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Armed to the Teeth: The Use of a Person's Mouth, Teeth, or Body as a Dangerous Instrument for Aggravated Offenses

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Armed to the Teeth: The Use of a Person's Mouth, Teeth, or Body as a Dangerous Instrument for Aggravated Offenses

Cover Page Footnote

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**ARMED TO THE TEETH: THE USE OF A PERSON'S MOUTH,
TEETH OR BODY AS A DANGEROUS INSTRUMENT FOR
AGGRAVATED OFFENSES**

COURT OF APPEALS OF NEW YORK

People v. Plunkett¹
(decided June 7, 2012)

I. FACTUAL BACKGROUND

Defendant David Plunkett has a history of mental illness and is a carrier of the human immunodeficiency virus (HIV).² During a visit to his primary care physician, he was found by police openly possessing marijuana and acting strangely in the waiting room.³ This behavior prompted the police to arrest Plunkett.⁴ Plunkett resisted the arrest and bit the police officer on the finger.⁵ As a result, Plunkett was charged and convicted of aggravated assault upon a police officer.⁶

Three elements must be satisfied to sustain a conviction for aggravated assault under New York Penal Law § 120.11. A prima facie case requires: (1) “intent to cause serious physical injury”, (2) “to a person whom he knows or reasonably should reasonably know to be a police officer or a peace officer engaged in the course of performing his official duties”, and (3) an injury caused by means of a “deadly weapon or dangerous instrument.”⁷ In New York, a “serious physical injury” is one that “creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the func-

¹ 971 N.E.2d 363 (N.Y. 2012).

² *Id.* at 364.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Plunkett*, 971 N.E.2d at 364; *see generally* N.Y. PENAL LAW § 120.11 (McKinney 1993).

⁷ N.Y. PENAL LAW § 120.11 (McKinney 1993).

tion of any bodily organ.”⁸ A “dangerous instrument” is defined as “any instrument, article or substance, including a ‘vehicle’ as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.”⁹

The county court did not address the first two elements of the aggravated assault charge upon a police officer or peace officer.¹⁰ To establish the third element, the People specified in Plunkett’s indictment that the dangerous instrument used by the defendant was his teeth.¹¹ Defense counsel challenged the charge on the premise that Plunkett’s teeth cannot be considered a dangerous instrument within the meaning of the Penal Law.¹² The county court agreed, citing precedent that teeth are not a dangerous instrument.¹³ However, the court concluded that Plunkett’s AIDS infected saliva was a dangerous instrument, and the bite by the defendant’s teeth was a vehicle to transmit the virus.¹⁴ Plunkett was induced to plea to the top three counts of the indictment and the county court granted the right to appeal recognizing that complicated legal issues were at stake.¹⁵ The Appellate Division affirmed the county court’s judgment, reasoning that the previous plea resulted in a forfeiture of any appellate claims.¹⁶ The Court of Appeals subsequently rejected the county court’s determination that the saliva of a person infected with the AIDS virus constituted a dangerous instrument.¹⁷ The Appellate Division’s order was modified, the count of aggravated assault was dismissed, and the case was remanded for resentencing.¹⁸

II. THE CONSTITUTIONAL IMPLICATIONS OF *PLUNKETT*

Absent from the court’s opinion in *Plunkett* was any discus-

⁸ N.Y. PENAL LAW § 10.00 (10) (McKinney 2008).

⁹ N.Y. PENAL LAW § 10.00 (13) (McKinney 2008).

¹⁰ *Plunkett*, 971 N.E.2d 363. There was no dispute that there was an assault on a police officer or peace officer. *Id.*

¹¹ *Id.* at 364.

¹² *Id.*; see generally N.Y. PENAL LAW § 10.00 (13).

¹³ *Plunkett*, 971 N.E.2d at 365.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 366.

¹⁷ *Id.* at 368.

¹⁸ *Plunkett*, 971 N.E.2d at 368.

sion pertaining to the constitutionality of New York Penal Law § 120.11. Paramount to any of the concerns mentioned by the court is the necessity that the statute provides fair notice of its meaning to a person of common intelligence.¹⁹ If the words or meaning of a criminal statute are vague or ambiguous, it may run afoul of a person's due process rights guaranteed by the United States Constitution.²⁰ A statute must be sufficiently explicit so that a reasonable person knows what behavior it is intended to permit or prohibit.²¹ The statute must provide a criminal defendant fair notice of the "manner, time and place of the conduct underlying the accusations, so as to enable him to answer the charges and prepare an adequate defense."²²

It is not the duty of the United States Supreme Court to interpret state statutes; states must take appropriate action in drafting and interpreting their statutes to protect them from subsequently being declared unconstitutional.²³ Along with the fair notice requirement, the language must not "permit or encourage arbitrary and discriminatory enforcement."²⁴ Additionally, a "deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."²⁵

III. "A BITE OUT OF THE BIG APPLE" - NEW YORK'S LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION

The court in *Plunkett* was faced with a basic legal question, but one that has been met with controversy and varied approaches throughout the courts of the United States: whether part of a person's anatomy can be considered a "deadly weapon" or a "dangerous in-

¹⁹ *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (stating that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law").

²⁰ *See* U.S. CONST. amend. V (protecting the deprivation of life, liberty, or property, without due process of law); U.S. CONST. amend. XIV, § 1 (same).

²¹ *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964).

²² *People v. Evangelista*, 771 N.Y.S.2d 791, 793 (Crim. Ct. 2003); *People v. Keindl*, 502 N.E.2d 577, 579 (N.Y. 1986).

²³ *People ex rel. Serra v. Warden, Rikers Island Men's House of Det.*, 395 N.Y.S.2d 602, 607 (Sup. Ct. 1977).

²⁴ *People v. Bright*, 520 N.E.2d 1355, 1358 (N.Y. 1988).

²⁵ *Bouie*, 378 U.S. at 352.

strument” for the purposes of sustaining aggravated offenses.²⁶ In order to resolve this matter, the court carefully interpreted “dangerous instruments” within the meaning of the Penal Law and applicable legal precedent.²⁷

It is well-established in New York State that a person’s body parts alone are not deadly weapons or dangerous instruments capable of satisfying the elements of an aggravating offense.²⁸ There are important policy concerns underlying the courts’ unwillingness to allow the human anatomy to fall within the definition of a dangerous instrument.²⁹ One major concern is the imposition of liability on the “extraordinary man,” whose physical attributes may be superior to that of the “ordinary man.”³⁰ By virtue of this distinction, the New York Court of Appeals has explained that due to the physical build of the “extraordinary man,” he would face heightened charges every time he merely threatened another with bodily assault.³¹ Factors such as “the size of the perpetrator, his weight, strength, etc., as well as any infirmities or frailties of the victim would all be relevant in understanding one’s ability to cause serious physical injury or death.”³² Hence, the “extraordinary man” would be penalized more harshly than the “ordinary man” for the same offense, even if the extent of the injury was identical.³³

The court also expressed concern that if the human anatomy could be considered a dangerous weapon, statutory liability for assaults would be blurred beyond distinction.³⁴ For example, if the “extraordinary man” were to get into a fistfight with another person, it would blur the statutory line between simple assault and assault with a dangerous instrument, regardless of the severity of the victim’s injury.³⁵ The ordinary meaning of the term “dangerous instrument” has

²⁶ *Plunkett*, 971 N.E.2d at 368.

