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## Comments

### A PUNCHER'S CHANCE: ASSESSING THE CLASSIFICATION OF MARTIAL ARTISTS' HANDS AS DEADLY WEAPONS

*"The ultimate aim of martial arts is not having to use them."*<sup>1</sup>

#### I. INTRODUCTION: THROWING THE PUNCH HEARD 'ROUND THE WORLD

In November of 2013, twenty-seven-year-old Jamal Parks made waves in the legal realm of martial arts when he was charged with aggravated assault under the Texas Penal Code.<sup>2</sup> According to reports, Mr. Parks was involved in an altercation in his home with his friend.<sup>3</sup> As the situation escalated, Mr. Parks reportedly beat his friend with his hands and threw him through drywall.<sup>4</sup> Further, when the police arrived, Mr. Parks physically assaulted the responding officer severely enough to jeopardize the officer's life.<sup>5</sup> According to the section of the Texas Penal Code under which Mr. Parks was charged, a finding that a deadly weapon was employed in the assault is required to establish an aggravated assault charge.<sup>6</sup> Here, the deadly weapon used was the defendant's hands—the hands of a trained mixed martial arts (MMA) fighter.<sup>7</sup>

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1. MUSASHI MIYAMOTO & STEPHEN F. KAUFMAN, *MUSASHI'S BOOK OF FIVE RINGS: THE DEFINITIVE INTERPRETATION OF MIYAMOTO MUSASHI'S CLASSIC BOOK OF STRATEGY* 33 (2004) (discussing strategy in martial arts and conflict).

2. See Lauren Zakalik, *MMA Fighter Sentenced for Using Hands as Deadly Weapons*, WFAA (Nov. 2, 2015, 11:26 PM), <http://www.wfaa.com/story/news/local/tarrant-county/2015/11/02/mma-fighter-sentenced-for-using-hands-as-deadly-weapons/75073388/> [<https://perma.cc/B2K5-H42B>] (noting facts surrounding arrest of Jamal Parks).

3. See *id.*; see also *MMA Fighter Jamual Parks Sentenced 6 Years in Prison for Assaulting a Friend, Police Officer with Bare Hands*, REALTY TODAY (Nov. 9, 2015, 6:00 AM), <http://www.realtytoday.com/articles/49606/20151109/mma-fighter-jamual-edward-parks-sentenced-6-years-prison-assault.htm> [<https://perma.cc/NV4Q-JJWQ>] (reporting details that led to Mr. Parks's arrest and sentencing).

4. See *MMA Fighter Jamual Parks Sentenced 6 Years in Prison for Assaulting a Friend, Police Officer with Bare Hands*, *supra* note 3; see also Zakalik, *supra* note 2, and accompanying text.

5. See Zakalik, *supra* note 2 (noting facts surrounding arrest of Jamal Parks).

6. See TEX. PENAL CODE ANN. § 22.02(b)(1) (West 2009) (noting statutory criteria for assault with deadly weapon).

7. See Zakalik, *supra* note 2 (noting facts surrounding arrest of Jamal Parks).

Although perhaps shocking, this type of charge is not entirely unprecedented.<sup>8</sup> Anyone who has spent time around martial arts has heard the legend about a black belt or professional boxer registering his or her hands as deadly weapons.<sup>9</sup> But, surprisingly, this idea carries more weight than most anticipated.<sup>10</sup> In Mr. Parks's case, the defendant plead guilty to aggravated assault.<sup>11</sup> Accordingly, there was very little room left for judicial scrutiny of whether the hands of a martial artist can qualify as a deadly weapon under the law.<sup>12</sup>

As is discussed below, a person's body is generally allowed to be classified as a deadly weapon under Texas's case law.<sup>13</sup> Although this direct point has had some glancing blows with the legal system, there is currently some discrepancy about how to treat the body of an individual with respect to considering it a deadly weapon.<sup>14</sup> States are divided on this issue—some categorically exclude the body as a deadly weapon, while other states allow the body to be a deadly weapon under certain circumstances.<sup>15</sup> This Comment will focus on how, and if, the body of a trained martial artist should be treated differently under these analyses.<sup>16</sup> First, it will discuss various states' jurisprudence surrounding the issues, showcasing the di-

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8. See Paul Thompson, *Judge Rules Martial Arts Fighter's Hands and Feet are 'Deadly Weapons' in Road Rage Attack*, DAILY MAIL (last updated Mar. 7, 2012, 12:08 AM), <http://www.dailymail.co.uk/news/article-2111617/Fernando-Rodrigues-jailed-Judge-rules-martial-arts-fighters-hands-feet-deadly-weapons.html> (discussing another incident where MMA fighter had his hands charged as deadly weapons in Florida).

9. See Jonathan Maberry, *Martial Arts Myths & Misconceptions Black Belts Having To Register as Deadly Weapons*, FIGHTINGARTS.COM, <http://www.fightingarts.com/reading/article.php?id=460> (last visited Aug. 28, 2016) [<https://perma.cc/3J4T-9RKR>] (discussing legend of black belts having to register as deadly weapons).

10. See Eugene Volokh, *These Hands and Feet Are Registered as Deadly Weapons . . . in Guam!*, WASH. POST (Mar. 31, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/31/these-hands-and-feet-are-registered-as-deadly-weapons-in-guam/> [<https://perma.cc/W4N8-T2Z2>] (noting how martial arts experts must register their hands and feet as weapons in Guam); see also 10 GUAM CODE ANN. § 62100 (2016) (noting requirement that martial art experts register with government).

11. See Zakalik, *supra* note 2 (noting facts surrounding arrest of Jamal Parks).

12. See *id.* (noting case was adjudicated via plea deal).

13. See *Turner v. State*, 664 S.W.2d 86 (Tex. Crim. App. 1983) (finding that hands may constitute deadly weapon if used as such); see also *infra* notes 21–56 and accompanying text.

14. Compare *Turner*, 664 S.W.2d at 89–91 (holding that human body may be classified as deadly weapon), with *People v. Owusu*, 712 N.E.2d 1228, 1229 (N.Y. 1999) (holding that body can never be deadly weapon).

15. Compare *Turner*, 664 S.W.2d at 89–91, with *Owusu*, 712 N.E.2d at 1229; see also *infra* notes 21–103 and accompanying text.

16. See *infra* notes 120–173 and accompanying text.

chotomy among state courts in allowing, or not allowing, the human body to be treated as a deadly weapon.<sup>17</sup> Next, this Comment will briefly discuss how deadly various martial arts are, and one jurisdiction's approach to the treatment of martial artists under the law.<sup>18</sup> This Comment will then focus on how the body of a martial artist would affect these various paths of analysis.<sup>19</sup> Finally, this Comment will suggest which path of analysis should be utilized in determining whether the body of a martial artist should be deemed a deadly weapon, and how that analysis would impact the case of Mr. Parks.<sup>20</sup>

## II. BACKGROUND: JUDGE-JITSU—DIFFERENT STATES WITH DIFFERENT DISCIPLINES

### A. Round One—Texas Tries to Land the Knockout Blow

Texas has a rather voluminous amount of case law on what constitutes a deadly weapon and how the use of a person's body fits into that analysis.<sup>21</sup> The statute that Mr. Parks was charged under in 2013 is still in effect at the time of writing this article.<sup>22</sup> Specifically, Section 22.02 of the Texas Penal Code enumerates when an assault can be increased to an aggravated assault.<sup>23</sup> A standard assault charge can become an aggravated assault if it "causes serious bodily injury" to another or the perpetrator furnishes a deadly weapon during the assault.<sup>24</sup>

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17. See *infra* notes 21–103 and accompanying text.

18. See *infra* notes 104–119 and accompanying text.

19. See *infra* notes 122–173 and accompanying text.

20. See *infra* notes 174–195 and accompanying text.

21. See generally *Turner v. State*, 664 S.W.2d 86 (Tex. Crim. App. 1983) (determining if hands and fists can be deadly weapons); see also *Limuel v. State* 568 S.W.2d 309 (Tex. Crim. App. 1978) (noting injuries should be taken into account when determining if object is deadly weapon); *Danzig v. State*, 546 S.W.2d 299 (Tex. Crim. App. 1977) (finding evidence insufficiently proved weapon deadly), *overruled on other grounds by Denham v. State*, 574 S.W.2d 129 (Tex. Crim. App. 1978); *Ohlrich v. State*, 287 S.W.2d 478 (Tex. Crim. App. 1956) (finding ordinary use of hands does not equate to deadly weapon).

22. See TEX. PENAL CODE ANN. § 22.02 (West 2009). Mr. Parks was charged under Texas Penal Code Section 22.02(b)(2)(B) for his assault on the responding police officer. See *Mixed Martial Artist's Hands Deemed "Deadly Weapons" in Texas Assault Case*, COMBAT SPORTS LAW (Nov. 3, 2015), <http://combatsportslaw.com/2015/11/03/mixed-martial-artists-hands-deemed-deadly-weapons-in-texas-assault-case/> [<https://perma.cc/NR8L-UJ8L>] (referencing copy of indictment imposed into webpage).

