

### 3. Butterfly knives

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



A BUTTERFLY KNIFE OPEN AND CLOSED

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, though not all do. In some states, the lack of a lock for the handles is the difference between a legal and an illegal knife. 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. 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, in a one-handed operation. Like the switchblade, the butterfly’s use in movies has given it an unearned reputation as a criminal’s weapon. As with the switchblade, opening one is visually interesting, and frightening to

---

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 at 26.

<sup>62</sup> See *supra* note \_\_\_\_.

some persons unfamiliar with knives.<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, and yet used primarily as tools. A judge or juror's perception of the purpose of a knife may be quite different from the owner's reason for its possession, or the designer's purpose.<sup>64</sup>

## D. Bowie knives and Arkansas toothpicks

America's first period of knife control was 1837-1840, when the nation experienced a panic over the Bowie knife and the Arkansas toothpick.

The precise meanings of "Bowie knife" and "Arkansas toothpick" are vague. Indeed, historians of weaponry still do not know exactly what kind of knife Colonel Jim Bowie used in the famous 1827 fight by a riverside in Louisiana.<sup>65</sup>

Renzin Bowie (Jim's brother) was the actual inventor 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..." According to Renzin, the knife was designed for bear hunting.<sup>66</sup> Yet many people use "Bowie knife" to describe knives that have curved blades, or blades much longer than nine inches. A common characteristic seems to be that a "Bowie knife" is sharpened on one edge (per Renzin's original model), has a relatively thick spine, and a clip point.

Arkansas toothpicks have triangular blades as much as eighteen inches long, sharpened on both edges. The blade is typically thinner than the Bowie knife.

The strange legal history of Bowie knives and Arkansas toothpicks in the nineteenth century is detailed *infra* in Part V.

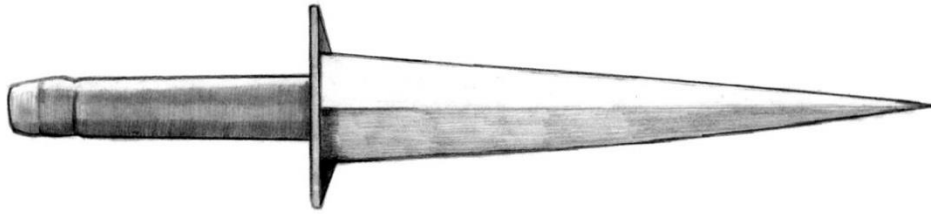
---

<sup>63</sup> Michael Burch, *Butterfly Knives Take Wing*, in JOE KERTZMAN, KNIVES 26 (2008).

<sup>64</sup> The problem of unpredictable jury and judge decisions is one reason why First Amendment law keeps many cases away from decisions on the facts, by setting strict standards about what kinds of libel cases or criminal incitement cases can go to the trier of fact.

<sup>65</sup> See RAYMOND W. THORPE, BOWIE KNIFE (1948).

<sup>66</sup> R.P. Bowie, letter to the editor, *Planter's Advocate*, Aug. 24, 1838, quoted in FREDERICK MARYATT, 1 A DIARY IN AMERICA: WITH REMARKS ON ITS INSTITUTIONS, PART SECOND 291 (1839).



ARKANSAS TOOTHPICK<sup>67</sup>

Both knives could be used as tools and often were; however, the Arkansas toothpick was designed for fighting, and the Bowie knife was quite good for that purpose, although it was designed for hunting.

## IV. Knives as Constitutionally Protected Arms

### 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>68</sup> So as a starting point, all knives would seem to be within the scope of the Second Amendment, just as all firearms are. Like firearms (and unlike battleships or tanks), 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 and carried and used in case of confrontation.

The *Heller* opinion 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>69</sup>

*Heller* makes it clear that the type of arms which are protected are not solely those which 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>70</sup> By this reasoning, any weapon that can be used for either militia duty or for private self-defense qualifies as an “arm.” Although militia use is not necessary to

---

<sup>67</sup> Drawing by Rhonda L. Thorne Cramer.

<sup>68</sup> *Heller* at 593.

<sup>69</sup> *Heller* at 625. For an application, see *People v. Yanna*, 297 Mich.App. 137 (2012) (holding unconstitutional a state law “which prohibits possession of tasers and stun guns by private individuals,” tasers “while plainly dangerous, are substantially less dangerous than handguns” which *Heller* found protected).

<sup>70</sup> *Heller*, at 585.

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

The federal Militia Act of 1792 required all able-bodied free white men between 18 and 45 to possess, among other items, “a sufficient bayonet....”<sup>71</sup> This both establishes 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 the carrying of swords in non-militia situations, such as when going to church.<sup>72</sup> In New England, the typical choice for persons required to own a bayonet or a sword was to choose the sword; this was 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>73</sup>

---

<sup>71</sup> Militia Act, 1 STAT. 271-04 (1792).

