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Chad Flanders

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Chad Flanders[*]
Desiree Austin-Holliday[**]

I. INTRODUCTION

Many states – including Missouri – have provisions that provide greater punishment for some felonies that are committed with, or by the use of, a "deadly weapon" or "dangerous instrument."[1] The definition of "deadly weapon" tends to be pretty straightforward, usually a list that includes several specific items that just are deadly weapons, such as guns and knives.[2] "Dangerous instrument" is deliberately left as a broader, more capacious term – defined not in terms of a list of instruments but in terms of those things that *could* be easily or "readily" used to cause serious physical injury or death.[3] But precisely because of the broad sweep of what counts as a dangerous instrument, and the role circumstances can play in making something dangerous, courts in Missouri have taken widely divergent stances on the definition of "dangerous instruments," both in general and in particular cases.

Consider the following representative cases:

[*]Professor of Law, Saint Louis University School of Law.
[**]Saint Louis University School of Law, Class of 2018. The authors thank Joe Welling for comments on an earlier draft.

1. *See, e.g.*, MO. REV. STAT. § 571.015.1 (Cum. Supp. 2017) ("Armed criminal action" when "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon . . . ."); MO. REV. STAT. § 570.023.1(2)–(3) (Cum. Supp. 2017) (Robbery in the first degree is defined as the forcible stealing of property when a person is "armed with a deadly weapon" or "[u]ses or threatens the immediate use of a dangerous instrument against any person.").

2. A deadly weapon in Missouri is defined as "any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged, or a switchblade knife, dagger, billy club, blackjack or metal knuckles." MO. REV. STAT. § 556.061(22) (Cum. Supp. 2017).

3. A dangerous instrument in Missouri is "any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." *Id.* § 556.061(20).

Case 1: A drunk driver rides through a heavily trafficked pedestrian area in the middle of the night. He hits someone and is charged, not just with second degree (reckless) assault but also with committing a felony with a dangerous instrument – his vehicle. The court, in affirming the conviction on the second charge, reasons that the car in these circumstances was an "instrument" that was "readily capable of causing death or physical injury" and that the driver knew that at the time, even though he might not have *intended* to use his car as a dangerous instrument. Is this right? Are cars always dangerous instruments, or just in some cases? Should it matter that the driver did not intend to cause serious physical injury or death by driving and was at most merely reckless?[4]

Case 2: A man uses an ice pick to shred the tires of his former lover's car. The ice pick, everyone concedes, *could* in almost any circumstance be used to cause someone serious physical injury, or even kill them. But at the time of the tire shredding, no one was in the area. Based on this fact, the court concludes that the ice pick was not "readily capable" of causing someone serious physical injury. Is this right? What if someone suddenly came upon the man while he was using the ice pick – would the proximity of the person transform the ice pick into a dangerous instrument? What if the man had an accomplice with him? And why is the risk to the person holding the ice pick not enough? Or is the better rule that an ice pick is *always* a dangerous instrument, even if someone is not around?[5]

Case 3: A person repeatedly hits someone with his fist, causing that person serious physical injury. He is charged with assault by use of a dangerous instrument – his hands. A court affirms the conviction. Is this right? Are hands really "instruments"? And again, what makes them dangerous: does a person have to *intend* his hands and fists (or elbows or feet) to be used *as* dangerous instruments to make them so? Is it an easier case, or the same case, if the person has a prosthetic arm? What if the person is wearing leather gloves (or even a ring), which would add to the harmfulness of the injury – but only imperceptibly? Do the gloves then become the dangerous instruments?[6]

Missouri courts have not provided consistent guidance on how to proceed in these cases, although in recent years, some judges have urged rather broad understandings of "dangerous instrument."[7] But courts should not aim

4. The facts here are based on State v. Jacobson, No. WD 79472, 2017 WL 2118655 (Mo. Ct. App.), *transfer denied*, (Mo. Oct. 5, 2017).