23. See TEX. PENAL CODE ANN. § 22.02 (West 2009).

24. TEX. PENAL CODE ANN. § 22.02(a)(1)–(2) (West 2009) (discussing the charge of aggravated assault).

In order to determine what can be a deadly weapon, courts regularly begin their analysis with the statute's definition section.<sup>25</sup> The Texas Penal Code defines a deadly weapon as either "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury."<sup>26</sup>

In 1976, *Mosley v. State* reached the Court of Criminal Appeals of Texas and concerned whether an object could be a deadly weapon.<sup>27</sup> *Mosley* presents an intuitive starting point of analysis because it was one of the first aggravated assault cases that utilized the new Penal Code and the legislature's definition of deadly weapon.<sup>28</sup> In *Mosley*, the defendant approached a female in a parking lot and threatened to kill her if she did not follow the defendant's instructions.<sup>29</sup> The defendant was armed with an unloaded air rifle, more commonly referred to as a BB gun.<sup>30</sup> The jury in this case determined that the gun used in the crime was very unreliable and launched projectiles at a very low velocity.<sup>31</sup> Applying the statute's definition of a deadly weapon, the court determined that this air rifle was not a deadly weapon for two reasons.<sup>32</sup> First, as determined by an expert witness at trial, the rifle was not a firearm and thus did not fall into the deadly weapon per se category.<sup>33</sup> Further,

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25. See *Mosley v. State*, 545 S.W.2d 144, 146 (Tex. Crim. App. 1976) (noting Texas' new Penal Code defines deadly weapon and thus analysis must stem from that definition); see also *Danzig*, 546 S.W.2d at 300 ("In determining whether the evidence was sufficient to show that the knife was a deadly weapon, as alleged, we turn first to . . . our new Penal Code, which defines 'deadly weapon' [.]."); *Turner*, 664 S.W.2d at 89 (noting court's initial deference to how deadly weapon is defined in statute).

26. TEX. PENAL CODE ANN. § 1.07(17) (West 2011) (defining deadly weapon pursuant to Texas law).

27. See *Mosley*, 545 S.W.2d at 145 (noting appellant's argument that there was insufficient evidence set forth to show utilization of deadly weapon during crime).

28. See *id.* at 144. *Mosley* was decided in 1976, which was three years after the enactment of the Texas Penal Code currently in use. See generally TEX. PENAL CODE ANN. § 1.01 (West 1994).

29. See *Mosley*, 545 S.W.2d at 145 (stating facts according to trial court record).

30. See *id.* Additionally, the court noted that the defendant never threatened to use the weapon as a bludgeon against the victim, which also weighed into the court ultimately finding that the air rifle was not a deadly weapon. See *id.*

31. See *Mosley*, 545 S.W.2d at 145–46 (detailing why air rifle could not be considered deadly weapon). The air rifle was fired in front of the jury during the trial. See *id.* The first attempt to fire the gun failed, and when it was successfully fired the projectile had a very low velocity. See *id.* Further, the record noted that projectiles from the gun usually never went over five feet. See *id.*

32. See *id.*

33. See *id.* (analyzing why air rifle was not deadly weapon per se). At trial, the state's expert witness testified that the air pistol in question was not a firearm. See

the court found that the air pistol was not used in a manner that was “calculated to produce death or serious bodily injury.”<sup>34</sup> Therefore, because the air rifle as it was used in this case did not fall under the statutory definitions of deadly weapon, the court vacated the finding that a deadly weapon was used in the crime.<sup>35</sup> The defendant’s case was subsequently reversed and remanded.<sup>36</sup>

A year later, the Texas Court of Criminal Appeals elaborated on what judges are permitted to consider in determining whether an object is a deadly weapon.<sup>37</sup> In *Danzig v. State*, the appellant assaulted a victim with a pen knife—the blade of which was roughly three or four inches long.<sup>38</sup> The main issue was whether this pen knife was a deadly weapon per se, or if it had to be proven as a deadly weapon because of how the defendant utilized it.<sup>39</sup> By looking to past cases decided using the old penal code, the court determined that “wounds inflicted in the injured party are factors to be considered in determining whether a weapon is a deadly weapon.”<sup>40</sup> Here, the court determined that the prosecution failed to show that the wounds inflicted would have resulted in death or serious injury.<sup>41</sup> Thus in this case, the court found that the pen knife was not a deadly weapon.<sup>42</sup>

In 1983, the same court decided *Turner v. State*, one of the first cases to discuss treating the body as a deadly weapon under the new

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*id.* Therefore, despite the language of Texas Penal Code § 1.07(17) (a), which defines a deadly weapon as a “firearm,” the air rifle in this case did not fall under the ambit of this provision. *See id.* at 146.

34. *Mosley*, 545 S.W.2d at 146 (quoting *Brown v. State* 233 S.W.2d 578, 579 (Tex. Crim. App. 1950)).

35. *See Mosley*, 545 S.W.2d at 146.

36. *See id.*

37. *See Danzig v. State*, 546 S.W.2d 299 (Tex. Crim. App. 1977) (reversing judgment), *overruled on other grounds by Denham v. State*, 574 S.W.2d 129 (Tex. Crim. App. 1978).

38. *See id.* at 300.

39. *See id.* at 300–01.

40. *Id.* at 301. In reaching this conclusion, the court considered authority from before the enactment of the 1973 Penal Code, including *Williams v. State*. *See Williams v. State*, 477 S.W.2d 24, 25 (Tex. Crim. App. 1972) (noting that pocket knives are not deadly weapons and wounds should be considered when determining deadliness of objects); *Johnson v. State*, 421 S.W.2d 918, 920 (Tex. Crim. App. 1968) (noting that victim injuries should be considered when evaluating objects’ deadliness); *Boazman v. State*, 501 S.W.2d 894, 896 (Tex. Crim. App. 1973).

41. *See Danzig*, 546 S.W.2d at 302. Although the *Danzig* court noted the need for expert testimony to prove that an object was a deadly weapon, this supposition was later overruled by *Denham v. State*. *See Denham v. State*, 574 S.W.2d 129, 131 (Tex. Crim. App. 1978) (concluding that there is no need for expert testimony to classify object as deadly weapon).

42. *See Danzig*, 546 S.W.2d at 302 (finding pen knife did not qualify as deadly weapon).

Texas Penal Code.<sup>43</sup> In *Turner*, the appellant was convicted of murder for killing a man with his hands.<sup>44</sup> On appeal, the appellant argued that the trial court erred in finding that his hands were deadly weapons utilized in the commission of the crime.<sup>45</sup> Due to the flexible definition of “deadly weapon” in Texas’s new penal code, the court had to determine if the hands of an individual could be classified as a deadly weapon.<sup>46</sup> The court reasoned that “a fist or hand are not ‘deadly weapons’ per se but can become such only in the manner used depending on the evidence shown.”<sup>47</sup> In *Turner*, the prosecution fell short of this evidentiary standard, failing to show that any of the victim’s fatal wounds were caused by the appellant’s hands.<sup>48</sup> Thus, the court seemed to have ushered the human body into Penal Code Section 1.07(17)(b) by allowing the body to be a deadly weapon depending on the evidence presented and the facts surrounding the case.<sup>49</sup>

Several years later, in *Stanul v. State*,<sup>50</sup> an appellant attempted to argue that a deadly weapon must be something that is in fact a weapon, or at the very least an instrument.<sup>51</sup> In *Stanul*, the appellant was charged with murder, and the court found that the appellant utilized a deadly weapon in the commission of the crime as an aggravating factor.<sup>52</sup> Specifically, the prosecution alleged that the appellant struck the victim’s head against the floor.<sup>53</sup> The appellant argued that previous case law required that an alleged deadly weapon be an instrument or object, and that because the floor was neither of these, he could not be found to have utilized the floor as

43. See *Turner v. State*, 664 S.W.2d 86, 89–91 (Tex. Crim. App. 1983).

44. See *id.* at 86–89 (discussing underlying crime subject to appeal at hand).

45. See *id.* at 86–87. Additionally, the appellant argued that his due process rights were violated and that the terms of his plea agreement had been violated, along with other appeals not relevant to this article. See *id.*

46. See *id.* at 89 (“It now has to be determined if a fist and hands are deadly weapons under the law and the facts of the case.”).

47. *Id.* at 90 (discussing how body parts can become deadly weapons).

48. See *Turner*, 664 S.W.2d at 91. Because the finding of a deadly weapon was not necessary for the appellant’s conviction, the trial court’s decision was affirmed but the finding of a deadly weapon was vacated. See *id.*

49. See TEX. PENAL CODE ANN. § 1.07(17)(b) (West 2011) (defining “deadly weapon” as “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury”).

50. 870 S.W.2d 329 (Tex. Crim. App. 1994).

51. See *id.* at 332–33.

52. See *id.* at 330 (“He also complains of the jury finding that a deadly weapon was used in the commission of the offense.”).