<sup>72</sup> For laws of the colonies of New Hampshire, New Haven, New Jersey, New Plymouth, New York, North Carolina, Rhode Island, and Virginia, see: ACTS AND LAWS, PASSED BY THE GENERAL COURT OR ASSEMBLY OF THE PROVINCE OF NEW-HAMPSHIRE IN NEW-ENGLAND 91-92 (Boston: B. Green, 1716) (“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.) (Hartford, Conn.: Case, Tiffany, 1857) (“a sworde”); *id.* at 131-132 (all males aged 16 to 60 must have “a sword”); *id.* at 201-02 (same); AARON LEARNING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 78 (Philadelphia: W. Bradford, 1752) (every male aged 16 to 60 must have “a Sword and Belt...”); THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 115 (William Brigham ed., Boston: Dutton and Wentworth, 1836) (every Sunday, 1/4 of the men, on a rotating basis, must carry arms to church; along with a gun and ammunition, carrying “sword” was required); 1 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 49-50 (Berthold Fernow ed., Albany, N.Y.: Weed, Parsons & Co., 1887); LAWS OF NORTH CAROLINA –1715, at 29 (“well-fixed sword”); *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., Wilmington, Del.: M. Glazier, 1977) (“a Sword or Bayenet”); ACTS AND LAWS, OF HIS MAJESTIES COLONY OF RHODE-ISLAND, AND PROVIDENCE PLANTATIONS IN AMERICA 85-94 (Boston: John Allen, 1179 [1719]), reprinted in Cushing, THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1647-1719 at 135, 221-228 (Wilmington, Del.: M. Glazier, 1977) (“one good Sword, or Baionet”); WILLIAM WALLER HENING, 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 (Philadelphia: Thomas DeSilver, 1823) (“a sword, musquet and other furniture fitt for a soldier”); *id.* vol. 5, at 16-17 (militiamen who are “horse-men” have a sword or cutlass).

<sup>73</sup> CRAMER, ARMED AMERICA, at 97-98.

## C. Technological Changes

*Heller* explicitly rejected the notion that the Second Amendment protects only the types of arms which were in existence in 1789, when Congress sent the Second Amendment to the States for ratification.<sup>74</sup> Saying 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, or a musket, or a 1789 handgun, then it is clear that such a firearm is within the Second Amendment.

As for knives, virtually every modern knife is comparable to the knives of 1789. Knives and other edged weapons were at least as common in English and American society in the eighteenth century as they are today, appearing frequently in a variety of contexts: commonly sold, carried and occasionally misused as deadly weapons;<sup>75</sup> and as tools.<sup>76</sup>

While modern knives are made of superior materials, from a functional perspective, the knife has advanced far less since 1789 than have firearms, printing presses, or a myriad of other technologies whose constitutional protections are indisputable.<sup>77</sup> Even the switchblade is old-fashioned; the first spring-ejected blades appeared in Europe in the late eighteenth century.<sup>78</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. They lost that argument in *Heller*. There is no similar argument with respect to knives: no modern knife is clearly more dangerous than any knife of 1789.

---

<sup>74</sup> *Heller* at 582.

<sup>75</sup> *King v. Hardy*, in THE PROCEEDINGS IN CASES OF HIGH TREASON, UNDER A SPECIAL COMMISSION OF OYER AND TERMINER 303-305 (London: 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. William Chetwynd*, 8(Part 3) PROCEEDINGS OF THE KING’S COMMISSIONS OF THE PEACE, AND OYER AND TERMINER 313 (1743) (a dispute over a slice of a cake leads to a pocket knife used in an assault); *Particulars of Margaret Nicholson’s Attempt to Assassinate His Majesty*, 10 THE EUROPEAN MAGAZINE, AND LONDON REVIEW 117 (Aug. 1786) (describes both Margaret Nicholson’s attempt on King George III’s life, and a similar attempt with a knife some years earlier by another insane woman).

<sup>76</sup> WILLIAM LUDLAM, JOHN BIRD, 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; WITH PRACTICAL INSTRUCTIONS TO THE TRADE IN GENERAL 351 (London: 1770) (used in setting type); TEMPLE H. CROKER, THOMAS WILLIAMS, SAMUEL CLARKE, 3 THE COMPLETE DICTIONARY OF ARTS AND SCIENCES (under “Tanning Engines” – no page numbers) (describing the machine used for tanning leather).

<sup>77</sup> See Cramer & Olson, *supra* note 2, at 716-22 for a comparison of firearms to other advancing technologies which enjoy constitutional protections.

<sup>78</sup> TIM ZINSER, DAN FULLER & NEAL PUNCHARD, SWITCHBLADES OF ITALY 7-8 (2012).