5. The facts here are based on State v. Baumann, 217 S.W.3d 914 (Mo. Ct. App. 2007).

6. The facts here are based on State v. Evans, 455 S.W.3d 452 (Mo. Ct. App. 2014).

7. One judge has explicitly urged a broad reading of Missouri's related Armed Criminal Action statute, which makes it an additional crime if one commits a felony with a dangerous instrument or deadly weapon. *See* State v. Jones, 479 S.W.3d 100, 106 (Mo. 2016) (en banc) (Wilson, J.) (Armed Criminal Action statute "was intended to reach as broadly as possible."). We touch on this related issue in Part V.

at a broad reading unless that is actually the *proper* reading of the statute, and it is not clear that a broad reading here is the correct one. Moreover, in the context of criminal law especially, an overly broad reading of a statute can lead to problems of vagueness. People should not be left to guess what things or objects (or body parts) are or are not dangerous instruments. An easy fix to the vagueness problem is to require that the offender have the purpose of causing serious physical injury or death *by means of* the instrument. Even if a dangerous instrument can be any number of things, it is enough to put people on notice that if they use a thing with the purpose of causing serious physical injury or death, then they will face a greater punishment – because they will have made the thing into a dangerous instrument by their intention. In this paper, we urge courts to embrace this "intentional" reading of what makes something a dangerous instrument.

This paper proceeds in three parts. Part II gives an overview of the development of the law on dangerous instruments in Missouri, mainly by contrasting dangerous instruments with deadly weapons. As noted above, deadly weapons are (in Missouri) mostly just *listed*, and it is clear from that list that there are some things that are harmless (e.g., an unloaded gun) but still count as deadly weapons. By comparison, dangerous instruments are things that are not necessarily dangerous but could become dangerous. But what circumstances make something "dangerous"? The stakes involved in defining dangerous instruments can be high. In Missouri, adding an Armed Criminal Action ("ACA") conviction on top of a felony conviction can add years – or even decades – to a sentence.[8]

Part III looks at some of the puzzles that have developed in the law based on the three cases listed above. Some courts in Missouri give an expansive reading of what circumstances make a thing dangerous, some tend in the direction that some things are in fact inherently dangerous, and some (the approach we favor) look to the purpose for which a person is using the instrument to determine whether in those circumstances it is "dangerous." The problems in defining "dangerous instruments," in fact, are deep and wide-ranging – because courts seem to disagree on almost every aspect of "dangerous instrument." Which circumstances are most salient in deciding when something is "dangerous"? What is an *instrument*? The point of this Part is mostly to show the variety of conflicting rules appellate courts have devised in this area and to identify what seems to us the consensus approach.

In the final Part, we present difficulties with the way the statute is currently being interpreted and offer a defense of our favored interpretation of the statute. The current interpretation faces two problems: it is hopelessly vague and it leads to absurd results. That is, the current interpretation leaves people to guess what is a dangerous instrument because under the right conditions almost *anything* could be. And this ambiguity leads to courts calling all sorts of things dangerous instruments, things that the legislature could not have

8. *See infra* Part II.

possibly intended to be captured by the term "dangerous instrument."[9] The solution to this, as already intimated above, is to restrict dangerous instruments only to those which we can show that the person *intended* to use in a way that would cause serious physical injury or death.

This Article is about the interpretation of a particular Missouri statute (although of a kind that is present in many other statutes), but it is also about something broader: what lawyers and scholars have called *overcriminalization*.[10] One problem with the complaint that American law is "overcriminalized" is that it can make sense on an abstract level but can fall apart when we get to particular examples. Which laws are unjust and need to be repealed? Once we get past some obvious candidates – drug laws, for example, or some minor (and silly) regulatory crimes[11] – it becomes harder to say *which* criminal laws are excessive. Certainly no one is eager to repeal laws on armed robbery or sexual assault. But with Missouri's ACA law, we believe we have an easy candidate for elimination and almost a perfect example of overcriminalization. The statute is redundant, construed broadly by the courts, and amounts in many cases to extremely lengthy sentences. In the end, legislatures are mostly responsible for attacking the phenomenon of overcriminalization. Our Article suggests, however, that courts can also properly play a role in giving narrow interpretations of these statutes, especially when a narrow reading is not only reasonable but probably correct.