53. See *id.* at 330–32.

a deadly weapon.<sup>54</sup> However, the court disagreed, noting that the manner in which the floor was utilized in the commission of the crime—as a hard surface upon which to smash the victim's head—was sufficient for a reasonable jury to find that the floor was a deadly weapon.<sup>55</sup> This case exemplifies Texas judiciary's position: anything can be a deadly weapon as long as the prosecution shows that the object was used in a manner capable of causing serious harm or death.<sup>56</sup>

Texas is not the only state that has allowed the human body to be deemed a deadly weapon.<sup>57</sup> For example, in *People v. Pennese*,<sup>58</sup> the Court of Appeals of Colorado determined that “in some circumstances, fists may be considered a deadly weapon.”<sup>59</sup> Likewise, in *Hall v. State*,<sup>60</sup> a Georgia case, the defendant was convicted of aggravated assault when no material weapon was utilized in the crime.<sup>61</sup> The statute in *Hall* stated in relevant part: “[a] person commits the offense of aggravated assault when he or she assaults . . . [w]ith a deadly weapon or with any object, device, or instrument which . . . is likely to or actually does result in serious bodily injury[.]”<sup>62</sup> Additionally, Kentucky, Minnesota, Mississippi, North Carolina, South Carolina, and Ohio all allow the fist or other parts of the body to be considered a deadly weapon or instrument under certain circumstances.<sup>63</sup> Further, some states' judiciaries have opted not to rule

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54. *See id.* at 332–35. The basis for appellant's argument stems from the wording used in the jury instruction—that the instruction frequently referred to an “object.” *See id.* at 332. Appellant argued that the floor could not be referred to as an “object.” *See id.* at 332.

55. *See id.* at 335 (“The jury could rationally find that the floor was capable of causing death or serious bodily injury in the manner of its use by appellant[.]”).

56. *See id.*; *see also* *Hill v. State*, 913 S.W.2d 581, 583 (Tex. Crim. App. 1996) (finding belts and straps are deadly weapons because they were utilized to deprive victim of food).

57. *See supra* notes 59–64 and accompanying text (noting other states that classify body parts as deadly weapons).

58. 830 P.2d 1085 (Colo. App. 1991).

59. *Id.* at 1087 (rejecting *People v. Ross*, 819 P.2d 507 (Colo. App. 1991)).

60. 664 S.E.2d 882 (Ga. Ct. App. 2008).

61. *See id.* at 885; *see also* *Dasher v. State*, 676 S.E.2d 181, 183 (Ga. 2009) (finding hands and feet were deadly weapons), *abrogated by* *Regent v. State*, 787 S.E.2d 217 (Ga. 2016).

62. *Hall*, 664 S.E.2d at 888 (alteration in original) (quoting GA. CODE ANN. § 16-5-21(a)(2) (West 2006)).

63. *See generally* *Johnson v. Commonwealth*, 926 S.W.2d 463, 465 (Ky. Ct. App. 1996) (“We believe the inclusion of parts of the human body as dangerous instruments depends on the facts of the case and the capability of the body part to ‘cause death or serious physical injury.’”); *State v. Born*, 159 N.W.2d 283, 284–85 (Minn. 1968) (“In our opinion, fists, when used to strike . . . may or may not be dangerous weapons depending on the circumstances of the case.”); *Puliam v. State*, 298 So.2d 711, 713 (Miss. 1974) (“While the use of feet and fists ordinarily would not consti-

out the possibility that hands can be deadly weapons, even though a prosecutor has not sought charges classifying the human body as a deadly weapon or instrument.<sup>64</sup>

#### B. Round Two—New York and a Statutory Interpretation Choke

Despite the preceding discussion, a number of states have elected to disallow the body from ever being considered a deadly weapon.<sup>65</sup> For example, in *People v. Owusu*, the Court of Appeals of New York was tasked with deciding whether an individual's teeth were a dangerous instrument.<sup>66</sup> *Owusu* stemmed from an altercation where the defendant bit a victim's finger so severely that he severed nerves.<sup>67</sup> In adjudicating this case, the court first determined that there was a "well-documented legislative history that a body part was never considered a dangerous weapon or instrument."<sup>68</sup> Next, the court looked to its own jurisprudence, noting several cases that discussed what objects constituted deadly weapons.<sup>69</sup> The court then created a categorical rule prohibiting parts of the body from being considered a deadly instrument, noting that a person's "criminal liability should be measured by the result . . . not the potential to [cause injury]."<sup>70</sup> In reaching this conclusion,

tute the use of a deadly weapon, they can constitute a deadly weapon if used with means or force likely to produce death."); *State v. Yarrell*, 616 S.E.2d 258, 262 (N.C. Ct. App. 2005) ("[H]ands and fists may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved.") (alteration in original) (quoting *State v. Rogers*, 569 S.E.2d 657, 663 (N.C. Ct. App. 2002)); *State v. Hariott*, 42 S.E.2d 385, 389 (S.C. 1947) (refusing to categorically rule out hands as deadly weapons); *State v. Griffith*, No. CA95-10-167, 1996 Ohio App. LEXIS 4539, at \*15 (Ohio Ct. App. Oct. 14, 1996).

64. See *Hariott*, 42 S.E.2d at 389 ("While we are not prepared to say that the fist may not under some circumstances constitute an instrument which may inflict serious bodily injury, it is not generally regarded as a deadly weapon.").

65. See *infra* notes 66–103 and accompanying text.

66. See *People v. Owusu*, 712 N.E.2d 1228, 1229 (N.Y. 1999) (deciding if teeth are considered deadly weapon).

67. See *id.* Even with the severity of the injuries, the trial court dismissed the counts that alleged the defendant had utilized a dangerous weapon in his attack. See *id.* However, on appeal by the state, the appellate court reinstated the charges. See *id.* Specifically, the appellate court relied on *People v. Carter*, which discussed a "use-oriented approach" to determining if an object was a deadly weapon. See *id.* at 1229; *People v. Carter*, 423 N.E.2d 30, 31–32 (N.Y. 1981). A use-oriented approach allows a deadly weapon to be anything depending on the manner in which it was used. See *Owusu*, 712 N.E.2d at 1229–30.

68. *Owusu*, 712 N.E.2d at 1230 (N.Y. 1999) (noting that "analysis is not premised on placing an exclusion in the statute's definition").

69. See *id.* at 1231–32 (citing *People v. Adamkiewicz*, 81 N.E.2d 176, 178–181 (N.Y. 1948) (finding that icpick fell under ambit of governing statute as deadly weapon); *People v. Vollmer*, 87 N.E.2d 291, 293 (N.Y. 1949) (finding no use of deadly weapon when defendant beat another man to death with fists)).

70. *Owusu*, 712 N.E.2d at 1232.

the court stated that “the hands of a boxer or martial arts expert could [not] constitute dangerous instruments.”<sup>71</sup> The basis for such a sweeping rule is founded in reasoning that attempted to avoid an “extraordinary man” rule, which would allow “increased criminal liability for use of a dangerous instrument where a heavy-weight champion merely threatens a blow . . . but not where an ordinary man beats another to death.”<sup>72</sup>

New York State further cemented this position in *People v. Plunkett*,<sup>73</sup> which dealt with a man who also utilized his teeth for an assault.<sup>74</sup> But, unlike in *Owusu*, there was more possibility for harm, as the appellant was HIV positive.<sup>75</sup> The appellant’s argument relied on the holding in *Owusu*, relying on the constrictive language utilized by the court.<sup>76</sup> Specifically, the court recognized *Owusu*’s attempt to avoid any semblance of a “sliding scale of criminal liability.”<sup>77</sup> In doing so, the unanimous panel held “[b]ecause defendant’s saliva too ‘came with him’—indeed, with his teeth—its utility for penal enhancement may not be treated differently.”<sup>78</sup>

Likewise, Massachusetts has adopted a broad categorical rule against the inclusion of the body as a deadly weapon for purposes of aggravated crimes.<sup>79</sup> In *Commonwealth v. Davis*, the Appeals Court of Massachusetts concluded that the body can never be a dangerous weapon.<sup>80</sup> However, unlike the New York judiciary, the Massachusetts court considered a history of prosecution which has opted to “not consider[ ] assault cases involving the use of hands, feet, fingers or teeth as incidents where ‘dangerous weapons’ were employed.”<sup>81</sup> Further, the court considered its interest in practic-

71. *Id.* at 1231 (stating that martial arts training does not implicate one’s hands as deadly weapons).

72. *Id.* (analyzing implications of treating hands as deadly weapons).

73. 971 N.E.2d 363 (N.Y. 2012).

74. *See id.* at 364 (discussing classification of body parts as deadly weapons).

75. *See id.* (noting that appellant was HIV positive and had history of psychiatric illness).

76. *See id.* at 364–65 (noting that appellant’s attorney premised argument on language used by court in *Owusu*).

77. *Id.* at 368 (quoting *People v. Owusu*, 712 N.E.2d 1228, 1232 (N.Y. 1999)) (reasoning appellant’s ability to cause harm versus actual harm would result in unworkable test and application).

78. *Id.* (finding saliva of appellant was not deadly weapon).

79. *See Commonwealth v. Davis*, 406 N.E.2d 417, 420 (Mass. App. Ct. 1980) (“[W]e think that human teeth and other parts of the human body should be removed from consideration as dangerous weapons in . . . indictments, even on a case-by-case basis.”).