²⁷ *Id.*; see generally N.Y. PENAL LAW § 10.00 (13).

²⁸ See generally *People v. Austin*, 516 N.Y.S.2d 248 (App. Div. 2d Dep’t 1987) (“The use by the average layperson of the hand to strike a blow is insufficient proof of assault in the second degree.”).

²⁹ See generally *People v. Owusu*, 712 N.E.2d 1228 (N.Y. 1999).

³⁰ *Id.* at 1231.

³¹ *Id.* (reasoning that a heavyweight boxer would be subject to liability each time he was competing in a match); see also N.Y. PENAL LAW § 10.00 (13) (highlighting the fact that the definition includes the mere threatened use of a dangerous instrument).

³² *Id.* at 1232.

³³ *Id.* (arguing against a “sliding scale of criminal liability”).

³⁴ *Owusu*, 712 N.E.2d at 1232.

³⁵ *Id.*

consistently been interpreted to exclude “one’s arm, hand, teeth, elbow or [] other body part.”³⁶ The statute is interpreted to increase criminal liability only when the “actor has upped the ante by employing a device to assist in the criminal endeavor.”³⁷

Under this line of reasoning, the New York courts have determined that body parts that are “covered with apparel or objects . . . aggravate their use” and change the nature of the body part within the meaning of the Penal Code.³⁸ This type of addition or modification enhances the potential for serious injury in a way that justifies a heightened degree of criminal liability.³⁹ In *People v. Carter*,⁴⁰ the court observed that New York courts have historically adopted the use-oriented approach to determine whether an object can be considered a dangerous instrument.⁴¹ This approach emphasizes how the “instrument, article or substance” is used in relation to an aggravated offense, rather than how “innocuous [the item] may appear to be when used for its legitimate purpose.”⁴² Instead of declaring whether an item is dangerous per se, the courts have traditionally let the jury decide whether the evidence presented on a case by case basis supports a finding that an inherently innocuous item has been rendered a dangerous instrument by its usage under the circumstances.⁴³ By utilizing this approach, courts have found a multitude of normally innocuous items to qualify as dangerous instruments when used to inflict injury or enhance the severity of injury upon another person.⁴⁴

³⁶ *Id.* at 1233.

³⁷ *Id.*

³⁸ *People v. Johnson*, 504 N.Y.S.2d 311, 313 (App. Div. 3d Dep’t 1986).

³⁹ *Owusu*, 712 N.E.2d at 1232.

⁴⁰ *People v. Carter*, 423 N.E.2d 30 (N.Y. 1981).

⁴¹ *Id.* at 32.

⁴² *Owusu*, 712 N.E.2d at 1229-30; *see also Carter*, 423 N.E.2d 30, 32 (reasoning that a person could wear a pair of rubber boots without being considered to be armed with a dangerous weapon within the meaning of the Penal Law, but if the boots were used in a manner that “renders [them] readily capable of causing serious physical injury” then they would become a dangerous instrument).

⁴³ *Carter*, 423 N.E.2d at 32; *see also People v. Cwikla*, 400 N.Y.S.2d 35, 43 (App. Div. 1st Dep’t 1977), *rev’d on other grounds*, *People v. Cwikla*, 386 N.E.2d 1070 (N.Y. 1979) (concluding that a handkerchief used as a gag could be considered a dangerous instrument).

⁴⁴ *See People v. Curtis*, 679 N.E.2d 634 (N.Y. 1997) (involving a belt); *People v. Galvin*, 481 N.E.2d 565 (N.Y. 1985) (involving a sidewalk); *People v. Adamkiewicz*, 81 N.E.2d 76 (N.Y. 1948) (involving an ice pick); *People v. Mason*, 922 N.Y.S.2d 659 (App. Div. 3d Dep’t 2011) (involving a letter opener); *People v. Lev*, 822 N.Y.S.2d 73 (App. Div. 1st Dep’t 2006) (involving thick-soled sneakers); *People v. Edwards*, 792 N.Y.S.2d 394 (App. Div. 1st Dep’t 2005) (involving a shoe); *People v. Ray*, 710 N.Y.S.2d 138 (App. Div. 3d Dep’t 2000) (involving work boots); *People v. Austin*, 516 N.Y.S.2d 248 (App. Div. 2d

In the seminal case of *People v. Owusu*,⁴⁵ under a set of facts similar to those presented in *Plunkett*, the Court of Appeals explored the plain meaning of the term “dangerous instrument,” legislative history and judicial precedent to determine whether only external objects were meant to be included within its definition.⁴⁶ In *Owusu*, the defendant entered into a physical altercation with another man and bit the man on his finger so severely as to sever the nerves.⁴⁷ The supreme court dismissed three counts, including the second degree assault charge, on the premise that the defendant’s teeth could not be considered a dangerous instrument.⁴⁸ The Appellate Division reversed the lower court’s decision and applied the use-oriented approach.⁴⁹ The Court of Appeals rejected the People’s assertion that “the meaning of ‘dangerous instrument’ should be subject to case-by-case functional inquiries into the use of instruments, articles or substances.”⁵⁰ Citing past legislative history and commentary, the court concluded that the legislature intended to limit the meaning of a “dangerous instrument” to external objects only.⁵¹ As a result, the majority held as a matter of law that a person’s body parts alone cannot qualify as a dangerous instrument.⁵²

Justice Bellacosa, dissenting, criticized the majority’s flat refusal to recognize that the human body may be used as a dangerous instrument in some circumstances.⁵³ He criticized the majority for effectively taking a powerful leveraging tool away from prosecutors.⁵⁴ He emphasized that the statute contained no explicit language

Dep’t 1987) (stating that if a chair was used to attack another person it would be a dangerous instrument); *People v. Davis*, 466 N.Y.S.2d 540 (App. Div. 3d Dep’t 1983) (involving an arm cast); *People v. Bouldin*, 338 N.Y.S.2d 686 (App. Div. 3d Dep’t 1972) (involving a spatula).

⁴⁵ 712 N.E.2d 1228 (N.Y. 1999).

⁴⁶ *Id.*; see generally N.Y. PENAL LAW § 10.00 (13) (McKinney 2011).

⁴⁷ *Owusu*, 712 N.E.2d at 1229.