II. DEADLY WEAPONS, DANGEROUS INSTRUMENTS, AND ARMED CRIMINAL ACTION

Deadly weapons and dangerous instruments statutes usually occupy one of two roles: they either are part of defining a crime itself or they exist as part

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9. Consider the statement of one judge in a case before it was common to find cars were "dangerous instruments":

> By the state's argument a defendant convicted of involuntary manslaughter through reckless operation of an automobile could be separately tried for [A]rmed [C]riminal [A]ction for the same killing. I do not believe that the legislature had this kind of a situation in mind when it passed the [A]rmed [C]riminal [A]ction statutes.

State *ex rel*. Bulloch v. Seier, 771 S.W.2d 71, 76 (Mo. 1989) (en banc) (Blackmar, J., concurring), *overruled en banc by* State v. Blackman, 968 S.W.2d 138 (Mo. 1998) (per curiam).

10. Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015).

11. *See, e.g.,* Paul Larkin & John-Michael Seibler, *Time to Prune the Tree: The Need to Repeal Unnecessary Criminal Laws*, HERITAGE FOUND. (Feb. 25, 2016), https://www.heritage.org/crime-and-justice/report/time-prune-the-tree-the-need-repeal-unnecessary-criminal-laws (listing crimes such as "transport[ting] dentures across state lines" and "sell[ing] malt liquor labeled 'pre-war strength'" as examples of laws to be repealed).

of a separate penalty-enhancement statute. For the former, first-degree robbery might be defined as a forcible stealing *by use of* a deadly weapon or dangerous instrument.[12] For the latter, an additional penalty may be added onto a crime if it were a crime that was committed with a dangerous instrument or deadly weapon.[13] A person might be convicted of kidnapping, then have several years added onto her sentence because the crime was accomplished through the use of a gun or knife.[14] In Missouri, the state employs its deadly weapons and dangerous instrument provisions in both ways – that is, as both part of substantive crimes and as a way to increase sentences – and both can be used at the same time. A person can be charged with first-degree robbery, which carries with it a certain sentence and then *also* charged with the crime of Armed Criminal Action – basically committing a crime with a deadly weapon or dangerous instrument – which adds an additional sentence of three years. Despite being a separate criminal statute (rather than part of the state's sentencing machinery), the courts, including the United States Supreme Court, have treated Missouri's ACA statute as a sort of sentencing-enhancement provision, thus removing any double jeopardy problem when a person is convicted both of committing a robbery with a deadly weapon *and* committing a felony with a deadly weapon.[15]

Deadly weapons and dangerous instruments are defined separately, and the separate definitions can give us insight into how to interpret each phrase. "Deadly weapons" is a relatively specific list of particular "weapons," whereas "dangerous instruments" is open-ended, and context is necessary to determine whether a given object is dangerous or not.[16] As a result, it is relatively easy to figure out whether something is or is not a deadly weapon – just check the list to see – and comparatively harder to assess whether something is a dangerous instrument because doing so requires looking at a variety of factors to see whether this object is *in these circumstances* a dangerous instrument. This Part sharpens the contrast between the two technical terms, which gives us some insight into the proper understanding of "dangerous instrument" and how – if it is possible – to give some shape and limit to that term.

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12. MO. REV. STAT. § 570.023 (Cum. Supp. 2017).

13. MO. REV. STAT. § 571.015 (Cum. Supp. 2017).

14. *See id.*

15. As the Supreme Court held, "[S]imply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." Missouri v. Hunter, 459 U.S. 359, 368 (1983).