## D. The Scope of the Right to Keep and Bear Knives

The question of whether knives qualify as a type of arms suitable for self-defense would seem 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 personal weapons, a knife, or an impact weapon, such as a billy club.<sup>79</sup> While 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 a more effective choice than bare hands or begging for mercy.

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

A knife may also be the best or only available defensive choice for a person who, for a variety of reasons, may not or chooses 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. A \$10 knife may be an option where a \$130 used rifle is not.

A person who chooses a knife for self-defense may live in an area where firearms (even post-*McDonald*) are more strictly regulated than knives. For example, a knife that you can buy and take home right away provides at least some protection during the period of days, weeks or months that it take to get government permission to own a firearm.

A person may be reluctant to own a firearm out of concern that he may be unable to adequately secure it from his children. While knives are still dangerous, a parent may conclude that the danger of a knife is sufficiently self-evident to a child 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 several kitchen knives just lying in drawers or in a block on the kitchen counter.

Whether a particular arm is the ideal choice for self-defense does not affect whether that arm is constitutionally protected. In *Heller*, Dick Heller's .22 caliber revolver is about the weakest self-defense firearm possible. The Court upheld his right to own it, even though a higher-caliber handgun would be more effective at stopping an attacker.

---

<sup>79</sup> There are specialized knives whose blades are surrounded such that they can be used to cutting rope, or seat belts, but are essentially useless as a stabbing or cutting 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.

And rightly so. Some people prefer a .22 for self-defense because the recoil is so minimal that it is very easy to handle. Since .22 caliber ammunition is much less expensive than in other calibers, a person may be able to afford more frequent target practice with a .22.

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.

*Heller* addressed not only the right to keep a gun in the home, but also the right to *bear* arms. While *Heller* allows carry bans in “sensitive places,” the opinion recognizes a general right to carry. Some lower courts have been resisting *Heller*’s language about right to carry, and the issue may perhaps need another Supreme Court case for a final resolution.<sup>80</sup> Yet already today, in 41 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>81</sup> In those states, the right to bear arms is already in effect, as a practical matter.

In some states, these licenses are specifically for concealed *handguns*, and do not allow the licensee to carry a concealed knife.<sup>82</sup> The reason for this odd situation is that the laws were enacted with the support of the National Rifle Association and other gun rights activists. These were concerned about the right to carry firearms, and did not pay attention to other arms, such as knives.

A few years ago, Knife Rights—the first proactive organization dedicated

---

<sup>80</sup> *Smith v. U.S.*, 09-CO-1412, 7-9 (D.C.App. 2011) (Washington D.C. police officer wrongfully terminated, and awaiting reinstatement arrested for carrying a handgun within the District); *Piszczatoski et al. v. Filko*, No. 10-06110, 10-11 (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 et al. v. County of Yolo*, No. 2:09-cv-01235 MCE-DAD, (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.”); *Woollard v. Sheridan*, No. 1:10-cv-02068-BEL (D.Md. 2012), 17-20 (applying intermediate scrutiny to strike down a concealed handgun permit system intended to ration the number of persons allowed to carry a firearm for self-defense).

<sup>81</sup> Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. R. 679-757 (1995); 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.R. 13-16 (2012)(forthcoming).

<sup>82</sup> 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. Stats. § 166.240), but allows concealed carry of a *firearm* if licensed (OR. REV. STATS. §§ 166.250, 166.291). 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 § 18-3302(7).

to knives—was created. Had such an organization existed back when these concealed carry laws were enacted, inclusion of knives would have been more likely.

Realistically speaking, if a state government decides that a particular individual is responsible enough to carry a concealed loaded handgun in public places throughout the state, it does not make much sense to forbid that person from carrying a concealed knife.

## E. Switchblades

One of the most important state supreme court decisions regarding knives is *State v. Delgado* (Or. 1984). There, the Oregon Supreme Court struck down Oregon’s ban on manufacture, sale, transfer, carrying, or possession of switchblades on the grounds that it violated the Oregon Constitution’s “right to bear arms” provision. The defendant, Joseph Delgado, “was walking with a companion on a public street. The two appeared disorderly to an officer nearby, and when 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 patdown search.”<sup>83</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.

The Oregon Supreme Court built upon a previous decision, *State v. Kessler* (Or. 1980) that 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>84</sup> *Kessler* had recognized that possession of billy clubs was protected in one’s home; *Delgado* recognized that a switchblade knife was also a constitutionally protected arm.<sup>85</sup>

The State argued that the switchblade knife “is an offensive weapon used primarily by criminals.” The Oregon Supreme Court decided that the distinction between defensive and offensive weapon was not 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>86</sup>

The Oregon Supreme Court also engaged in originalist analysis, observing that the possession and carrying of pocket knives is deeply embedded in European and American history. “[K]nives 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

---

<sup>83</sup> *State v. Delgado*, 692 P.2d 610 (Or. 1984).