⁴⁸ *People v. Owusu*, 659 N.Y.S.2d 976, 977 (Sup. Ct. 1997), *rev’d*, 669 N.Y.S.2d 366 (App. Div. 2d Dep’t 1998), *rev’d*, 93 N.Y.2d 398, 712 N.E.2d 1228 (N.Y. 1999).

⁴⁹ *People v. Owusu*, 669 N.Y.S.2d 366, 367 (App. Div. 2d Dep’t 1998), *rev’d*, 712 N.E.2d 1228 (N.Y. 1999).

⁵⁰ *Owusu*, 712 N.E.2d at 1230.

⁵¹ *Id.* at 1231; see 1937 Report of N.Y. Law Rev. Comm’n, at 728 (stating that killing “with bare fists cannot be said to be effecting death with a ‘dangerous weapon,’ ” but a fatal shooting would be as a matter of law).

⁵² *Owusu*, 712 N.E.2d at 1233.

⁵³ *Id.* (Bellacosa, J., dissenting) (stating that it is the petit jury’s duty to differentiate whether someone used their body as a dangerous criminal instrument).

⁵⁴ *Id.*

that would prevent the human body from being considered a dangerous instrument, and urged that the controlling definition must include “[a]nything that can be used to cause death or serious injury.”⁵⁵ The Justice recognized that “the human body and its parts are indisputably ‘tangible’ ” and could certainly be read into the court’s statutory interpretation.⁵⁶ He questioned the majority’s reliance on the “extraordinary man” analogy with a rebuttal that the teeth of an “ordinary man” have the potential to inflict serious injury on a larger or stronger individual.⁵⁷ The Justice rejected the majority’s holding, noting that a bite with artificial dentures would qualify as a dangerous instrument under its holding.⁵⁸ Although practically identical as far as their usage and their potential for harm, the artificial dentures would result in increased criminal liability, whereas a bite with regular teeth would not.⁵⁹ He observed that there should not be a line drawn as a matter of law.⁶⁰ Rather, he proposed that a jury is more than capable of “distinguishing between a body part used in an ordinary fashion, even if it inflicts harm, and one used in a criminal manner so as to constitute a ‘dangerous instrument’ that produces serious bodily harm.”⁶¹

In *People v. Mateo*,⁶² the defendant was convicted of assault in the first degree.⁶³ The court found the dangerous instrument to be the defendant’s pit bull.⁶⁴ The pit bull caused “serious and protracted disfigurement” to the victim.⁶⁵ The court left it to the jury to decide whether evidence and witness testimony properly established the defendant’s intent.⁶⁶

In *People v. Byrd*,⁶⁷ the defendant, while wearing hard plastic

⁵⁵ *Id.* at 1234.

⁵⁶ *Id.* at 1235.

⁵⁷ *Owusu*, 712 N.E.2d at 1236 (agreeing that a punch from Mike Tyson in a sanctioned boxing match could not be actionable, but a bite to Evander Holyfield’s ear could be differentiated); see generally *People v. Vollmer*, 87 N.E.2d 291 (N.Y. 1949).

⁵⁸ *Owusu*, 712 N.E.2d at 1236 (Bellacosa, J., dissenting).

⁵⁹ *Id.*

⁶⁰ *Id.* at 1237.

⁶¹ *Id.*

⁶² 909 N.Y.S.2d 266 (App. Div. 4th Dep’t 2010).

⁶³ *Id.* at 266-67.

⁶⁴ *Id.* at 267.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 855 N.Y.S.2d 505 (App. Div. 1st Dep’t 2008).

sandals, repeatedly kicked the victim in the stomach.⁶⁸ As a result, the victim suffered broken ribs and a ruptured pancreas.⁶⁹ The defendant argued that he could not be charged with aggravated assault after the court's holding in *Owusu*, "because a body part cannot be a dangerous instrument."⁷⁰ The court rejected the defendant's argument and stated that although a body part cannot be a dangerous instrument, the defendant's sandals had the capability of aggravating the injury.⁷¹ Thus, depending on its use, a "shod foot" may be a dangerous instrument.⁷²

In *People v. Warren*,⁷³ the defendant was charged with assault in the second degree after the victim alleged she was thrown down a staircase to the concrete below.⁷⁴ The defendant argued that, under the circumstances, he did not use the concrete floor as a dangerous instrument.⁷⁵ The trial court agreed and dismissed that count of the indictment.⁷⁶ On appeal, the count was reinstated, and the court stated that there was sufficient evidence for a grand jury to satisfy the charge.⁷⁷ The court noted that although there was sufficient evidence presented to the grand jury for indictment, the People still have the burden to demonstrate beyond a reasonable doubt that the defendant intended to use the concrete as a dangerous instrument.⁷⁸

IV. THE FEDERAL APPROACH - CONFLICT AMONGST THE CIRCUITS

One of the leading federal court cases that addressed whether a person's anatomy, in particular a person's mouth and teeth, can be considered a deadly and dangerous weapon was the Eighth Circuit case of *United States v. Moore*.⁷⁹ A doctor informed Moore, an inmate at a medical center in Minnesota, that he had tested positive for

⁶⁸ *Id.* at 507.

⁶⁹ *Id.*

⁷⁰ *Id.* at 511.

⁷¹ *Id.*

⁷² *Byrd*, 855 N.Y.S.2d at 511.

⁷³ 949 N.Y.S.2d 496 (App. Div. 2d Dept 2012).

⁷⁴ *Id.* at 497.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 499.

⁷⁸ *Warren*, 949 N.Y.S.2d at 499.

⁷⁹ 846 F.2d 1163 (8th Cir. 1988).

HIV and that the disease was transmissible via blood or semen.⁸⁰ Moore was suspected of smoking in a non-smoking area and a violent altercation ensued after he refused to act accordingly during questioning.⁸¹ A correction officer attempted to restrain Moore and during the struggle Moore bit the officer several times, holding each bite for five to seven seconds.⁸² Later, during questioning, Moore remarked that he “hope[d] the wounds that he inflicted on the officers when he bit them were bad enough that they get the disease that he has.”⁸³

Moore was charged with assault on federal officers with a dangerous weapon, in particular, his mouth and teeth.⁸⁴ An expert testified at the trial that although the medical profession did not recognize well-proven instances where HIV was transmitted via a human bite, the virus nonetheless has a miniscule presence in human saliva.⁸⁵ Additionally, the expert went on to state that aside from the presence of HIV, a human bite can be “much more dangerous than a dog bite” due to a variety of germs present in the human mouth.⁸⁶ He categorized a human bite as being one of the most “dangerous form[s] of aggression” and “one of the most dangerous of all forms of bites.”⁸⁷

The Eighth Circuit has established that the jury should determine what constitutes a “deadly and dangerous weapon.”⁸⁸ It is not necessary that the injury cause a “substantial likelihood of death” but that the harm must be “more than a minor injury.”⁸⁹ The court in *Moore* reasoned that it is too difficult to determine as a matter of law whether an item can be deadly or dangerous and it must be left to the jury to decide whether the usage has rendered an object “deadly and dangerous.”⁹⁰ The court emphasized that the relevant inquiry is not

⁸⁰ *Id.* at 1164 (noting that the defendant had also tested positive for hepatitis, but this item was not included in the indictment).