16. *Compare* MO. REV. STAT. § 556.061(22) (Cum. Supp. 2017), *with id.* § 556.061(20).

A. Deadly Weapons

Missouri defines a deadly weapon as "any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged, or a switchblade knife, dagger, billy club, blackjack or metal knuckles."[17] The list is fairly straightforward, although it requires some commentary. The group of weapons can be divided into four kinds: firearms or, more generally, something that can "discharge" a "shot"; knives or pointed objects of various sorts; bludgeons; and finally, metal knuckles. There is no additional clause that allows for things of a similar sort; the item is either on the list, or it is not. But still, there are some ambiguities, both in the statute and in the subsequent case law, which make even the closed list of "deadly weapons" not always capable of an easy interpretation.

First, consider weapons that are *like* the objects on the list, but not identical to them. What about a kitchen knife, or a butcher knife, or (more generically) a knife that is not a switchblade knife? Do they count as deadly weapons? A straightforward answer would be that because these types of knives are not specifically enumerated on the list, they would not be included – or better, they would be the types of knives that *might* be dangerous instruments, but not deadly weapons. But Missouri courts have nonetheless found in some cases that objects that are *close enough* to be "daggers" are close enough to be deadly weapons rather than dangerous instruments.[18] In one case, a toy sword was found to be a "dagger" even though it, in fact, was nothing of the sort – it was not designed for cutting, or really for doing any of the things ordinary daggers could do. It was meant to be a toy.[19] So it seems that de-

17. § 556.061(22).

18. The Supreme Court of Missouri held,

> It is very clear that the legislature has now stated that "knife" under some circumstances and for some purposes means "dagger."
>
> Logic is repelled by a contention that a knife, seven to eight inches long with a four to five inch blade, can never be considered to be a dagger. Certainly some knives under some circumstances may be used as, and may reasonably be considered to be daggers and deadly weapons.

State v. Martin, 633 S.W.2d 80, 82 (Mo. 1982); *accord* State v. Brookins, 410 S.W.3d 706, 709 (Mo. Ct. App. 2013).

19. As the court of appeals explained:

> Our examination of the replica sword reveals that it is made of solid metal and is 22 1/2 inches long when measured from the tip of its blade to the bottom of its hilt. The blade is 18 inches long. It weighs more than a pound. It has a sharp point and sharpened edges. When referring to the replica sword in closing argument, defense counsel stated, "It's a toy. It's heavy. It's pointy. It's still a toy. It's not a deadly weapon, and it's not a dagger." We disagree. The jury could readily determine that it had a hilt (or handle), a fixed blade,

spite the list-like nature of the definition, courts will interpret the statute as implicitly covering those things that are "like" the others on the list. "Dagger," especially, has been thought to be sufficiently capacious to cover anything that has a blade.[20]

Second, note that the deadly weapons statute has something that the dangerous instrument definition (discussed below) has also. It says that some items will be counted as deadly weapons if they can discharge a shot that is "readily capable of producing death or serious physical injury."[21] In particular, even though something is not exactly a *firearm*, if it is something that can discharge a shot that could cause death or serious physical injury, it will fall under the deadly weapon provision. But this condition – a non-firearm must still be capable of "shooting" – requires us to determine what it means for "a shot" to be *readily capable* of causing the injury. The wording is a bit awkward, but we can see what is meant. Consider something like a slingshot. The slingshot could be used to discharge a shot, say a rock, and that rock could cause serious physical injury, if not death – but perhaps it would have to be the case that there was actually a rock in the slingshot. An unloaded slingshot might not be enough to qualify as a "deadly weapon."[22]

> sharpened edges, and a sharp point. Whatever one chooses to call it, it meets the *Martin* description of "a short weapon with a sharp point used for stabbing" and satisfies most of the characteristics of a dagger set forth in *Payne*.