80. *See id.* at 420.

81. *Id.* The court also acknowledged that this suggests that state attorneys have been unwilling to interpret the court’s precedent in such an expansive way.

ing “judicial restraint” and keeping with the intent of the legislature in ruling as they did.<sup>82</sup> Specifically, the court noted “[t]he clear weight of authority is to the effect that bodily parts alone cannot constitute a dangerous weapon for the purposes of an aggravated assault.”<sup>83</sup> Lastly, a variety of policy considerations were weighed, looking to both the fairness and deterrent effect of such a rule.<sup>84</sup>

In Alabama, courts have considered parallel arguments in reaching a similar conclusion of law.<sup>85</sup> In *McMillian v. State*, the appellant bit the victim in the face so severely that the victim lost vision permanently in her left eye.<sup>86</sup> Because the appellant and victim were in a relationship at the time of this incident, the appellant was charged under a domestic violence statute in Alabama.<sup>87</sup> Specifically, the statute in question required the use of a “deadly weapon or a dangerous instrument.”<sup>88</sup> In holding for the appellant, the *McMillian* court adhered very strictly to precedent, which instructed “that body parts, without more, are not deadly weapons or dangerous instruments.”<sup>89</sup> Even though similar language is utilized by courts reaching similar outcomes as Texas courts, the court here suggests that “without more” implies some sort of extrinsic object.<sup>90</sup> However, this ruling was not reached without disagreement,

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*See id.* Further, the court claimed that other sections of the penal code could be utilized to enhance punishment based on a sliding scale of potential to cause harm. *See id.* at 421–22. This is akin to the rationale used by the New York Court of Appeals in *Owusu*. *See People v. Owusu*, 712 N.E.2d 1228, 1231 (N.Y. 1999).

82. *See Davis*, 406 N.E.2d at 421 (suggesting legislative intent should be considered). Further, the court found that such a rule would contradict the legislature in enacting separate statutes for regular and aggravated assault. *See id.* at 421–22; *accord* *People v. Van Diver*, 263 N.W.2d 370, 372–73 (Mich. Ct. App. 1977).

83. *Davis*, 406 N.E.2d at 420.

84. *See id.* at 420–22. Specifically, the court considered the weight of authority among states on the issue, the possibility of charging such a crime under other statutes, and the need to avoid statutory “turbulence” where possible. *See id.* at 422.

85. *See McMillian v. State*, 58 So.3d 849 (Ala. Crim. App. 2010) (analyzing policy considerations).

86. *See id.* at 850–51 (discussing attack on victim).

87. *See id.* at 850; *see also* ALA. CODE § 13A-6-130 (2016) (“A person commits the crime of domestic violence in the first degree if the person commits the crime of assault in the first degree pursuant to Section 13A-6-20 or aggravated stalking pursuant to Section 13A-6-91, and the victim is a current or former spouse, parent, [or] child[.]”).

88. ALA. CODE § 13A-6-20(a) (2016) (noting requirement of deadly weapon for aggravated assault charge).

89. *McMillian*, 58 So.3d at 853.

90. *Compare id.* (noting court’s reliance on higher court’s word choice inferring body parts cannot be deadly weapons “without more”), *with Turner v. State*, 664 S.W.2d 86, 90 (Tex. Crim. App. 1983) (noting that body parts can only be deadly weapons “in the manner used depending on the evidence shown”). Thus, *McMillian* and *Turner* both effectively say that body parts cannot be deadly weapons

as a number of judges on the panel concurred, but urged the Alabama Supreme Court to overturn its established rule.<sup>91</sup>

Additionally, in *People v. Van Diver*, the Court of Appeals of Michigan made a categorical rule against hands or fists being considered deadly weapons.<sup>92</sup> In *Van Diver*, the defendant used his hands to cover the mouth of a young girl when he attempted to abduct her.<sup>93</sup> Subsequently, the defendant was charged with felonious assault, which required the use of a deadly weapon.<sup>94</sup> The court overturned the conviction, finding “[i]t is this Court’s belief that this distinction based on the use of a weapon evidences a legislative intent that bare hands were not to be included as a dangerous weapon.”<sup>95</sup> Further, the *Van Diver* court noted that “[i]f we were to rule that bare hands could be a dangerous weapon, it would lead to anomalous results, for practically every assault that would qualify as an aggravated assault . . . would also be capable of prosecution as an assault with a dangerous weapon.”<sup>96</sup>

Nebraska has also developed a rule which bars classifying the body as a deadly weapon or dangerous instrument.<sup>97</sup> In fact, in *State v. Bachelor*, where teeth were not considered a deadly weapon, a Nebraska court considered non-binding authority to conclude that the body cannot be considered a deadly weapon.<sup>98</sup> In *Bachelor*,

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“without more,” but *McMillian* interprets that as without an additional object, and *Turner* interprets that as without additional evidence. See *McMillian*, 58 So.3d at 853; *Turner*, 664 S.W.2d at 90.

91. See *McMillian*, 58 So.3d at 853–54 (Wise, J., concurring) (“Therefore, I write specially to urge the Alabama Supreme Court to reconsider its holding in *Ex Parte Cobb* that the use of body parts cannot constitute the use of a ‘deadly weapon’ or a ‘dangerous instrument.’”) (urging reconsideration of *Ex Parte Cobb*, 703 So.2d 871 (Ala. 1996)).

92. See *People v. Van Diver*, 263 N.W.2d 370, 372 (Mich. Ct. App. 1977).

93. See *id.* at 371.

94. See *id.* The governing statute in this case was Michigan Compiled Laws Section 750.82, which listed a variety of deadly weapons, and then states “or other dangerous weapon” as a catch-all for finding a deadly weapon. See *id.* at 371; MICH. COMP. LAWS ANN. § 750.82 (West 2016).

95. *Van Diver*, 263 N.W.2d at 372. Thus, the court also looked to the legislative intent of the statute and practiced judicial restraint, as seen in many other cases discussed. See *supra* notes 66–94 and accompanying text; see also *infra* notes 98–103 and accompanying text.

96. *Van Diver*, 263 N.W.2d at 373. The Court of Appeals of Nebraska later relied on the *Van Diver* court’s reasoning in deciding *State v. Bachelor*. See *State v. Bachelor*, 575 N.W.2d 625, 629–30 (Neb. Ct. App. 1998) (reasoning that allowing hands to be deadly weapons would allow all assaults to be assault with deadly weapon).

97. See *Bachelor*, 575 N.W.2d at 631.

98. See *id.* at 631. As this was a case of first impression for Nebraska, the court opted to consider authority from other jurisdictions as guidance. See generally *id.* (noting that weight of persuasive authority favors disallowing body parts from be-

the defendant took a bite out of another person's nose with his teeth and was subsequently charged with assault in the second degree, which required the use of a deadly weapon.<sup>99</sup> The court ruled that hands, feet, and teeth cannot amount to a deadly weapon because of the potential policy implications that stem from it.<sup>100</sup> Specifically, the majority wrote, “[i]f we rule that teeth or other body parts are dangerous instruments, then virtually every assault which would qualify as a third degree assault would also be capable of prosecution as second degree assault.”<sup>101</sup> Essentially, the court was wary of overstepping the bounds set by the legislature, and they felt that allowing the body to be classified as a deadly weapon would blur the line between assault with an extrinsic weapon and assault with the bare hands, feet, or teeth.<sup>102</sup> Other judiciaries throughout the country have also cited these policy concerns.<sup>103</sup>

### C. Taking the Gloves Off —How Should Martial Arts Training Impact the Treatment of the Body as a Deadly Weapon?

There are very different ways to analyze and consider the deadliness a person's body.<sup>104</sup> However, all of the previously discussed cases had one thing in common—they all dealt with suspects who

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ing classified as deadly weapons); *see also* Commonwealth v. Davis, 406 N.E.2d 417, 420 (Mass. App. Ct. 1980) (reasoning that the majority of states do not allow body parts to be deemed deadly weapons).

99. *See Bachelor*, 575 N.W.2d at 627. The statute that the defendant was charged under was Revised Statutes of Nebraska Section 28-309 (1)(a), which stated that “[a] person commits second degree assault if he or she intentionally or knowingly causes bodily injury to another person with a dangerous instrument[.]” *Id.* at 629.

100. *See id.* at 631–32 (discussing reasoning for finding that body parts cannot be deadly weapons).

101. *Id.* at 631 (identifying problems with treating body parts as deadly weapons).

102. *See id.* at 631–32 (“Without excluding body parts from the definition of dangerous instruments, the shove in the bar is no different from a slash with a knife or a gunshot unless there is serious bodily injury[.]”). The court elaborated, saying that if serious bodily injury resulted, then a different statute could be utilized to charge the suspect, specifically Revised Statutes of Nebraska Section 28-109(20). *See id.* (discussing why body parts should not be classified as deadly weapons).