⁸¹ *Id.* at 1165.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Moore*, 846 F.2d at 1166.

⁸⁵ *Id.* at 1165.

⁸⁶ *Id.* at 1165-66 (adding that the combination of these germs could lead to serious infection).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1166; *see* *United States v. Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982).

⁸⁹ *Moore*, 846 F.2d at 1166; *see* *United States v. Webster*, 620 F.2d 640, 641-42 (7th Cir. 1980) (reasoning that legislative definitions should not be read so narrowly as to exclude reasonable meanings).

⁹⁰ *Moore*, 846 F.2d at 1166 (emphasizing that almost any object can cause great bodily

the actual harm that the object caused, but whether the object has the “capacity, given the manner of its use” to inflict serious injury.⁹¹

Thus, leaving the question of whether the object or substance has the capacity for harm for the jury to decide, the court emphasized that the inquiry is not whether the object or substance in its resting state should be considered dangerous as a matter of law.⁹² Although Moore did not transfer any germs or diseases he may have held at the time of the bite, the fact that he had the capacity to transfer such was deemed sufficient to allow the issue to reach the jury.⁹³ Ultimately, the court found that the evidence supported a finding that Moore’s mouth and teeth were used in a manner that rendered them a dangerous weapon.⁹⁴

The Fourth Circuit arrived at a similar conclusion in *United States v. Sturgis*,⁹⁵ wherein the defendant was also HIV positive.⁹⁶ Sturgis was visiting an inmate at a reformatory and was informed that he would be subject to a contraband search before being granted visitation rights.⁹⁷ A foreign object was discovered during the search and Sturgis expressed his desire to terminate the search and cancel the visit.⁹⁸ He reached into his pants and placed an object into his mouth which caused the officer to suspect that Sturgis was attempting to conceal contraband.⁹⁹ When the officer attempted to retrieve the substance, the defendant reacted violently and bit the officer on the finger, pressing down with the bite for several seconds as to cause a serious wound with heavy blood flow.¹⁰⁰ As other officers arrived to restrain Sturgis, he continued to struggle and bit another officer on the arm.¹⁰¹ It was suspected that Sturgis had swallowed narcotics, and as such, he was transported to a local hospital to be treated.¹⁰² His violent behavior continued at the hospital as he tried to spit and

harm, and whether and when such harm is caused depends on the circumstances).

⁹¹ *Id.*

⁹² *Id.* at 1167.

⁹³ *Id.*

⁹⁴ *Id.* at 1168.

⁹⁵ 48 F.3d 784 (4th Cir. 1995).

⁹⁶ *Id.* at 785.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Sturgis*, 48 F.3d at 785.

¹⁰¹ *Id.*

¹⁰² *Id.* at 786.

bite the medical attendants, and later remarked “I’ll bite you like I did her. I hope you get it,” displaying his intent to infect those around him with HIV.¹⁰³

The court relied on expert testimony at the trial, citing accepted medical literature, which confirmed that HIV could be transferred through a human bite.¹⁰⁴ Similar to New York’s statute for assault with a dangerous weapon, the federal system also requires three elements to be proven.¹⁰⁵ Particularly, the government must establish that (1) there was an assault (2) with a dangerous weapon, (3) and there was intent to cause bodily harm.¹⁰⁶ The court in *Sturgis* found that the assault element was clear and the intent element was satisfied by the statements made by the defendant during the struggle.¹⁰⁷ Once again, the conviction hinged upon the court’s interpretation of a “dangerous weapon.”¹⁰⁸ The court’s decision was consistent with the Eighth Circuit’s decision in *Moore* holding that an object’s innate character should not be determinative.¹⁰⁹ The object’s use and capacity to threaten life and limb should govern whether an object is dangerous.¹¹⁰ Thus, the court’s interpretation of the statute permitted teeth to be construed as “a dangerous weapon if they are employed as such.”¹¹¹ The court observed the lack of any artificial lines in the statute’s language that would otherwise prohibit a finding that the human body was excluded from consideration.¹¹² Instead, the court determined that the jury must ascertain whether the facts as presented warrant a particular instrumentality dangerous under the circumstances it was used, observing that there was no need to resort to a flat determination as a matter of law.¹¹³ Through this holding, the

¹⁰³ *Id.*

¹⁰⁴ *Id.*; see *HIV Transmission*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (click “Can HIV be transmitted by human bite?”) (last visited Mar. 12, 2013).

¹⁰⁵ 18 U.S.C. § 113 (A) (3) (2006).

¹⁰⁶ *Sturgis*, 48 F.3d at 786; see 18 U.S.C. § 113 (a) (3) (“Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.”).

¹⁰⁷ *Id.* at 787.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; *Moore*, 846 F.2d 1163; see also *United States v. Johnson*, 324 F.2d 264 (4th Cir. 1963).

¹¹¹ *Sturgis*, 48 F.3d at 788.

¹¹² *Id.* at 788 (stating that any other interpretation would be an “exercise in empty formalism”).

¹¹³ *Id.* Here, the court asserts that a jury is more than capable of determining that a body

court aimed to protect those injured by these assaults, law enforcement officials in this case, rather than shield the perpetrator from aggravated charges.¹¹⁴

Justice Hall, in his dissent, took issue with the majority's liberal interpretation of the statute and inclusion of body parts within the its meaning.¹¹⁵ He expressed concern about the blurring of the statutory lines.¹¹⁶ He further remarked that although any object could be considered a weapon within the statute, if the legislature intended to include body parts, it clearly would have proscribed it in the statutory language.¹¹⁷ He interpreted the statute as directing that one must be armed with a "weapon," noting that neither body parts nor stationary objects fall within the statute's ordinary meaning.¹¹⁸

The Ninth Circuit, in *United States v. Rocha*,¹¹⁹ resolved a related question as to whether the use of one's bare hands can support a conviction for assault with a dangerous weapon.¹²⁰ During a prison fight, the defendant used his hands to pull out the legs of the victim, causing the victim's body to crash onto the concrete floor beneath him.¹²¹ The defendant was charged and convicted with assault with a dangerous weapon by the district court.¹²² The jury concluded that the defendant's hands constituted the dangerous weapon, not the concrete floor.¹²³ The defendant appealed, urging that the use of one's bare hands could not satisfy an assault under the federal statute.¹²⁴

The Ninth Circuit has interpreted the term "dangerous weapon" as "any object that is used in a way to inflict great bodily harm."¹²⁵ In *United States v. Riggins*,¹²⁶ the Ninth Circuit reasoned

part was used in a dangerous manner and uses finger nails as an example. *Id.* It has confidence a jury could differentiate between a slap to the face and the use of that same hand's fingernails to claw out the victim's eyes. *Id.*

¹¹⁴ *Sturgis*, 48 F.3d at 789.