<sup>84</sup> *State v. Kessler*, 289 Or. 359 (1980).

<sup>85</sup> *Delgado* at 611-12.

<sup>86</sup> *Id.* at 612.



America and used primarily for work, but also for fighting.”<sup>87</sup>

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

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.... 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>88</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>89</sup> But the *Delgado* court observed that the relevant Congressional testimony “offers no more than impressionistic observations on the criminal use of switch-blades.”<sup>90</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.

Unlike Oregon, some states ban even the home possession of switchblades.<sup>91</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, and 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.”

We can see the problem in *Lacy v. State* (2009), in which the Indiana

---

<sup>87</sup> *Id.* at 613-14.

<sup>88</sup> *Id.* at 614.

<sup>89</sup> S. Rep. No. 1980, 85th Cong., 2d Sess., reprinted in 1958 U.S. CODE CONG. & AD. NEWS 3435, 3437, quoted in *State v. Delgado*, 692 P.2d 610, 612 (Or. 1984).

<sup>90</sup> *Delgado* at 612.

<sup>91</sup> *E.g.*, COLO. REV. STAT. ANN. § 18-12-102 (2011) (possession of gravity or switchblade knives is a felony, even in one’s home); TENN. ANN. CODE § 39-17-1302(a)(7) (2011) (possession, manufacture, transportation, repair, or sale of an automatic knife is a class A misdemeanor).

Court of Appeals upheld a ban on possession of automatic knives on the grounds that “switchblades are primarily used by criminals and are not substantially similar to a regular knife or jackknife.”<sup>92</sup> If they are illegal, then by definition, they will be “primarily used by criminals.” Thus, so would any prohibited arm.

Lacy quotes *Crowley Cutlery Co. v. U.S.* (7<sup>th</sup> Cir. 1988) to refute the Oregon Supreme Court’s position in *Delgado* that switchblade knives are not intrinsically different from other knives. *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>93</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, where 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.

## V. Bowie Knives and the Nineteenth Century Cases

The U.S. Supreme Court in *Heller* favored the general approach of leading early nineteenth century cases such as *Nunn v. State* and *Chandler v. State*. Regarding knives, the nineteenth century state cases are less helpful today; many of these cases are derivative of the one nineteenth century case which *Heller* explicitly repudiated.

In the nineteenth century, there were quite a lot of cases involving Bowie knives. They mostly follow a theory adopted by the Tennessee Supreme Court in the 1840 *Aymette v. State* that the right to arms in the state constitution (and, by dicta, analogously in the Second Amendment) applies to all individuals, but only for the possession of militia-type arms. According to *Aymette*, since the Bowie knife is not a militia-type arm, individuals have no right to possess one. But *Aymette* was wrong on its facts, and its theory has been specifically repudiated by *Heller*.

About a decade after the first appearance of the Bowie knife, some

---

<sup>92</sup> Lacy v. State, 903 N.E. 2d 486, 492 (Ind. App. 2009).

<sup>93</sup> *Crowley Cutlery Co. v. U.S.*, 849 F.2d 273, 279 (7<sup>th</sup> 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.*

southern states had begun passing laws against it. Alabama imposed a \$100 tax on the transfer of any Bowie knife or Arkansas toothpick<sup>94</sup>—the equivalent of \$5,000 in today’s money. Tennessee in 1837 prohibited the carrying of such knives.<sup>95</sup> An attempt to add pistols to the 1838 Tennessee bill failed.<sup>96</sup>

The Tennessee Supreme Court in *Aymette v. State* upheld the ban on concealed carry of Bowie knives and Arkansas toothpicks, holding that the Tennessee Constitution’s guarantee of a right to keep and bear arms “for their common defence does not mean for *private defence*, but being armed, they may as a body, rise up to defend their rights, and compel their rulers to respect the laws.”<sup>97</sup> According to *Aymette*, the Bowie knife was not suitable for “civilized warfare” but was instead favored by “assassins” and “ruffians.”<sup>98</sup> Significantly, the 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>99</sup>

The major nineteenth century Bowie knife precedent which is not part of the *Aymette* line comes from Texas. In 1859, the Texas Supreme Court in *Cockram v. State* ruled that under the Texas state constitution right to arms, and the Second Amendment, “The right to carry a bowie-knife for lawful defense is secured, and must be admitted.”<sup>100</sup> At the same time, the court upheld enhanced punishment for manslaughter perpetrated with a Bowie knife. 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

---

<sup>94</sup> ACTS PASSED AT THE CALLED SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ALABAMA, ch. 11 (1837).

<sup>95</sup> An Act To Suppress the Use of Bowie Knives, ALABAMA ACTS, ch. 11 (1837); An Act to Suppress the Sale and Use of Bowie Knives and Arkansas Tooth Picks in this State, TENNESSEE ACTS, ch. 137 (1838).