State v. Harrell, 342 S.W.3d 908, 914 (Mo. Ct. App. 2011) (quoting *Martin*, 633 S.W.2d at 81) (citing State v. Payne, 250 S.W.3d 815, 820–21 (Mo. Ct. App. 2008)).

20. Although one appeals court has resisted this trend and cautioned against an overly broad reading of "dagger":

> While the Missouri Supreme Court has described "dagger" as a "short weapon with a sharp point used for stabbing," we do not believe that they intended that term to cover every possible short, pointed weapon. *Martin,* 633 S.W.2d at 81. In each case cited by the State where a court uses this definition to describe the weapon in question, the court was describing a knife of some variety. *See id.* at 82 (knife between seven and eight inches long); [State v. Chowning*,* 866 S.W.2d 165, 168–69 (Mo. Ct. App. 1993)] (pocket knife of undetermined dimensions which was displayed to the jury but not contained in the record on appeal); [State v. Maynard*,* 714 S.W.2d 552, 557 (Mo. Ct. App. 1986)] (long knife with a "very dagger-type blade"). While the definition was practical when applied to knives, it is overbroad when read without context of the particular factual situation to which it was applied.

Payne, 250 S.W.3d at 821.

21. § 556.061(22).

22. As one court has indeed concluded, in distinguishing between an unloaded firearm and a "stoneless slingshot": "[t]hus, by statutory definition, an unloaded firearm is a deadly weapon while an arrowless bow, an empty pellet gun or a stoneless slingshot which are not readily capable of discharging and causing death or serious physical injury are not deadly weapons." State v. Straw, 742 S.W.2d 579, 581 (Mo. Ct. App. 1987).

This leads us to the third, and probably most important, observation about deadly weapons. It seems key that the item is on the list and also that *most of the time* it can cause serious physical injury or death. But this does not always have to be the case. An unloaded gun, to take the most obvious example, cannot cause death or serious physical injury (at least if it is being used as a gun, as opposed to a bludgeon). Firearms that are unloaded, however, are included on the list. Nor does the list say that a dagger or a switchblade knife must be sharp rather than dull. The list of deadly weapons seems, in other words, to contain things that are *intrinsically dangerous*. And it is this fact that deadly weapons are intrinsically dangerous, as one can put it, which contrasts them most directly with dangerous instruments.[23]

B. Dangerous Instruments

Under Missouri statute, a dangerous instrument is defined as "any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury."[24] Already we can see that this definition will be more difficult to interpret than the one given for "deadly weapons." The deadly weapons statute, at least at first look, gives a simple list and leaves the fact finder only to ask, "Was the thing used on the list or not?" But for dangerous instruments, the inquiry is significantly more open-ended.[25] The fact finder has to make an inquiry, not only into the nature of the object but, just as importantly, into the nature of the situation. The inquiry is not only about "what this thing is." It is also about what this thing is in the context of the overall situation, which may include features outside of the person using the instrument but also (and maybe essentially) features about the person's own, subjective mental state.

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23. This focus on intention and "actual use" has been well put by one court:

> In contrast to its decision to define what constitutes a "dangerous instrument" by the manner in which the item is used, the legislature chose to determine what constitutes a deadly weapon by setting forth a list of specific items. Whether an item constitutes a deadly weapon does not depend upon either its intended or actual use by the defendant.

Harrell, 342 S.W.3d at 915.

24. § 556.061(20).

25. One court stated:

> Dangerous instruments, on the other hand, can be virtually any item. They are not enumerated by statute and become dangerous instruments when used in a manner where the object is readily capable of causing death or other serious physical injury. Narrow descriptive words define one set of items and the particular manner of use defines the other set of items.

Payne, 250 S.W.3d at 819.

There seem to be, in fact, four main inquiries that the fact finder must make in deciding whether something is or is not a dangerous instrument.