103. *See People v. Van Diver*, 263 N.W.2d 370, 373 (Mich. Ct. App. 1977) (“If we were to rule that bare hands could be a dangerous weapon, it would lead to anomalous results, for practically every assault that would qualify as an aggravated assault . . . would be capable of prosecution as an assault with a dangerous weapon.”) The court further explained that such a result was not intended by the legislature by the fact that the two offenses are actually separate offenses. *See id.*

104. *See supra* notes 21–103 and accompanying text.

used their body to strike someone, but that suspect did not have a history of martial arts training.<sup>105</sup> Thus, the judicial system is left with a grey area of how to handle a trained martial artist in a similar situation.<sup>106</sup> As noted previously, New York State did away with this concern in one sentence, although other courts have not been quite as dismissive.<sup>107</sup>

Intuitively, all martial arts are not equally dangerous to life and limb.<sup>108</sup> However, some styles are in fact deadly.<sup>109</sup> Courts have yet to fully embrace exactly how to treat martial arts in the eyes of the law, even though there have been some instances where the two have intersected.<sup>110</sup> For example, the occasion that gives rise to the writing of this article, where Jamal Parks was charged with assault with a deadly weapon, showcases the variety of legal frameworks courts have opted to utilize.<sup>111</sup> Further, in 2012 another trained martial artist was charged with assault with a deadly weapon when he struck two men with his hands during a road rage incident.<sup>112</sup>

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105. For a discussion of instances of assault with no martial arts training, see *supra* notes 21–103 and accompanying text.

106. For a discussion of instances of assault with no martial arts training, see *supra* notes 21–103 and accompanying text.

107. See *People v. Owusu*, 712 N.E.2d 1228, 1231 (N.Y. 1999) (“Nor can an argument be made that . . . the hands of a boxer or martial arts expert could constitute dangerous instruments[.]”).

108. See *Why Most Martial Arts Don't Work*, FUNCTIONAL SELF DEFENSE, <http://www.functionalselfdefense.org/martial-arts-dont-work> [<https://perma.cc/7D57-XYLE>] (discussing problems with most types of martial arts for purposes of real-world application).

109. See *Teenager Chokes His Cousin to Death Using RNC*, GRACIE JIU-JITSU ACADEMY (Apr. 6, 2012), <http://www.gracieacademy.com/news/teenager-chokes-his-cousin-to-death-using-rnc.asp> [<https://perma.cc/3A5G-SK5N>] (discussing death of twenty-four-year-old who died after being choked by fourteen-year-old trained in Brazilian Jiu Jitsu); see also Bonnie Malkin, *British Kick-Boxing Champion Dies in Sydney Fight*, TELEGRAPH (Aug. 17, 2011, 11:42 AM), <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/8706238/British-kick-boxing-champion-dies-in-Sydney-fight.html> (discussing in-ring collapse and subsequent death of Muay Thai Kickboxing fighter); Eben Pindyck, *An Obsessive Chronicle of Deaths in the Ring*, NEW YORKER (Dec. 22, 2015), <http://www.newyorker.com/news/sporting-scene/an-obsessive-chronicle-of-deaths-in-the-ring> [<https://perma.cc/Q5H4-BP8C>] (chronicling deaths of boxers while in ring).

110. See Thompson, *supra* note 8 (discussing incident where hands and feet were deemed deadly weapons in road rage incident involving MMA fighter); see also *infra* notes 112–113 and accompanying text (discussing road rage incident with trained martial artist).

111. See *supra* notes 2–14 and accompanying text.

112. See Thompson, *supra* note 8. In this case of MMA expert Fernando Rodrigues, Judge John Hurley stated:

I've always thought that if you are a black belt in karate or you are an expert in martial arts, that your hands and feet would be considered weapons. That's what I've always thought since I was an attorney. He's a

However, this man was subsequently found not guilty in a later jury trial.<sup>113</sup>

Nonetheless, a lesser-known jurisdiction rose to the challenge, and actually codified how martial arts training should be considered in assault cases.<sup>114</sup> In Guam, a series of statutes requires that experts of karate, judo, or other martial arts register with the Department of Revenue and Taxation.<sup>115</sup> The statute defines expert as

[A] person trained in the arts of . . . fighting technique, whereby the hands . . . or other parts of the body are used as weapons, who shall have completed at least one level of training therein and have been issued a belt or other symbol showing proficiency in such art.<sup>116</sup>

Further, failure to register as required can result in a misdemeanor charge.<sup>117</sup> However, if the accused is charged with some type of physical assault after registration, the registered expert “shall upon conviction thereof, be deemed guilty of aggravated assault.”<sup>118</sup> Thus, Guam avoided any semblance of judicial scrutiny of the issue central to this article, as the legislature has stepped in and made an assault by a martial artist an automatic aggravated assault.<sup>119</sup>

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mixed martial arts competitor. He’s an expert in Muay Thai and Brazilian Jujitsu.

*Id.* (quoting Judge John Hurley).

113. See *Former MMA Fighter Cleared in Coral Springs Road Rage Incident*, NBC MIAMI (Oct. 25, 2013), <http://www.nbcmiami.com/news/Former-MMA-Fighter-Cleared-in-Coral-Springs-Road-Rage-Incident-229236841.html> [<https://perma.cc/4TW9-UW8B>] (noting defendant was found not guilty by jury trial). According to the report, the jury seemed to believe that the defendant utilized his martial arts training to “de-escalate the situation.” See *id.*

114. See Volokh, *supra* note 10 (discussing how martial arts experts must register their hands and feet as weapons in Guam); see also 10 GUAM CODE ANN. § 62100 (2016).

115. See 10 GUAM CODE ANN. § 62100–62106 (2016). The registration of an individual who is a qualified expert costs a one-time fee of \$5.00. See *id.* § 62103 (2016).

116. 10 GUAM CODE ANN. § 62104 (2016) (defining karate or judo expert generally).

117. See 10 GUAM CODE ANN. § 62105 (2016) (listing penalties for failure to register).

118. 10 GUAM CODE ANN. § 62106 (2016) (describing charges for assault when one is a martial arts expert).

119. See *id.*; see also Volokh, *supra* note 10; *Are Your Hands and Feet “Registered as Deadly Weapons?”* WEAPONS MAN (Mar. 31, 2014), <http://weaponsman.com/?p=14769> [<https://perma.cc/2J2Y-BDVX>] (noting automatic increase to aggravated assault).

III. ANALYSIS: DEVELOPING A GAME PLAN: DETERMINING WHAT APPROACH COURTS SHOULD UTILIZE WHEN EVALUATING THE STATUS OF A MARTIAL ARTISTS' BODY AS A DEADLY WEAPON

Given both paths of analysis for determining if hands can be deadly weapons in addition to the position Guam has taken, courts are left with three very different ways to analyze the same problem—especially when martial artists are thrown into the mix.<sup>120</sup> Thus, the remainder of this Comment will focus on the pros and cons of the three separate paths of analysis present—the “per se rule” holding that the body can never be a deadly weapon; the analysis that, if proven, the body can be a deadly weapon; and the Guam approach, which codifies the treatment of martial artists’ hands and feet.<sup>121</sup>

A. The Ground Game: New York’s Treatment of Martial Artists’ Hands as Deadly Weapons

States like New York have created a “per se rule” disallowing the body from ever being considered a deadly weapon.<sup>122</sup> Most would agree that this approach utilizes the highest amount of judicial restraint because this analysis appreciates the existence of separate statutes for aggravated and regular assault.<sup>123</sup> As discussed by a number of the courts above, many states have separate statutes for

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120. For background information and analysis of courts finding the body can never be a deadly weapon, see *supra* notes 65–103 and accompanying text. For background and analysis of court’s finding the body can be considered a deadly weapon, see *supra* notes 21–64 and accompanying text. For more on Guam’s law requiring the registration of martial arts experts, see *supra* notes 114–119 and accompanying text.

121. For a strength and weakness analysis of courts who have found that the body can never be a deadly weapon, see *infra* notes 122–138 and accompanying text. For a strength and weakness analysis of courts finding that the body can be a deadly weapon, see *infra* notes 139–158 and accompanying text. For an analysis discussing the strengths and weaknesses of Guam’s approach to martial artists’ bodies being considered deadly weapons, see *infra* notes 159–173 and accompanying text.

122. See *supra* notes 65–103 and accompanying text (discussing law New York and other states have adopted).

123. For a discussion on various state laws, see *supra* notes 65–103 and accompanying text. See also *People v. Owusu*, 712 N.E.2d 1228, 1232–33 (N.Y. 1999) (noting that there are separate statutes for crimes with deadly weapons because the body should not be defined as deadly weapon); *People v. Van Diver*, 263 N.W.2d 370, 372 (Mich. Ct. App. 1977) (“It is this Court’s belief that this distinction based on the use of a weapon evidences a legislative intent that bare hands were not to be included as a dangerous weapon.”).

assault and aggravated assault with a deadly weapon.<sup>124</sup> Thus, if an assault with hands or feet can fall under either statute, then virtually every assault that uses the hands or feet could be charged as an aggravated assault.<sup>125</sup> However, if the legislature was seeking this outcome, then the separate statutes could depend solely on the harm caused and not necessarily the use of a deadly weapon.<sup>126</sup>

Relatedly, the New York judiciary confronts the martial artist's hands dilemma directly in their pursuit to avoid an "extraordinary man rule."<sup>127</sup> Again, allowing the hands of a trained martial artists to be a deadly weapon blurs the statutory lines set by the legislature.<sup>128</sup> For example, a slight jab to the face by a boxer could be aggravated assault, whereas an ordinary man beating another man to within inches of his death would only be regular assault.<sup>129</sup>

However, the logic in opposition to the extraordinary man rule still accounts for a situation where a heavyweight boxer and a normal person both deliver one punch to a victim.<sup>130</sup> Here, the boxer would be more likely to cause a more severe injury than an ordinary person.<sup>131</sup> And still, this works out to impose a higher penalty on the boxer than on the ordinary man, but not because of his *capability* of causing a more severe injury; rather, it is because he actually *did* cause a more severe injury.<sup>132</sup> Thus, the New York model fo-

124. See *supra* note 123 and accompanying text (noting states that have adopted separate aggravated and regular assault statutes).