<sup>96</sup> *House of Representatives*, NASHVILLE DAILY REPUBLICAN BANNER, January 13, 1838, at 2.

<sup>97</sup> *Aymette v. State*, 21 Tenn. (2 Hump.) 154, 158, 159 (1840).

<sup>98</sup> *Id.* at 159-60. 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*.” (emphasis in original). The opinion repeatedly ties the right solely to the “common defence.”

*Aymette* is the ur-text for the “civilized warfare” interpretation of the right to keep and bear arms, by which all person have a right to own arms which are useful for militia purposes. For a sympathetic treatment of the 19<sup>th</sup> century’s “civilized warfare” cases, see Michael P. O’Shea, AM. L. REV., *supra*.

<sup>99</sup> JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 77 (1820).

<sup>100</sup> *Cockrum v. State*, 24 Tex. 394, 401, 402 (1859).

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>101</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 the blade compared to a pen-knife or dagger. Bullets, especially the relatively low velocity projectiles common in the black powder era, were almost surgical in the cosmetic consequences.<sup>102</sup>

Another part of the judicial and legislative fear of Bowie knives may have been concerns about poor people or people of color. As 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>103</sup>

Bowie knife carrying was certainly common in some places. Contemporary sources leave no question that Bowie knives, Arkansas toothpicks, and similar knives, were a common part of the American landscape until well after the Civil War, and not just for decoration, hunting, or slicing tough cuts of meat.<sup>104</sup> An account of Gold Rush California describes how masquerade balls in California would generally have “No weapons allowed” signs at the entrance. An observer tells us that

[I]t was worth while to go, if only to watch the company arrive, and

---

<sup>101</sup> *Id.* at 403 (emphasis added).

<sup>102</sup> 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. 25-38 (Fall 2001) (examining damage in living tissue measured in experiments at the Letterman Army Institute of Research, Wound Ballistics Laboratory).

<sup>103</sup> *Cockrum*, at 396-97.

<sup>104</sup> A few representative articles of the period illustrating the widespread violence associated with edged weapons (along with many other deadly weapons): *Scenes at New Orleans*, 35 THE LIVING AGE 523 (1852); *Editor’s Easy Chair*, 11 HARPER’S NEW MONTHLY MAGAZINE 411-12 (Aug. 1855); FREDERICK MARRYAT, 1 A DIARY IN AMERICA: WITH REMARKS ON ITS INSTITUTIONS 106-10 (1839); GEORGE AUGUSTUS SALA, 2 TEMPLE BAR 120-30 (July 1861); GEORGE COMBE, 2 NOTES ON THE UNITED STATES OF NORTH AMERICA 93-95 (1841); AMERICAN ANTI-SLAVERY SOCIETY, AMERICAN SLAVERY, AS IT IS: TESTIMONY OF A THOUSAND WITNESSES 202-05 (1839).

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 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>105</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* (1872), 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 found with any of these things about his person, he would be punished for an offense against discipline.”<sup>106</sup> *English* cites no authority for its claim with respect to knives of various sorts, and as we will see shortly, the claim appears to be false. As with *Aymette*, *English* recognized that bayonets and swords were “arms”

---

<sup>105</sup> J.D. Borthwick, *Three Years in Calafornia* [sic], 2 HUTCHINGS ILLUSTRATED CALIFORNIA MAGAZINE 171-02 (Oct. 1857).

One of the first problems encountered by the anti-Bowie laws was vagueness. In *Haynes v. State* (1844), the Tennessee Supreme Court dealt with the complaint that the statute was vague and overbroad. 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...” An Act to Suppress the Sale and Use of Bowie Knives and Arkansas Tooth Picks in this State, TENN. ACTS, ch. 137 (1838).

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 as disagreed about whether Haynes’s knife 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 v. State*, 24 Tenn. (5 Humph.) 120, 121 (1844).

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* at 122-3.

<sup>106</sup> *English v. State*, 35 Tex. 473, 477 (1872).

protected by the Second Amendment.<sup>107</sup>

The West Virginia Supreme Court of Appeals in *State v. Workman* (1891) 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, 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>108</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>109</sup> *Heller* repudiated *Aymette* and its progeny, *English* and *Workman*.

Moreover, even if *Heller* had adopted *Aymette*’s rule (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.

Bowie knives were most emphatically 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, where it was generally seen in murderous frays in the streets and bar-rooms.”<sup>110</sup> Other Mississippi militiamen were “armed with the rifles, shot-guns, and knives which they had brought from their homes”; we have drawings of crudely made daggers and Bowie knives that were “in common use among the insurgent troops from the Mississippi region....”