First, there is the question of what counts as an "instrument, article, or substance." It is unclear whether these three words provide any limitation at all on what can count as a dangerous instrument. One issue, which can give courts trouble, is whether a body part can be an instrument, article, or substance.[26] A boot may be an "instrument," but what about a hand or a foot or an elbow? Does the instrument, article, or substance have to be of a certain size, such that it can be held by someone – perhaps, as the person makes the assault that causes physical injury or death? This would seem to rule out cars, but Missouri courts have repeatedly held that cars can be dangerous instruments.[27] Moreover, what exactly is an article or a substance? Here again, we face the problem that almost anything could be an article, although "substance" could be limited to powders or chemicals of some sort.[28] It is hard to say.

The second inquiry is the nature of the instrument or substance or article itself.[29] Does the object have sharp edges? Is it blunt? Is it heavy? Some things do not seem even in the universe of things that could ever be "dangerous." A sunflower does not seem to be something that could readily harm someone unless it was used as a sort of poison.[30] A baseball bat, however, does look like the type of thing that could hurt someone – although we would still need to analyze the context in which it was being used (picked up during a fight, picked up by the batter on deck in a baseball game, etc.). This leads us to the next inquiry.

Third, the factfinder has to assess what the relevant *circumstances of use* are, so as to make an object "dangerous." These again seem hard to pin down exhaustively, although we may list some obvious circumstances. A relevant circumstance may be how the object was held (was the pencil being pressed against someone's neck?), or the words that were said by the person holding the object ("give it to me or I'll stab you with this pen"). More generally, the mental state of the person using the object could be considered. Was the per-

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26. State v. Evans, 455 S.W.3d 452, 453 (Mo. Ct. App. 2014) (discussing whether a hand or fist can qualify as a dangerous instrument).

27. *See infra* Part III.

28. One court has found gasoline to be a dangerous instrument: "[w]hile a bottle of gasoline may be innocuous in the ordinary sense when used for a harmless purpose, it can readily be transmogrified into a dangerous instrument when employed in a threat to use it as an explosive to produce physical harm." State v. Anderson, 663 S.W.2d 412, 416 (Mo. Ct. App. 1983).

29. "The first factor involved is the nature of the instrument itself." City of Independence v. Young, 760 S.W.2d 909, 910 (Mo. Ct. App. 1988).

30. A variety of commonly eaten fruits and vegetables have poisonous parts. Both apples and cherries have poisonous seeds, and all parts of sunflower plants are somewhat toxic if copious quantities are consumed. Cindy Haynes, *Potentially Poisonous Plants*, IOWA ST. U. (Feb. 21, 2003), https://hortnews.extension.iastate.edu/2003/2-21-2003/poison.html.

son acting recklessly or even purposely with regard to the object and the prospect of the object causing harm, or was the person oblivious to the fact that (for example) the chainsaw was on and running? Another obvious circumstance could be simply whether there was a person or people around so that someone was at risk of being hurt or killed by use of the object. Although the verb "use" might suggest some intentional use of the object *qua* dangerous instrument,[31] courts have interpreted use very broadly, almost in the sense of "handled" or "held" or even "controlled."[32]

The fourth inquiry (one which is related to the second and third) is whether, given the circumstances, the object was in fact "readily" capable of causing serious physical injury or death. Here we reach another important contrast to the deadly weapons provisions. Only certain things can be deadly weapons, but a lot of things potentially can be dangerous instruments – a pen, a piece of rope, a boot, a car. The question is not whether, given the circumstances, the object was just capable in the abstract of being dangerous but whether, *in these circumstances*, an *immediate* risk of serious physical injury or death was created. So the fact finder should ask whether the thing was dangerous and also whether the thing had a real, present, and actual capability to cause serious physical injury or death. Note how (in a way similar to the focus on the circumstances of "use") this shifts the inquiry from whether something is intrinsically dangerous – like a gun, where the legislature has said that guns are everywhere and always deadly, even when unloaded – to whether something is dangerous in this situation, that is, in this immediate situation. If that were not the case, then anything that was in the abstract capable of causing death or serious physical injury would automatically be considered a dangerous instrument, regardless of the circumstances. But the legislature, by specifying that the object has to be "readily capable" of harm, rejected this interpretation.[33]