125. See *People v. Van Diver*, 263 N.W.2d 370, 373 (Mich. Ct. App. 1977) ("It is our belief that the [l]egislature . . . intended that the statutes should be distinct and separate.").

126. See *Turner v. State*, 664 S.W.2d 86, 89 (Tex. Crim. App. 1983) (noting that "wounds inflicted on the injured party are factors to be considered in determining whether a weapon is a deadly weapon") (quoting *Danzig v. State*, 546 S.W.2d 299, 301 (Tex. Crim. App. 1977), *overruled on other grounds by* *Denham v. State*, 574 S.W.2d 129 (Tex. Crim. App. 1978)).

127. See *People v. Owusu*, 712 N.E.2d 1228, 1231 (N.Y. 1999) ("Nor can the argument be made that . . . the hands of a boxer or martial arts expert could constitute dangerous instruments.").

128. See *id.* at 1231–32 (noting that separate statutes exist to treat hands separate from weapons).

129. See *id.* at 1231 (noting problems with measuring culpability by potential to harm).

130. See *id.* (noting unfairness toward boxer when compared to ordinary man beating someone to death with their hands).

131. See Cecil Adams, *The True Force of a Boxer's Punch*, CONNECT SAVANNAH (July 20, 2010), <http://www.connectsavannah.com/savannah/the-true-force-of-a-boxers-punch/Content?oid=2133328> [<https://perma.cc/8CTK-67GA>] (discussing punching power of seven Olympic boxers, which ranges from 447 to 1,066 pounds of peak punching force at the point of impact).

132. See *Owusu*, 712 N.E.2d at 1232 (noting that one's ability to cause harm "should not expose him to criminal liability beyond that measured by the extent of his victim's injury").

cuses on the end result of the injury, not on the perpetrator's ability to inflict harm.<sup>133</sup> Under this analysis, courts treat martial artists the same as an ordinary person—increase the penalties only if the harm is increased, not if the harm *could have been* increased.<sup>134</sup>

However, such an approach avoids any semblance of deterrent principles because martial artists are not 'put on notice' that they could face higher criminal penalties—regardless of if those higher penalties are from an ability to inflict harm or from the actual harm caused.<sup>135</sup> Other courts have also implied that hands should not be a deadly weapon because there is a lack of notice for the perpetrator that their body could be a deadly weapon.<sup>136</sup> For example, the Appeals Court of Massachusetts noted the historical lack of prosecuting the body as a deadly weapon as a reason for creating a per se rule against the body being a deadly weapon.<sup>137</sup> Thus, the Massachusetts judiciary also considers fairness to the defendant, and assumes that people would act differently with their hands if they were on notice that their hands could be a deadly weapon.<sup>138</sup>

#### B. Stand and Throw 'em: Texas's Approach to Martial Artists' Hands as Deadly Weapons

On the opposite end of the spectrum are states like Texas which have left the door open for finding that the body is a deadly weapon.<sup>139</sup> Under this approach, the body can be categorized as a deadly weapon "in the manner used depending on the evidence shown."<sup>140</sup> Even though this is the opposite approach than the pre-

133. *See id.*; *see also* N.Y. PENAL LAW § 120.05(1) (McKinney 2016) (reasoning actually causing serious physical injury to victim is an element of assault in the second degree).

134. *See* N.Y. PENAL LAW § 120.05(1) (McKinney 2016); *see also* *Owusu*, 712 N.E.2d at 1232 ("If a person is capable of producing serious physical injury and does so, his criminal liability should be measured by the result (the injury), not the potential to do so.").

135. *See* JOHN P. HOFFMAN, *DELINQUENCY THEORIES* 17–32 (1st ed. 2011) (discussing principles of deterrence).

136. *See* *Commonwealth v. Davis*, 406 N.E.2d 417, 420 (Mass. App. Ct. 1980) ("[F]or over fifty years prosecutors have not considered assault cases involving the use of hands, feet, fingers or teeth as incidents where dangerous weapons were employed."); *see also* *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1059 (Mass. 1980) (discussing use of deterrence in aggravating statutes).

137. *See* *Davis*, 406 N.E.2d at 420 (noting prosecutors' choice to not charge assaults with the body as assaults with a deadly weapon).

138. *See supra* notes 136–137 and accompanying text.

139. *See supra* notes 21–64 and accompanying text.

140. *Turner v. State*, 664 S.W.2d 86, 90 (Tex. Crim. App. 1983) ("[W]e conclude that a fist or hand are not 'deadly weapons' per se but can become such only in the manner used depending on the evidence shown."). For additional discus-

viously discussed courts have taken, similar factors are considered.<sup>141</sup> For example, whereas New York looks to the harm caused in determining what crime to charge the defendant with, Texas considers the harm caused to the victim in deciding if an object is a deadly weapon.<sup>142</sup> However, this approach can have serious problems with consistency.<sup>143</sup> For example, depending on how an item is used it may be classified as a deadly weapon.<sup>144</sup> Thus, Texas also avoids any semblance of a deterrent effect because an object may be a deadly weapon in one sense, whereas the identical object is not a deadly weapon in another.<sup>145</sup>

Additionally, courts subscribing to this method must weigh the sufficiency of evidence in determining whether hands or feet are a deadly weapon.<sup>146</sup> Thus, this approach removes the determination of whether the body is a deadly weapon from the legislature and places it in the courtroom.<sup>147</sup> However, when martial artists are implicated, this seems to make more sense.<sup>148</sup> As discussed above, a trained martial artist is more capable of delivering severe harm to a person.<sup>149</sup> Just as a three-inch pen knife may not be a deadly weapon, but an eight-inch buck knife would be, the ability of an

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sion about Texas' approach to the body and deadly weapons, see *supra* notes 21–64 and accompanying text.

141. See *infra* notes 142–158 and accompanying text (discussing courts' reliance on harm for defining what is deadly weapon versus what is aggravated assault).

142. See *Turner v. State*, 664 S.W.2d 86, 89 (Tex. Crim. App. 1983) (noting that wounds inflicted should be considered in determining if weapons are deadly).

143. See *infra* notes 144–145 and accompanying text.

144. See *Turner v. State*, 664 S.W.2d 86, 88–91 (Tex. Crim. App. 1983) (noting that because prosecution must prove a weapon is deadly by how it is used in a crime, this will inherently mean that same object will be deadly in some instances and not deadly in others).

145. See *id.* For additional discussion on deterrence, see HOFFMAN, *supra* note 135, at 17–32.

146. See *Lane v. State*, 151 S.W.3d 188, 190 (Tex. Crim. App. 2004) (analyzing whether “the evidence presented at appellant’s trial was legally sufficient to prove that, during the commission of his offense, he used his hand or his foot as a deadly weapon.”). In *Lane*, the court reasoned that the use of the defendant’s closed fist to strike the victim several times in the head and the repeated kicking of the victim in the body was sufficient evidence to show his body was used as a deadly weapon. See *id.*

147. Compare *Turner*, 664 S.W.2d at 88–91 (discussing what courts should consider in deciding if something is a deadly weapon), with *Commonwealth v. Davis*, 406 N.E.2d 417, 420 (Mass. App. Ct. 1980) (showing great deference to legislature’s interpretation of deadly weapon).

148. See *infra* notes 149–152 and accompanying text (discussing martial artists’ impact on Texas’s approach).

149. See *supra* note 109 and accompanying text (discussing damage capable by martial artists).

object to cause harm is an intuitive consideration in determining if a weapon is deadly.<sup>150</sup> In the same way, the Texas judiciary takes a similar approach to the body—hands and feet should be treated differently depending on their ability to cause harm, just as any other object would be.<sup>151</sup> Thus, the logical conclusion is that the body can be a deadly weapon if it is proven to be utilized in a deadly way.<sup>152</sup>

However, there is one glaring drawback to this approach, which courts aligning with New York have cited.<sup>153</sup> By allowing the body to be a deadly weapon, it effectively allows any assault to be tried as an assault with a deadly weapon.<sup>154</sup> Texas would most likely counter this argument by claiming that their evidence-based approach is a protection to the legislature's statutory scheme—if there is no evidence to show that the body was used as a deadly weapon, then it cannot be charged as a deadly weapon.<sup>155</sup> Further, Texas courts could argue that they are well within the ambit of their law and are not practicing judicial activism, because the Texas Penal Code defines a deadly weapon as “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.”<sup>156</sup> Because the Penal Code uses the word “anything” instead of the words “object or instrument,” Texas is not overstepping the language used by the legislature in their Penal Code.<sup>157</sup> Thus, there is no basis for criticizing the Texas judiciary on the

150. See *Turner*, 664 S.W.2d at 88–90 (discussing need to weigh wounds caused by object in determining status as deadly).