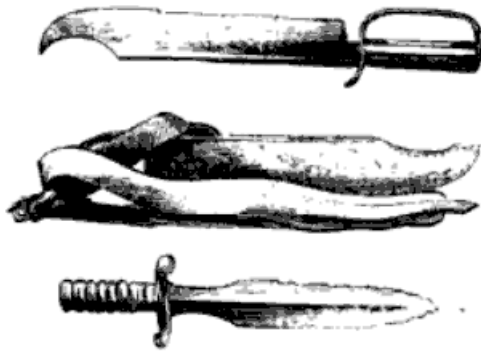
---

<sup>107</sup> *Id.* at 477 (“The word ‘arms’ in this 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....”)

<sup>108</sup> *State v. Workman*, 35 W.Va. 367, 372 (1891).

<sup>109</sup> *Heller*, at 613.

<sup>110</sup> BENSON JOHN LOSSING, 1 PICTORIAL HISTORY OF THE CIVIL WAR IN THE UNITED STATES OF AMERICA 479 n. 2 (1866).



WEAPONS OF THE INSURGENTS.

111

Also in the North, the Bowie knife seems to have been regarded as a militia weapon. During the Civil War, the town of Bridgewater, Massachusetts, raised a volunteer unit, and in the heady enthusiasm of doing so, “Voted, that each volunteer be furnished with a uniform, ‘and a revolver and Bowie knife.’” A footnote tells us “This vote was subsequently reconsidered as far as it related to revolvers and Bowie knives” although not why.<sup>112</sup> The initial vote in favor of supplying Bowie knives seems improbable if possession of such a weapon “would be an offense against discipline.”

Knives have long been part of the American military equipment, even after the Bowie knife fell out of fashion. During World War II, American soldiers, sailors, and airmen wanted and purchased fixed blade knives, often of considerable dimensions.<sup>113</sup> At least for some units, soldiers were “authorized an M3 trench knife, but many carried a favorite hunting knife.”<sup>114</sup> The Marine Corps issued the Ka-Bar fighting knife.<sup>115</sup> As one World War II memoir recounts: “This deadly piece of cutlery was manufactured by

---

<sup>111</sup> *Id.* at 541. Other accounts referencing soldiers carrying Bowie knives, without apparently being in violation of military discipline, include Louis-Phillipe-Albert d’Orleans Paris, Louis Fitzgerald Tasistro, Trans., 1 HISTORY OF THE CIVIL WAR IN AMERICA 271 (1875); 2 BATTLES AND LEADERS OF THE CIVIL WAR: BEING FOR THE MOST PART CONTRIBUTIONS BY UNION AND CONFEDERATE OFFICERS 607 (Robert Underwood Johnson ed., 1887); SAMUEL MOSHEIM SMUCKER, THE HISTORY OF THE CIVIL WAR IN THE UNITED STATES: ITS CAUSE, ORIGIN, PROGRESS AND CONCLUSION 987 (1865); SAMUEL MOSHEIM SMUCKER, 1 A HISTORY OF THE CIVIL WAR IN THE UNITED STATES: WITH A PRELIMINARY VIEW OF ITS CAUSES 188 (1864); WILLIAM HOWARD RUSSELL, THE CIVIL WAR IN AMERICA 175 (1861); JAMES ROBERTS GILMORE, PERSONAL RECOLLECTIONS OF ABRAHAM LINCOLN AND THE CIVIL WAR 110-111 (1899); D.M. KELSEY, DEEDS OF DARING BY BOTH BLUE AND GRAY: THRILLING NARRATIVES OF PERSONAL COURAGE 300 (1883).

<sup>112</sup> WILLIAM SCHOULER, 2 A HISTORY OF MASSACHUSETTS IN THE CIVIL WAR 539 (1871).

<sup>113</sup> Walter E. Burton, *Knives for Fighting Men*, POPULAR SCIENCE 150-03 (July 1944).

<sup>114</sup> GORDON L. ROTTMAN, U.S. SPECIAL WARFARE UNITS IN THE PACIFIC THEATER 1941-45: SCOUTS, RAIDERS, RANGERS AND RECONNAISSANCE UNITS 27 (2005).

<sup>115</sup> 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.”

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>116</sup> Vietnam memoirs report that Ka-Bar and similar knives were still in use: “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>117</sup> Even today, some special forces units regularly carry combat knives.<sup>118</sup>

## VI. Criminological Considerations: Is a Knife More Dangerous Than a Gun?

We know from *Heller* that handguns, as a general class, are protected by the Second Amendment. This is so notwithstanding the frequent use of handguns in violent crimes, including homicide. Accordingly, if another type of arms is much *less* dangerous than a handgun, then that type of arms cannot possibly be prohibited, consistent with *Heller*.