But there is, nonetheless, an underlying unity that links deadly weapons and dangerous instruments. We might say that dangerous instruments *are* deadly weapons *given the circumstances*. The legislature is attuned to how "weapons" make a dangerous circumstance all the more dangerous. Some objects are always weapons; that is just what they are – they are made to shoot things at people or to stab people. Other objects, however, become (in a manner of speaking) weapons. The question, then, is when does an "instrument, article, or substance" become a weapon? That is, what circumstances turn an ordinary object into something that *acts like* a weapon that is on the list of "deadly weapons."

31. A point we return to later in the Article.

32. *See infra* Parts III and IV.

33. *See* State v. Williams, 126 S.W.3d 377, 384 (Mo. 2004) (en banc).

C. Armed Criminal Action

Although the main purpose of this Article is to unpack what a dangerous instrument is, especially as opposed to a deadly weapon, it may help to further contextualize the inquiry by looking at how the terms operate as part of Missouri's ACA statute – perhaps the most frequent context in which the terms are explicated. Under the ACA statute, a person is guilty of Armed Criminal Action if that person commits a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon."[34] Again, the ACA acts as a sort of sentencing enhancement to felonies – if one commits a felony with a deadly weapon or dangerous object, more years are added to one's sentence.[35] But the statute presents us with obvious, additional interpretive difficulties, especially in the case of dangerous instruments.

For starters, what does it mean to commit a crime *with* a deadly weapon or dangerous instrument, in the various ways that the statute enumerates (by, with, through the use, assistance, or aid of)? Consider a situation in which a person shoots another with a gun – there, the actual crime is committed *by* a deadly weapon. A harder case is when one commits a crime when a person merely has a deadly weapon or dangerous instrument with him or her at the time. It would seem that if one has a gun on one's person and, for example, steals something valuable, then one may be guilty of committing a crime *with* a deadly weapon. But courts have ruled this out by joining the "by, with and through" language with "use, assistance, or aid of a dangerous instrument."[36] That is, one must actually have *used* or been *assisted* or *aided* by the deadly weapon or dangerous instrument. It is not enough that it is merely *on* one's person at the time the crime was committed.

Does this help matters? It does limit the reach of the ACA statute in some deadly weapons cases, but this limit has been easily taken away by courts that see people as being *emboldened* when they carry a gun, even when the gun is not used.[37] However, it is not clear that this reading also applies to

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34. MO. REV. STAT. § 571.015 (Cum. Supp. 2017).

35. Of course, there is the possibility that the years will run concurrently, rather than consecutively.

36. As one court of appeals has stated,

> It follows that, in order for Appellant to have committed ACA in the course of committing first-degree burglary, as that crime was charged here, he must have gained entry "by, with, or through the use, assistance, or aid of" the rifle, most likely in a manner similar to one imagined and described to the trial court by the prosecutor, and a person not participating in the crime . . . must have been present in the home when Appellant entered.

State v. Carpenter, 109 S.W.3d 718, 723 (Mo. Ct. App. 2003).

37. A clear example of this is found in *Jones*, although *Jones* involved a "deadly weapon" and not a dangerous instrument:

cases of dangerous instruments – for a dangerous instrument is defined by the context in which it is used, and a dangerous instrument that is safely tucked away, not easily reachable by the person, would not be "readily capable" of causing death or serious injury. Again, the difference between deadly weapons and dangerous instruments is crucial here. A deadly weapon is always a deadly weapon, and so within the case of an ACA/deadly weapon charge, the question is whether one used the deadly weapon or was aided or assisted by having it. In the case of an ACA/dangerous instrument charge, the question is more complicated because we first have to consider whether, in the context, the instrument was readily capable of causing serious physical injury or death and *then* we have to decide whether the person committing the felony used the instrument or was assisted or aided in his or her felony by using it.