151. See *id.* at 90 (citing lack of evidence for not finding hands and feet were not deadly weapons).

152. See *id.* (noting why body parts can be treated as deadly weapons).

153. See *infra* notes 154–158 and accompanying text (discussing statutory problems allowing body parts to be deadly weapon creates).

154. See *Commonwealth v. Davis*, 406 N.E.2d 417, 421–22 (Mass. App. Ct. 1980) (discussing how treating the body as deadly weapon would obstruct the statutory scheme); see also *People v. Van Diver*, 263 N.W.2d 370, 373 (Mich. Ct. App. 1977) (noting that if hands were deadly weapons then every assault could be assault with use of deadly weapon).

155. See *Turner v. State*, 664 S.W.2d 86, 88–90 (Tex. Crim. App. 1983) (discussing need to consider harm caused against victim).

156. TEX. PENAL CODE § 1.07(17)(B) (West 2011).

157. Compare *id.* (noting utilization of “anything” as word choice), with N.Y. PENAL LAW § 10.00(13) (McKinney 2013) (defining “dangerous instrument” as “any instrument, article, or substance, including a ‘vehicle’[,] . . . under the circumstances in which it is used, . . . is readily capable of causing death or other serious physical injury.”). Specifically, the New York law utilized language which suggests the use of an extrinsic object, whereas the language used by the Texas legislature does not. See *id.* Further, the definition of “dangerous instrument” was utilized instead of the definition of “deadly weapon” because “deadly weapon” is defined by a short list of specific weapons in the New York Penal Code. See N.Y. PENAL LAW § 10.00(12) (McKinney 2013) (defining “deadly weapon”).

grounds that they are being too judicially active, as they are interpreting the law well within the language used by the legislature.<sup>158</sup>

### C. Fighting in the Clinch: Guam's Approach to Martial Artists' Hands as Deadly Weapons

Guam's answer to this predicament is novel.<sup>159</sup> In an attempt to avoid any judicial scrutiny of the issue, Guam codified the requirement for martial arts experts to register themselves with the government.<sup>160</sup> This approach most closely aligns with the principles of deterrence because it puts individuals on notice that they will be held to a higher standard if they are involved in a physical altercation.<sup>161</sup> Considering the amount of harm some martial artists can do, this seems to make the most logical sense.<sup>162</sup> Further, this approach avoids the sliding scale of liability that the New York judiciary was wary of because it does not allow for a panoply of factors to be considered when evaluating what specific statute under which an individual should be charged.<sup>163</sup> In that regard, the issue is clear: a martial arts expert using his or her body in an assault will

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158. See *supra* note 157 and accompanying text (noting why Texas's courts are compliant with the legislature in their utilization of law).

159. See *supra* notes 114–119 and accompanying text (discussing Guam's approach to dealing with body parts as deadly weapons when martial artists are involved).

160. See 10 GUAM CODE ANN. § 62100 (2016) (discussing requirement of registration for martial arts experts).

161. See HOFFMAN, *supra* note 135, at 17–32. Specifically, the text discusses the need for a rational person who can make choices by weighing the pros and cons of a particular decision. See *id.* at 18. Additionally, for effective deterrence, the swiftness in the administration of justice, certainty of being caught, and severity of punishment must outweigh the potential gain from committing the crime. See *id.* at 20–21. Thus, putting an individual on notice of a more severe penalty serves one of these principles. See *id.* at 20–22. Additionally, legally mandated registration could add credence to the certainty of being caught for a crime, because it forces additional contact between the individual and the governing authority. See *id.* at 25–26.

162. See *supra* note 109 and accompanying text (discussing harm martial artists are capable of).

163. See *People v. Owusu*, 712 N.E.2d 1228, 1232 (N.Y. 1999). Specifically, the court noted that if hands could be considered deadly weapons, then courts would need to consider “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.” *Id.* By avoiding consideration of these other factors, Guam exemplifies a better understanding of the deadliness of martial arts, as some martial arts are deadly regardless of the size and weight of parties involved in the altercation. See Dan Faggella, *Five Keys for Becoming a Jiu-jitsu Giant Killer*, JIU-JITSU MAG. (May 12, 2015), <http://jiujitsumag.com/five-keys-for-becoming-a-jiu-jitsu-giant-killer/> [<https://perma.cc/NJQ3-EE9W>] (noting that Jiu Jitsu “was created for a smaller, weaker practitioner to defeat bigger, stronger opponents”).

be charged as an aggravated assault.<sup>164</sup> Compared to the convoluted analysis that the Texas approach and New York approach can breed, the clarity in Guam's treatment of the issue is rather refreshing.<sup>165</sup>

Additionally, this approach avoids some courts' concerns that allowing the body to be a deadly weapon would cause separate statutes to begin to share a very blurry line.<sup>166</sup> Specifically, there is a very valid concern that allowing the body to be classified as a deadly weapon would create an automatic aggravating factor in virtually all assault cases at the discretion of the prosecution.<sup>167</sup> However, under Guam's approach to this issue, *only* martial artists could have their assault charge aggravated, thus avoiding this potential arbitrariness.<sup>168</sup>

However, one could argue that this simply shuffles the analysis instead of doing away with the issue altogether.<sup>169</sup> For example, courts will still need to determine at what point an individual has trained in a martial art long enough to warrant the requirement of registration.<sup>170</sup> The statute suggests that the litmus test is when

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164. See 10 GUAM CODE ANN. § 62106 (2016) ("Any registered karate or judo expert who thereafter is charged with having used his art in a physical assault on some other person, shall upon conviction thereof, be deemed guilty of aggravated assault.").

165. See *supra* notes 65–103 and accompanying text for more on how the New York courts have handled this issue. See *supra* notes 21–64 and accompanying text for more on how the Texas courts have handled this issue.

166. See *People v. Van Diver*, 263 N.W.2d 370, 373 (Mich. Ct. App. 1977) (noting that allowing bare hands to be charged as deadly weapons "would lead to anomalous results, for practically every assault that would qualify as an aggravated assault . . . would also be capable of prosecution as an assault with a dangerous weapon"); see also *Commonwealth v. Davis*, 406 N.E.2d 417, 421–22 (Mass. App. Ct. 1980) (discussing problems with allowing bare hands to be classified as deadly weapons); *State v. Bachelor*, 575 N.W.2d 625, 631–32 (Neb. Ct. App. 1998) (noting that without excluding body parts from being deadly weapons, shoving someone could be charged under same statute as shooting someone).

167. See *Van Diver*, 263 N.W.2d at 373; see also *Davis*, 406 N.E.2d at 420 (noting no history of prosecutors charging bare handed assaults as assaults with deadly weapons).

168. See 10 GUAM CODE ANN. §§ 62100–62106 (2016) (discussing the treatment of martial artists in assault charges).

169. See *infra* notes 170–173 and accompanying text (stating problems presented by Guam's approach).

170. See 10 GUAM CODE ANN. § 62104 (2016) (noting that a martial artist is required to register when they "have completed at least one level of training" and "have been issued a belt or other symbol showing proficiency in such art"). Although this section defines when someone may be required to register, different martial arts issue belts at different stages. See Jennifer Lawler, *Martial Arts Promotions . . . Testing, 1, 2, 3*, DUMMIES, <http://www.dummies.com/how-to/content/martial-arts-promotions-testing-1-2-3.html> [https://perma.cc/6E4L-4XX8] (last visited Oct. 2, 2016) (observing variety of ways different martial arts administer rank increase tests).

someone “[has] been issued a belt or other symbol showing proficiency in such art.”<sup>171</sup> Thus, this presents a problem based on the lethality among various martial arts and the levels of proficiency attained by the practitioner.<sup>172</sup> Although this codification avoids judicial consideration in determining if the body of a martial artist is a deadly weapon, it creates room for additional scrutiny in determining when an individual has “shown proficiency” in a given martial art.<sup>173</sup>

#### IV. CONCLUSION: WHY GUAM HAS THE BLUEPRINT FOR THE RIGHT SYSTEM

As mixed martial arts continues to grow and more people begin practicing martial arts, courts will probably see more cases relating to martial artists and if their bodies are considered deadly weapons.<sup>174</sup> Currently, the weight of authority favors disallowing the hands from being considered deadly weapons, but courts reached this conclusion with little attention paid to how martial artists fit into that analysis.<sup>175</sup> With the potential deadliness of martial artists considered, it seems that Guam’s approach of registration makes the most sense for two main reasons.<sup>176</sup>

First, martial arts practitioners now have notice that they will be held to a higher standard in an assault case.<sup>177</sup> Primarily, this fulfills one of the key requirements of deterrence because it puts

171. 10 GUAM CODE ANN. § 62104 (2016) (noting when someone must register with the government).