¹¹⁵ *Id.* at 790 (Hall, J., dissenting).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 789-90 (stating that it is a strain on the "boundaries of ordinary usage to call body parts 'objects' ", and pausing for concern that "[o]nce body parts are deemed weapons, the term ceases to be of any use as a distinguishing factor).

¹¹⁸ *Id.* at 790-91.

¹¹⁹ 598 F.3d 1144 (9th Cir. 2010).

¹²⁰ *Id.* at 1146.

¹²¹ *Id.* at 1147.

¹²² *Id.* at 1153.

¹²³ *Id.*

¹²⁴ *Rocha*, 598 F.3d at 1146; see 18 U.S.C. § 113 (A) (3) (2006).

¹²⁵ *Rocha*, 598 F.3d at 1153; see *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994) (quoting *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982)) (stating that

that a shoe and belt were in fact dangerous weapons because each was an external item and not part of one's body.¹²⁷ These items were used to augment physical blows.¹²⁸ The court concluded that although the various parts of the human body are capable of inflicting great harm, Congress intended to include only external objects as dangerous weapons.¹²⁹ As such, it held that even though Rocha used his hands to trip his victim and caused serious harm, his hands were not dangerous weapons, and to decide otherwise would blur statutory lines.¹³⁰

V. OUT-OF-STATE INTERPRETATIONS OF "DANGEROUS INSTRUMENT" AND "DEADLY WEAPON"

As previously stated, only a minority of jurisdictions recognize that a person's body, particularly one's mouth or teeth, when used to inflict serious bodily harm upon another, may be considered a dangerous instrument for purposes of sustaining aggravated charges. The District of Columbia is one jurisdiction that concluded "human teeth fit comfortably under the plain meaning of the term dangerous weapon."¹³¹ The court addressed the concerns that other courts have raised about the blurring of statutory lines in *In re D.T.*¹³² In this matter, the court determined that a body part may be converted into a dangerous weapon depending on the circumstances surrounding the assault.¹³³ However, the court further directed that "simply possessing teeth in no way meets that critical threshold" of being armed with a dangerous weapon.¹³⁴ The court rejected the presumption that all persons are armed with dangerous weapons every time they get

determining whether an object is dangerous depends on the manner in which it was used and non-obvious items can be deemed dangerous if "used in a manner likely to endanger life or inflict great bodily harm").

¹²⁶ 40 F.3d 1055 (9th Cir. 1994).

¹²⁷ *Id.* at 1057.

¹²⁸ *Rocha*, 598 F.3d at 1157.

¹²⁹ *Id.* Here the court joins the majority of jurisdictions in holding that one's body cannot be considered a dangerous instrument. *Id.*

¹³⁰ *Id.* (reasoning that every assault essentially requires the use of some part of the body and by holding that a body part could be considered a dangerous weapon would practically eliminate simple assault charges and raise every indictment to aggravated assault).

¹³¹ *In re D.T.*, 977 A.2d 346, 355 (D.C. 2009) (noting that the defendant bit a police officer on his leg, through his pants, as to draw blood and leave bite marks).

¹³² 977 A.2d 346 (D.C. 2009).

¹³³ *Id.* at 354.

¹³⁴ *Id.*

dressed in the morning and put on their belts and shoes.¹³⁵ However, the court explained that such items can be found dangerous under the circumstances.¹³⁶ Likewise, the court directed that a body part, capable of satisfying that same criteria, can also be found dangerous under the circumstances.¹³⁷ Under this approach, all simple assaults do not automatically convert into assaults with dangerous weapons.¹³⁸ Rather, when a body part is used for a secondary purpose, such as in an attack, whether the body part was “likely to cause death or great bodily injury in the manner in which [they were used],” threatened or intended to be used, is a matter reserved for the jury’s determination.¹³⁹

It is well established in the District of Columbia that within the meaning of “weapon” is “any instrument of offense; anything used, or designed to be used, in attacking an enemy.”¹⁴⁰ Human teeth, certainly capable of causing severe and dangerous injuries, fall well within that definition.¹⁴¹ Even though body parts can be construed as “dangerous” in this jurisdiction, although a stretch, it is worth mentioning that human teeth are slightly different than normal body parts.¹⁴² Human teeth can be removed and are not technically “fixed and stationary,” unlike parts of the body such as arms and legs.¹⁴³

New Mexico shares a similar viewpoint as that of the District of Columbia as demonstrated in the case *State v. Neatherlin*.¹⁴⁴ The defendant in this case, who had tested positive for hepatitis C, intentionally bit the victim and uttered the words “I hope you die [;] I hope you die.”¹⁴⁵ An expert at trial noted there is a very small possibility (two percent) that hepatitis C can be transmitted through blood or saliva.¹⁴⁶ The trial court subsequently convicted the defendant of ag-

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *In re D.T.*, 977 A.2d at 354.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 350. (quoting *Tatum v. United States*, 110 F.2d 555, 555 (D.C. Cir. 1940)).

¹⁴¹ *In re D.T.*, 977 A.2d at 350.

¹⁴² *Id.* at 352.

¹⁴³ *Id.*

¹⁴⁴ 154 P.3d 703, 706 (N.M. Ct. App. 2007).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 707.

gravated battery with a dangerous weapon.¹⁴⁷ The New Mexico Court of Appeals reversed the conviction, not because a person's mouth cannot be a dangerous weapon, but because the jury was not given instructions on the lesser charge of misdemeanor aggravated battery.¹⁴⁸

New Mexico courts have concluded that whether, under each particular set of circumstances, a body part or normally innocuous item was put to use in a manner that is capable of inflicting great bodily harm is a matter reserved for the jury's determination.¹⁴⁹ Specific jury instructions are to be given, directing the jury that if the object or instrument is used as a weapon and has the potential to cause death or serious injury, then it may be considered to satisfy an aggravated offense.¹⁵⁰ The courts partially relied on the plain definition of the word "weapon" in taking this position, explaining that the plain meaning is broad enough to include parts of the body, specifically recognizing one's teeth and mouth.¹⁵¹

New Mexico focuses on conducting a "functional inquiry into the manner of use" to find "an object's status as a deadly weapon."¹⁵² In making a determination based off of the actual use of the item, New Mexico courts strive to protect the victim rather than the perpetrator.¹⁵³ Thus, by allowing otherwise innocuous items or body parts to be considered within the realm of their statutory scheme for aggravated offenses, the court has sought to deter individuals from using their mouths to attack others and minimize the potential for injury.¹⁵⁴ As a result, the question of whether a person's mouth or teeth can be used as a deadly weapon in New Mexico is a question of fact for the jury to decide and has not been reduced to a matter of law.¹⁵⁵

At one point, Alabama was a state that left open the possibility that a person's body could be deemed a dangerous instrument.¹⁵⁶

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 712-13.