Are knives more dangerous than guns? Quite the opposite. In 2010, “Knives and other cutting instruments” were used in 13.1 percent of U.S. murders, behind firearms (67.5%), and handguns alone (46.2%), but ahead of blunt objects (4.2%), shotguns (2.9%), and rifles (2.8%).<sup>119</sup>

That 13 percent includes *all* knives, including steak knives, butcher knives, linoleum knives, and so on. It also comprises “other cutting instruments,” such as screwdrivers (sharpened and otherwise), straight razors, and other signs of excessive inventiveness by criminals. It may be that a very significant percentage, perhaps most, of these crimes involve the kitchen cutlery—which is found in every home, and has large blades.

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). Knives and other cutting instruments are actually in last place in the FBI statistics for robbery, behind “Other weapon.”

Similarly, sharp objects are again in last place for aggravated assault weapon type (47.9/100,000 people), behind firearms (51.8), personal weapons (69.0), and other weapons (83.3).<sup>120</sup>

Unsurprisingly, data show that gunshots are more lethal than knife

---

<sup>116</sup> E.B. SLEDGE, WITH THE OLD BREED: AT PELELIU AND OKINAWA 21 (2007).

<sup>117</sup> JOHN CORBETT, WEST DICKENS AVENUE: A MARINE AT KHE SANH 149 (2003).

<sup>118</sup> FRED J. PUSHIES, WEAPONS OF DELTA FORCE 63-64 (2002).

<sup>119</sup> FBI, CRIME IN THE UNITED STATES 2010, Table 11 (Murder Circumstances by Weapon). For some homicides, the type of firearm is unknown, which is why the “firearm” figure is higher than the figures for handguns + rifles + shotguns.

<sup>120</sup> FBI, CRIME IN THE UNITED STATES 2010, TABLE 9 (Rate: Number of Crimes per 100,000 Inhabitants).



wounds. Wilson & 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 gunshot abdominal wounds were lethal.<sup>121</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>122</sup>

Another study examined all New Mexico penetrating traumas ("firearm or stabbing injury") "who presented to either the state Level-1 trauma center or the state medical examiner" from 1978 to 1993. This study found that while nonfatal injury rates were similar for firearms and stabbing (34.3 per 100,000 person-years for firearms, 35.1 per 100,000 person-years for stabbing), firearm fatality rates were much higher than for knives: 21.9 vs. 2.7. In other words, 39.0 percent of firearms penetrating traumas were fatal, compared to 7.1 percent of knife penetrating traumas; so firearm injuries were 5.5 times more likely to result in death than were knife injuries.

Not all of these New Mexico penetrating traumas were criminal attacks; 44 percent of the firearms deaths and 57 percent of the knife deaths were suicides. While 8 percent of the firearms deaths were accidents, so were 3 percent of the knife deaths.<sup>123</sup>

Knives in general are far less regulated than firearms: no mandatory background checks, no prohibitions on interstate sales (except for switchblades),<sup>124</sup> and no serial number requirements. The least expensive knives are considerably less expensive than the cheapest firearms.<sup>125</sup> Only about half of American homes have a gun, but almost every home has several 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

---

<sup>121</sup> Harwell Wilson & Roger Sherman, *Civilian Penetrating Wounds to the Abdomen*, 153 ANNALS OF SURGERY 639, 640 (1961).

<sup>122</sup> Linda E. Saltzman, James A. Mercy, Patrick W. O'Carroll *et al.*, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043 (1992).

<sup>123</sup> Cameron Crandall, Lenora Olson, Lynne Fullerton, *et al.*, *Guns and Knives in New Mexico: Patterns of Penetrating Trauma, 1978-1993*, 4 ACAD. EMERGENCY MEDICINE 265 (1997).

As for the remaining firearms deaths classified as "homicide," about 7-13 percent of them were probably justifiable homicides by persons who were not law enforcement officers. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 114 (1991). It is unknown whether a similar percent of the knife homicides were justifiable.

<sup>124</sup> 15 U.S.C. § 1242 (1958).

<sup>125</sup> Searching Amazon.com on September 29, 2012 found more than 298 matches for "combat knife" under \$25, and 114 matches under \$10. By comparison, even the cheapest, single-shot .22 rifles (which would only be used by *very* stupid criminals) at Cabela's website on the same date was \$99.99. The cheapest repeating .22 rifle, the Mossberg 702 Plinkster, was \$139.99.

for firearms regulation.

## VII. 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>126</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>127</sup> Another approach is the “history and tradition” test.<sup>128</sup> Some courts have used intermediate scrutiny, particular for laws that involve persons who have already demonstrated themselves to be more likely than most to misuse a firearm.<sup>129</sup>

Here, we test some knife laws against the weakest possible relevant standard, intermediate scrutiny.<sup>130</sup> We are not saying the intermediate scrutiny is necessarily the correct standard in all cases; but if a knife control fails intermediate scrutiny, it will fail all of the more rigorous standards as well.