172. See *supra* note 109 and accompanying text for a discussion about the potential lethality of various martial arts.

173. See 10 GUAM CODE ANN. § 62104 (2016); see also *supra* notes 169–172 and accompanying text.

174. See Kevin Iole, *Why MMA is Bigger than Ever – And Still Growing*, YAHOO! SPORTS (July 24, 2015, 3:50 PM), <http://sports.yahoo.com/news/why-mma-is-bigger-then-ever-and-still-growing-195031479.html> [<https://perma.cc/U64B-NFCX>] (noting growth of Mixed Martial Arts); see also Alan Snel, *Small Businesses Bloom as Mixed Martial Arts Grow in Popularity*, LAS VEGAS BUS. PRESS (last updated September 9, 2013, 7:12 PM), <http://www.reviewjournal.com/business/business-press/small-businesses-bloom-mixed-martial-arts-grow-popularity> [<https://perma.cc/2HHD-2AP7>] (discussing growth of small businesses in martial arts industry).

175. See *Commonwealth v. Davis*, 406 N.E.2d 417, 420 (Mass. App. Ct. 1980) (“The clear weight of authority is to the effect that bodily parts alone cannot constitute a dangerous weapon for the purpose of an aggravated assault based on the alleged use of such a weapon.”).

176. See *infra* notes 177–184 and accompanying text (analyzing why Guam’s approach makes sense).

177. See 10 GUAM CODE ANN. § 62100 (2016). By requiring registration, martial art practitioners are effectively put on notice of their potentially heightened criminal liability. See generally *id.*

the individuals on notice of their potentially higher legal liability.<sup>178</sup> Further, this incentivizes safe practices in not only teaching the art, but also the responsibility accompanied with it.<sup>179</sup>

Second, this approach avoids the possibility of the common person having their hands deemed a deadly weapon and, in turn, avoids the statutory ambiguity cited as a concern by many courts.<sup>180</sup> An approach modeled off of Guam's statutes would only allow increased liability for martial artists who have reached a certain level of proficiency.<sup>181</sup> Thus, judicial scrutiny would be avoided in determining if a layperson's hands are deadly weapons.<sup>182</sup> Additionally, this would not blur the lines between different levels of assault, because only martial artists would be subject to increased liability.<sup>183</sup> Thus, this approach would avoid the problem cited in many courts, which suggest that allowing the body to be a deadly weapon would make virtually every assault capable of being an aggravated assault.<sup>184</sup>

The biggest hurdle inherent in the Guam approach is how courts should determine the proficiency level that is required for a martial artist's hands to be deemed deadly weapons.<sup>185</sup> But, like a large number of specialized issues in courts, determining the deadliness of a martial artist's hands would be analyzed better in light of expert testimony on the issue.<sup>186</sup> As is commonplace in today's le-

178. See HOFFMAN, *supra* note 135, at 17–32. Specifically, this adds weight to the severity and the certainty of punishment, which are both touchstones to successful deterrence. See *id.* at 20–21. For more discussion on the principles of deterrence, see *supra* note 167 and accompanying text.

179. See HOFFMAN, *supra* note 135, at 17–32; see also *supra* note 161 and accompanying text (discussing deterrence generally).

180. See *People v. Van Diver*, 263 N.W.2d 370, 373 (Mich. Ct. App. 1977) (observing that allowing bare hands to be deadly weapons would cause problems with current statutory scheme); see also *supra* note 172 and accompanying text.

181. See 10 GUAM CODE ANN. §§ 62100–62106 (2016) (discussing Guam's approach to martial artists being treated as deadly weapons).

182. See *id.* (discussing Guam's avoidance of classifying regular hands as deadly weapons).

183. See *id.* (discussing increased penalties for martial artists in assault cases).

184. See *Commonwealth v. Davis*, 406 N.E.2d 417, 421–22 (Mass. App. Ct. 1980) (discussing how allowing human body to be considered deadly weapon would allow virtually any assault to be assault with deadly weapon); see also *People v. Van Diver*, 263 N.W.2d 370, 373 (Mich. Ct. App. 1977) (noting that if hands were deadly weapons, then every assault could be assault utilizing deadly weapon); *State v. Bachelor*, 575 N.W.2d 625, 631–32 (Neb. Ct. App. 1998) (noting that without excluding body parts from being deadly weapons, shoving someone could be charged under same statute as shooting someone).

185. See 10 GUAM CODE ANN. § 62104 (2016) (defining karate or judo expert for purposes of the statute); see also *supra* notes 169–173 and accompanying text.

186. See *Mosley v. State*, 545 S.W.2d 144, 146 (Tex. Crim. App. 1976) (noting use of expert testimony in determining if object is deadly weapon); see also *Turner*

gal world, lawyers and judges frequently lack specialized knowledge that requires the use of expert testimony.<sup>187</sup> Similarly, judges could rely on expert testimony to determine if an individual is proficient enough in a martial art to warrant the title of expert.<sup>188</sup> Thus, the admittance of expert testimony would properly illuminate this issue, and allow the court to reach a supported conclusion of law.<sup>189</sup>

Even if the Guam approach was applied in the case of Mr. Parks, the outcome would probably be the same.<sup>190</sup> Mr. Parks was a professional mixed martial arts fighter.<sup>191</sup> Under the scrutiny of any expert's testimony, he would most likely be found to be proficient enough at his art to warrant his hands being treated as a deadly weapon.<sup>192</sup> The key difference, however, is that he would be aware of his potential liability, and possibly would have been de-

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v. State, 664 S.W.2d 86, 90 (Tex. Crim. App. 1983) (noting that there was lack of evidence and testimony to support finding hands were deadly weapons). Although Texas courts used to require expert testimony to establish that an object is a deadly weapon, this was later overruled by *Denham v. State*. See *Denham v. State*, 574 S.W.2d 129, 131 (Tex. Crim. App. 1978). The *Denham* court reasoned that “[t]o say that a four-inch bladed knife, whether it is a pocket knife or some other type, is not a deadly weapon unless an expert so testifies is to strain the bounds of reason.” See *id.* at 131 (quoting *Harris v. State*, 562 S.W.2d 463, 467 (Tex. Crim. App. 1978) (Douglas, J., dissenting)). Although expert testimony is not required to prove that an object is a deadly weapon, expert testimony can still be helpful to determine if an object is a deadly weapon. See *Tamez v. State*, 205 S.W.3d 32, 39–40, 43–44 (Tex. Ct. App. 2006). In *Tamez*, expert testimony was utilized to show that a fan motor placed in a sock was a deadly weapon. See *id.* Thus, although expert testimony is not required to prove an object is a deadly weapon, it can be a helpful way to prove an object's status as a deadly weapon. See *id.*; see also *Davidson v. State*, 602 S.W.2d 272, 273 (Tex. Crim. App. 1980) (“Although such expert testimony is not the only way to establish that a knife is a deadly weapon, it may still be particularly useful in supplementing meager evidence on the issue in order to meet the sufficiency requirement.”)

187. See Greg Eastman, Vandy M. Howell & Maria Salgado, *A Primer on When to Use Expert Witnesses and How to Find Them*, BLOOMBERG BNA (Jan. 7, 2013), <http://www.bna.com/a-primer-on-when-to-use-expert-witnesses-and-how-to-find-them/> [<https://perma.cc/U6F4-FBTE>] (noting when to use expert testimony in litigation).

188. See *supra* note 186 and accompanying text; see also Eastman et al., *supra* note 187.

189. See *supra* notes 186–188 and accompanying text (discussing why expert testimony would be appropriate).

190. See *infra* notes 191–195 and accompanying text (observing why Guam's approach would analyze the case of Jamal Parks similarly).

191. See *Jamal Parks*, SHERDOG, <http://www.sherdog.com/fighter/Jamal-Parks-134229> (last visited Oct. 1, 2016) (discussing Jamal Parks' professional mixed martial arts career and record); see also *Jamal Parks*, TAPOLGY, <http://www.tapology.com/fightcenter/fighters/52542-jamal-parks> [<https://perma.cc/4S9M-5Y9G>] (last visited Oct. 1, 2016) (noting Jamal Park's professional martial arts career).

192. See *supra* note 109 and accompanying text (discussing the dangerousness of various martial art styles).

tered from making the choice to assault someone.<sup>193</sup> Had Mr. Parks been forced to register his hands as deadly weapons, he would have *known* the potential consequences of his actions that day in November 2013.<sup>194</sup> Although nobody can say for certain whether that registration process would have caused Jamal Parks to act differently, at the very least it would not have surprised him or the martial arts world when a court ruled his hands were deadly weapons.<sup>195</sup>

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193. HOFFMAN, *supra* note 135, at 17–32. This conclusion relies on the effectiveness of deterrence theory, and that Mr. Parks would have been aware of swift, certain, and severe punishment if he chose to assault someone. *See id.* at 18–20.

194. *See* 10 GUAM CODE ANN. § 62100 (2016) (noting the requirement to register). Mr. Parks would be aware of the increased liability in his hands because he would have to register them with the government. *See generally id.*

195. *See generally id.* (noting requirement to register which assumes notice).

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