¹⁴⁹ *Neatherlin*, 154 P.3d at 708.

¹⁵⁰ *Id.*; NMR CR UJI 14-322 (West 2000).

¹⁵¹ *Neatherlin*, 154 P.3d at 709; see *Black's Law Dictionary* 1593 (6th ed. 1990) (defining a weapon as "[a]n instrument of offensive or defensive combat, or anything used, or designed to be used, in destroying, defeating, threatening, or injuring a person").

¹⁵² *Neatherlin*, 154 P.3d at 709.

¹⁵³ *Id.*; *State v. Vallejos*, 9 P.3d 668, 674 (N.M. Ct. App. 2000) ("The aggravated battery statute is directed at preserving the integrity of a person's body against serious injury.").

¹⁵⁴ *Neatherlin*, 154 P.3d at 710.

¹⁵⁵ *Id.* at 711.

¹⁵⁶ See *Brock v. State*, 555 So. 2d 285, 287 (Ala. Crim. App. 1989) (stating that fists could

The state has since modified its position on the matter. In *McMillian v. State*,¹⁵⁷ the court noted that the Alabama Supreme Court has concluded “body parts, without more, are not deadly weapons or dangerous instruments” within its statutory scheme.¹⁵⁸ The court in *McMillian* acknowledged that normally innocuous objects can be used in a matter that render them dangerous or deadly, but refused to include the human body in that category of “objects.”¹⁵⁹ Under this approach, the court expressed its concern that the line between the degrees of assault would be blurred if the human body could be a dangerous instrument, and pointed to the absence of any basis of distinguishment.¹⁶⁰ The court observed that the only rational basis for increasing the severity of punishment should be when an assailant implements an object apart from his own body.¹⁶¹ Any other reasoning would confuse the public’s perception of the acceptable standard of conduct, diminish necessary fair notice of a crime, and could lead to a violation of the defendant’s due process rights.¹⁶²

A Massachusetts court arrived at a similar conclusion in *Commonwealth v. Davis*.¹⁶³ In *Davis*, the defendant bit off a piece of someone’s ear and the trial court jury convicted the defendant of assault with a dangerous weapon.¹⁶⁴ The conviction on this charge was overturned and the Massachusetts Court of Appeals held that “human teeth or parts of the body should be excluded from consideration by the fact finder as instrumentalities which can be used as dangerous weapons.”¹⁶⁵ The court explained that the meaning of dangerous

be dangerous instruments or deadly weapons); ALA. CODE § 13A-1-2 (5) (West 1975) (defining a dangerous instrument as “[a]ny instrument, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is highly capable of causing death or serious physical injury”).

¹⁵⁷ 58 So. 3d 849 (Ala. Crim. App. 2010).

¹⁵⁸ *Id.* at 853; *see also* *Ex parte Cobb*, 703 So. 2d 871, 877 (Ala. 1996).

¹⁵⁹ *McMillian*, 58 So. 3d at 852-53.

¹⁶⁰ *Id.* at 852; *see also* *Ex parte Cobb*, 703 So. 2d at 877 (noting that Alabama’s legislature adopted their definition of “dangerous instrument” from New York’s Penal Law. The court looks to New York’s rationale as persuasive authority that, without more, the human body alone cannot be considered a dangerous weapon).

¹⁶¹ *McMillian*, 58 So. 3d at 853. In this case, the assailant used his mouth and teeth to remove the victim’s eyeball causing permanent blindness. *Id.* The court recognizes that this is indeed a serious injury but without an external instrumentality there cannot be an aggravated charge. *Id.*

¹⁶² *Id.* at 852.

¹⁶³ 406 N.E.2d 417 (Mass. App. Ct. 1980).

¹⁶⁴ *Id.* at 418.

¹⁶⁵ *Id.* at 419.

weapon as set out by the statute includes two classes of objects: (1) objects that are specifically designed to cause death or serious bodily injury, and (2) objects that are not inherently dangerous but can be put to a use that will inflict serious harm.¹⁶⁶ Objects that fall into the first category are deemed dangerous as a matter of law, while the dangerousness of instrumentalities in the second category are to be decided by the fact finder on a case by case basis.¹⁶⁷ As such, the court directed that any instrumentalities that fall into the second category have always been external objects apart from the human body.¹⁶⁸

Addressing the concern to protect victims from serious harm, the court in *Davis* pointed to other statutory vehicles enacted to protect the public without necessitating consideration of the human body as a dangerous instrument.¹⁶⁹ The court reasoned that the degree of harm should not have any relevance in transforming the human body into a dangerous instrument.¹⁷⁰ In addition, the court advised that it was not the legislature's intent to include body parts in its definition of "dangerous weapon," and any other holding would result in duplicative offenses and frustrate the statutory lines between assaults.¹⁷¹ The court noted that the jury is more than capable of determining whether, based on a particular set of circumstances, a body part was used as a dangerous weapon.¹⁷² However, the court concluded that to enable prosecutors to exploit the system with an excess of felonious indictments, would provide them with an unnecessary advantage.¹⁷³ The court explained that it was without authority to expand the meaning of a dangerous weapon, as such a task is reserved for the state legislature.¹⁷⁴ Thus, the court directed that any such changes should

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 419-20 (recognizing that objects that are dangerous per se include firearms and knives, while more innocuous items fall under the second category); *see also* *Com. v. Farrell*, 78 N.E.2d 697 (Mass. 1948) (involving a lighted cigarette); *Com. v. LeBlanc*, 334 N.E.2d 647 (Mass. App. Ct. 1975) (involving an automobile door); *Com. v. Tarrant*, 314 N.E.2d 448 (Mass. App. Ct. 1975) (involving a German shepherd dog).

¹⁶⁸ *Davis*, 406 N.E.2d at 420.

¹⁶⁹ *Id.* (stating that when serious physical injury occurs, prosecutors usually bring indictments for mayhem or assault with intent to maim and disfigure, which carry harsher penalties than basic assault or battery indictments).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 421.

¹⁷² *Id.* at 422.

¹⁷³ *Davis*, 406 N.E.2d at 422.