As *U.S. v. Skoien* (7<sup>th</sup> Cir. 2009) states, “In its usual formulation, [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 to the achievement of that interest.”<sup>131</sup> The Court has repeatedly held that under intermediate scrutiny, it is not enough for the government to assert that it has a legitimate public interest. In *Turner Broadcasting System, Inc. v. FCC* (1994), 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>132</sup>

### A. Home Possession

To justify a ban on home possession or transfer of a constitutionally protected arm requires that the government offer more than “impressionistic observations.” The government must also demonstrate that the ban would not be easily defeated by replacing the banned category of knives with some

---

<sup>126</sup> *Moore v. Madigan*, *supra* (7<sup>th</sup> Cir.; near-complete ban on bearing arms).

<sup>127</sup> *Ezell v. Chicago*, 651 F.3d 684 (7<sup>th</sup> Cir. 2011) (ban on firing ranges).

<sup>128</sup> *Heller II* (D.C. Cir.), *supra* (Kavanaugh, dissenting).

<sup>129</sup> *United States v. Skoien*, 614 F.3d 638 (7<sup>th</sup> Cir. 2010)(en banc) (persons convicted of domestic violence misdemeanors).

<sup>130</sup> Rational basis is not available, because a fundamental right is involved. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, *supra*.

<sup>131</sup> *U.S. v. Skoien*, 587 F.3d 803, 805 (7<sup>th</sup> Cir. 2009).

<sup>132</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994).

other, equally dangerous arm. 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 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. Carry

Lower courts are still arguing about the scope of the Second Amendment right to bear arms, and the issue may eventually be decided by the Supreme Court.<sup>133</sup>

Even without the Second Amendment, there are still 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>134</sup>

This is an accurate but not comprehensive list. One particularly important item is missing: lawful defense of self and others. Since knives with blades of longer than 2 ½ inches are among the Second Amendment “arms,” there is a right to carry them for lawful defense of self and others.

The *Rasdan* court distinguished the Akron ordinance from ordinances which were upheld in decisions such as *Riggins, supra*, and *People v. Ortiz* (N.Y. Crim. Ct. 1984); 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>135</sup>

Notably, the *Rasdan* court was using the rational basis standard. But after *Heller* and *McDonald*, rational basis does not suffice. And if there is going to be a general ban, with exceptions for permissible purposes for carrying (e.g., while hunting or hiking), then there has to be an exception that encompasses lawful self-defense.

## C. Bans on Carrying Certain Types of Knives

---

<sup>133</sup> *E.g.*, *Shepherd v. Madigan, supra, reh'g den.*; *Kachalsky v. Cacace*, No. 12-845 (U.S. 2012) (cert. petition with seven amicus briefs in support, including a brief from 20 States).

<sup>134</sup> *City of Akron v. Rasdan*, 105 Ohio App. 3d 164, 173, 663 N.E.2d 947, 953 (1995).

<sup>135</sup> *City of Akron* at 173-74; *Riggins* at 317; *People v. Ortiz*, 125 Misc. 2d 318, 324 (N.Y. Crim. Ct. 1984).

As detailed in Part II, some state or local laws allow the carry of a knife of a certain blade length, while forbidding the carry of another knife which has the same blade length, based on whether the knife is a folder or a fixed blade, or 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 intermediate standard of scrutiny, laws making such distinctions must be based on clear evidence that these features are a public safety problem, not mere conjecture. 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 21<sup>st</sup> century handguns, this is an impossible showing. Any rule of interpretation that allowed more restrictive laws for the 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>136</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>137</sup> These risks occur not only in public places, but even 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.

Any law that regulates the possession or carrying of knives, even the biggest and scariest knives (for persons those who find them scary), more severely than handguns is indefensible under intermediate scrutiny.

## Conclusion

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

Statutes which ban or impose special restrictions based on how a knife

---

<sup>136</sup> See Yanna, *supra*.

<sup>137</sup> Lawrence W. Sherman, Leslie Steele, Deborah Laufersweiler, *et al.*, *Stray Bullets and “Mushrooms”: Random Shootings of Bystanders in Four Cities, 1977-1988*, 5 J. QUANT. CRIMINOL. 297 (1989) (“rapid increase in both bystander woundings and killings since 1985 in all four cities” but “total bystander deaths appear to comprise less than 1% of all homicides in these cities.”); H. Range Hutson, Deirde Anglin & Michael J. Pratts, Jr., *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, N.E.J.M. 324, 325 (1994) (“Among the victims who had firearms injuries, 122 (28 percent) had no gang affiliation”).

opens, or on whether an opened knife can be locked upon, cannot pass any form of heightened scrutiny.

There is no rational basis for laws about the carrying of knives to be *more* restrictive than for the carrying of handguns. Knives are among the arms which Americans have a right to “bear.”

This Article has not aimed to resolve definitively every question about knife laws in the United States. Rather, we have endeavored to provide a starting point for further study, to examine some of the prohibitions which 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.