¹⁷⁴ *Id.*

occur through the proper legislative channels.¹⁷⁵

In *State v. Bachelor*,¹⁷⁶ a man was charged with assault in the second degree when he bit another man's nose during a physical altercation.¹⁷⁷ The Nebraska judge instructed the jury that a "dangerous instrument is *anything* which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury."¹⁷⁸ The jury subsequently found the defendant guilty of the second degree assault charge.¹⁷⁹ Defense counsel objected to this interpretation of a "dangerous instrument," arguing to replace the word "anything" with the word "object," but the court overruled this objection.¹⁸⁰ On appeal, the defendant challenged the jury instruction given during the trial, arguing that his teeth could not be considered the "anything" to sustain a conviction of second degree assault.¹⁸¹ Nevertheless, the appellate court reasoned that teeth are certainly capable of causing bodily injury.¹⁸² The court looked to the Michigan Court of Appeals for guidance, which had previously clarified that "[w]hat distinguished felonious assault . . . from simple assault and aggravated assault is the use of a dangerous weapon in the perpetration of the assault."¹⁸³ Thus, the court concluded that it would join the majority of jurisdictions, holding that neither teeth, nor body parts, fall within the category of "dangerous instruments."¹⁸⁴ Through this holding, the court sought to preserve the distinctions in the language of its assault statutes, and prevent the phrase "dangerous instrument" from becoming meaningless.¹⁸⁵

¹⁷⁵ *Id.* at 423.

¹⁷⁶ 575 N.W.2d 625 (Neb. Ct. App. 1998).

¹⁷⁷ *Id.* at 627.

¹⁷⁸ *Id.* at 629.

¹⁷⁹ *Id.* at 630.

¹⁸⁰ *Id.* at 629.

¹⁸¹ *Bachelor*, 575 N.W.2d at 629, 630 (observing that the defendant argued that since "his teeth are part of his body, they cannot be considered as a 'dangerous instrument' " within the meaning of the statute); see NEB. REV. STAT. § 28-309 (1995) ("(1) A person commits the offense of assault in the second degree if he or she: (a) Intentionally or knowingly causes bodily injury to another person with a dangerous instrument; (b) Recklessly causes serious bodily injury to another person with a dangerous instrument.").

¹⁸² *Bachelor*, 575 N.W.2d at 630.

¹⁸³ *Id.* at 630 (quoting *People v. Van Diver*, 263 N.W.2d 370, 372 (Mich. Ct. App. 1977)).

¹⁸⁴ *Id.* at 631; see also *Davis*, 406 N.E.2d 417; *Owusu*, 712 N.E.2d 1228; *Van Diver*, 263 N.W.2d 370.

¹⁸⁵ *Bachelor*, 575 N.W.2d at 631-32. The court stated "[d]eclaring body parts dangerous instruments makes the increased penalty for using a dangerous instrument meaningless and creates ambiguity, if not outright duplication, between second and third degree assault under

Louisiana courts have long held that a person's teeth or bare hands cannot be a dangerous weapon in the eyes of the law.¹⁸⁶ In *State v. Calvin*,¹⁸⁷ the court stated:

It is true that portions of the human anatomy may be dangerous and the bare hands of a merciless assailant may quite readily 'produce death or great bodily harm,' particularly if the victim be young or weak, but the fact remains that there must be proof of the use of some inanimate instrumentality before a defendant can be held guilty of assault 'with a dangerous weapon.'¹⁸⁸

As such, the court rejected any assertion to the contrary and required the use of an external instrumentality to sustain an aggravated charge with a dangerous weapon.¹⁸⁹

The Oregon legislature has defined a "dangerous weapon" as "any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury."¹⁹⁰ In *State v. Kuperus*,¹⁹¹ the court reversed a first-degree assault conviction on the ground that teeth are not recognized as a dangerous weapon in Oregon.¹⁹² Pointing to the plain meaning of the statute, the court suggested that a "dangerous weapon" must be external to the human body.¹⁹³ The court observed that the Oregon legislature "intended to distinguish between assaults committed without the use of an object external to the human body that could be used to harm the victim and those assaults in which such an object is used."¹⁹⁴ The court construed a weapon as something a person could arm themselves with or fortify their body with for offensive purposes,

Nebraska law." *Id.* at 632.

¹⁸⁶ *State v. Calvin*, 24 So.2d 467, 469 (La. 1945); *State v. Clark*, 527 So. 2d 542, 543 (La. Ct. App. 1988); see LA. REV. STAT. ANN. § 14:2 (3) (West 2010) (defining a dangerous weapon as "any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm").

¹⁸⁷ 24 So.2d 467 (La. 1945).

¹⁸⁸ *Id.* at 469.

¹⁸⁹ *Id.*

¹⁹⁰ OR. REV. STAT. ANN. § 161.015 (1) (West 2012).

¹⁹¹ 251 P.3d 235 (Or. Ct. App. 2011).

¹⁹² *Id.* at 239. The victim, in this case, lost part of his ear after the defendant bit it which left a visible scar. *Id.* The victim required a prosthetic device as a result. *Id.*

¹⁹³ *Id.* at 237.

¹⁹⁴ *Kuperus*, 251 P.3d at 238.

and since a person cannot “arm himself with his own body and parts thereof, including his teeth, his own teeth cannot be considered a dangerous weapon for purposes of first-degree assault.”¹⁹⁵

In *Ojeda v. State*,¹⁹⁶ the Texas court stated that “[a] hand or fist is not a deadly weapon per se, but may become a deadly weapon if used in a manner capable of causing death or serious bodily injury.”¹⁹⁷ The defendant in *Ojeda* beat his girlfriend with closed fists, causing facial fractures, a broken finger, and a loss of teeth in addition to other various injuries.¹⁹⁸ The court affirmed the lower court’s finding that the defendant’s closed fist was used as a deadly weapon.¹⁹⁹ In *Najera v. State*,²⁰⁰ a man with HIV was charged with aggravated sexual assault after it was disclosed he knowingly engaged in unprotected sex.²⁰¹ The appellate court affirmed the trial court’s conviction and stated that a jury could have rationally concluded that the defendant used his penis and bodily fluids, knowingly and willingly, as a deadly weapon under the circumstances.²⁰² Thus, Texas courts have concluded that it is for the jury to determine whether the body part was used as a deadly weapon by examining all of the evidence and the circumstances in which the body part was put to use.²⁰³ Under this line of reasoning, the parts and fluids of a person’s body can be deemed deadly weapons in Texas if the evidence supports the jurors’ conclusion.²⁰⁴

VI. CONCLUSION

The court in *Plunkett* held that a person’s body, more specifically a person’s mouth or teeth, cannot be deemed a dangerous instrument within the meaning of Penal Law section 10.00 (13) under

¹⁹⁵ *Id.* at 238-39.

¹⁹⁶ 05-09-01343-CR, 2011 WL 3528189, at *1 (Tex. App. Aug. 12, 2011).

¹⁹⁷ *Id.* at *7; *Turner v. State*, 664 S.W.2d 86, 90 (Tex. Crim. App. 1983); see TEX. PENAL CODE ANN. § 1.07 (a) (17) (West 2010) (providing that a deadly weapon is “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury”).

¹⁹⁸ *Ojeda*, 2011 WL 3528189 at *3.

¹⁹⁹ *Id.* at *1.

²⁰⁰ 955 S.W.2d 698 (Tex. App. 1997).

²⁰¹ *Id.* at 701.

²⁰² *Id.*

²⁰³ *Ojeda*, 2011 WL 3528189 at *7. The evidence can include the words spoken by the defendant, the weapon’s intended use, the physical characteristics of the weapon, the severity of the injury, and the victim’s testimony among the factors to be considered. *Id.*

²⁰⁴ *Id.* at *8.

any circumstances. This interpretation of the statute fails to take into consideration an important concern: the protection of the victim of such attacks. There is a legitimate state interest in protecting law enforcement officials from the severe harm that can be inflicted upon them while performing their regular course of duty. No greater harm can be posed to such an individual than harm from an aggressor who has nothing to lose, and often this is the scenario presented when officers of the law take action against criminals or prisoners, who often will resort to any possible measure to inflict harm upon another. When backed into a corner, and fighting for survival, an individual can, and will, resort to any measure necessary to protect their freedom, and this includes the use of one's body.

By declaring that a person's body, as a matter of law, can *never* be a dangerous weapon, the New York courts take any prevailing circumstances out of the jury's hands. Although there is a miniscule chance that diseases such as HIV can be transmitted via saliva in a human bite, the court in *Plunkett* failed to recognize that when a struggle between two individuals occurs, the physicality may cause blood to be present in the aggressor's mouth before the bite occurs. This would drastically increase the probability that a disease would in fact be contracted by the victim of a human bite, especially in vicious bites that break through layers of skin.²⁰⁵ Coupled with the intent to transfer said disease to the victim, the state should interpret the statute to encompass such situations, as HIV is most certainly deadly if contracted. This intent could be demonstrated by a showing that the defendant in fact knew he was HIV positive at the time of an assault and by statements made expressing the desire to transmit the disease. Placing the focus on the aggressor's intent to transfer a virus would eliminate concerns of placing increased liability on anyone with a transcommunicable disease.²⁰⁶ Of course, the burden would still remain on the People to prove intent beyond a reasonable doubt. The public would be best protected by placing a focus on the intent to

²⁰⁵ See Laura M. Maruschak & Randy Beavers, *HIV in Prisons, 2007-08*, BUREAU OF JUSTICE STATISTICS – BULLETIN, 2 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf> (noting that “New York was the only state to report more than 5% of its male custody population and more than 10% of its female custody population with HIV or confirmed AIDS”).

²⁰⁶ See Ari Ezra Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL'Y & L. 550, 553-54 (2011) (noting that sexually active HIV positive individuals have been convicted of aggravated assault in the past even though they “had a good faith belief that they could not transmit the disease, had used protection, and had no intent to harm”).

harm with a particular item, rather than examining the characteristics of the instrument itself.

A major concern of the courts is raising the culpability of the “extraordinary man”. If a person is so “extraordinary” in physical stature, he or she should be on notice that his or her actions would cause serious physical injury to someone physically less fortunate. The minority view gives the jurors an opportunity to examine each case on a factual basis, and the jurors are more than capable to determine whether a simple fist fight between equals is different from a six-foot four, three-hundred pound man punching an elderly woman. Of course if the heavyweight fighter threatened a blow during the normal course of a fight, there could be no culpability, but the situation may be different if Mike Tyson threw an uppercut punch to the average citizen outside of the boxing profession. If the facts indicate that the human body was not used as a dangerous weapon under the circumstances, the jury can convict the defendant on a lesser charge. A jury is often called upon to consider complicated issues in deliberation, and it would not be an onerous task for the jury to take one’s size, weight, and strength into consideration while deliberating a charge.

Many courts have held that innocuous items such as handkerchiefs and belts could be considered dangerous weapons, whose normal purpose, or even secondary purpose, in no way suggests the ability to cause serious harm. Items such as handkerchiefs, arm casts, belts and pit bulls have qualified as deadly weapons or dangerous instruments. It is not a stretch of the imagination to consider the human body can have a significant ability to inflict harm upon another as a secondary purpose. It would seem that the human body, in particular, one’s mouth and teeth, qualify under the statute more so than the rather innocuous items, particularly because one of the mouth’s *primary* purposes is biting.

Similarly, the court in *Plunkett* places too much emphasis on the blurring of statutory lines. The court asserts that an alternative holding would effectively eliminate simple assault charges since every assault requires some action by the human body. The court fails to consider that its holding leaves open the possibility that individuals fitted with prosthetic arms or legs could potentially face elevated charges if they were used to injure another. In the future, improvements in medical technology will further frustrate these artificial boundaries established in New York, as prosthetics will become more

similar to the human anatomy both functionally and aesthetically. The “use-oriented” approach appropriately resolves this problem by not declaring an item dangerous per se, but by empowering the jury to analyze the circumstances which gave rise to the injury, and how the otherwise innocuous item was transformed into a dangerous instrument or deadly weapon. The court in *Plunkett* states that the measure of criminal liability should reflect the actual harm and not the potential to inflict harm. The “use-oriented” approach does just that. It measures the harm caused by an object not normally capable of inflicting such harm. The human body alone is capable of causing severe physical injury, disfigurement, and even death.²⁰⁷ The statutory language does not explicitly exclude the human body from consideration as a dangerous instrument. When the human body has the capacity to cause serious injury or death, coupled with the intent to do so, the perpetrator should be held to a higher level of culpability.

However, if a defendant were to be convicted of aggravated assault, with his or her mouth or body constituting the dangerous instrument, there would likely be a valid defense of unconstitutionality under the current construction of New York Penal Law § 120.11. From an objective view, the ordinary person probably would not equate the plain meaning of the word “instrument” with the human body. However, for the reasons preceding, New York legislature should amend its aggravating statutes to explicitly state that a person’s body may be considered by the trier of fact when determining whether or not, under the circumstances, it was a dangerous instrument. New York legislature should also consider changing the word “instrument” to “weapon” if it intends to exclude the human body from satisfying aggravated charges. The word “weapon” carries with it a connotation of some outside instrumentality, whereas the word “instrument” is more ambiguous. Despite the court’s interpretation of what legislature intended the statute to mean, the face of the statute must provide fair notice. Additional clarifying language would help provide the requisite notice to would-be offenders, promote consistent application of the law and serve to protect the public interest.

²⁰⁷ See James B. McArthur, *As the Tide Turns: The Changing HIV/aids Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 740 (2009) (comparing HIV infected individuals to other handicaps and concluding that “[s]ociety has determined the penalties that individuals should suffer if they permanently debilitate or blind another human being, and society should criminalize the transmission of HIV likewise”).

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