On this point, we can notice another split in the case law. When one uses a deadly weapon to break into a house, say by shooting the lock on a door open, then the case is relatively straightforward – one has used the deadly weapon in the process of committing a felony (a burglary). There is no need to show that the deadly weapon was used in a way that might cause harm because deadly weapons are always deadly weapons, no matter the context. (Remember that even an unloaded gun counts as a deadly weapon.) But dangerous instruments are different. If one uses an axe to break open a door, that is not *necessarily* enough for an ACA/dangerous instrument conviction because in those circumstances the use of the axe may not be enough to make it "readily capable" of causing serious physical injury or death, and to think that it is enough by itself is to fall into the trap of turning some dangerous instruments into deadly weapons. Consider the case in which one *merely* uses an axe to break open a door when no one else is around and then discards the axe. This would likely not be enough to show ACA/dangerous instrument.[38] Compare this to the case where one shoots open a lock with a gun and then discards it, which would presumably be enough to show ACA/*deadly weapon*.

> Here, Jones unlawfully entered C.H.'s garage with a gun in his hands. The jury reasonably could infer that the gun "aided" or "assisted" Jones by bolstering his confidence to enter a garage that he knew might be occupied. The weapon provided "aid" or "assistance" by giving Jones both the ready means to overcome any resistance and the assurance that the mere presence of the gun would prevent or deter such resistance in the first instance. It does not matter whether such resistance occurs, or even whether anyone who might have offered such resistance actually saw him cross the threshold. The jury reasonably could infer that Jones crossed that threshold with the "aid" or "assistance" of his gun because the gun bolstered Jones' confidence in making the unlawful entry.

State v. Jones, 479 S.W.3d 100, 109 (Mo. 2016) (en banc).

38. For reasons we will get into later in this Article, it is especially relevant here that no one was around who was "readily capable" of being injured by the axe. *See* MO. REV. STAT. § 556.061.20 (Cum. Supp. 2017).

Of course, it may be easy enough to show in other circumstances that an axe is, in fact, a dangerous instrument – maybe it can be shown that the person was also planning to wield the axe to threaten anyone he or she saw inside the house. The point is not that the axe is *not*, in this case, a dangerous instrument; rather, it is to show that it is not automatically a dangerous instrument. One has to make a further showing apart from showing that the object was used in the commission of a crime (a showing one does not have to make in the case of deadly weapons), viz., that in the circumstances, the object was *readily capable* of causing serious physical injury or death and so qualifies as a dangerous instrument. But we are getting into some of the puzzles presented by dangerous instruments, and we should now address them more directly.

III. CARS, ICE PICKS, AND FISTS

This Part aims to show that, fairly quickly, we can get into interpretive muddles when unpacking the term "dangerous instrument," especially in the context of the ACA statute. Dangerous instruments, as we have seen, include ordinary things that have very ordinary uses and so are not always "dangerous."[39] What makes them dangerous is the *context* in which they are used – where, in context, the objects become "readily capable" of causing serious physical injury or even death to other people. The problem is that, if we become too generous when we identify the circumstances in which ordinary objects become dangerous instruments; that is, if we don't take care to narrow those circumstances appropriately, then it turns out that many ordinary objects are in fact dangerous nearly all the time. When we do this, all sorts of things that are dangerous only in limited circumstances turn into things that are almost always dangerous.[40] As we argue in the third part, as the statute becomes more broad – to include more things as "dangerous" – it loses its

39. *See, e.g.*, State v. Davis, 611 S.W.2d 384, 386–87 (Mo. Ct. App. 1981) (noting that under the older version of the statute, leather-sole shoes, rocks, hoe handles, and champagne bottles had been declared dangerous weapons); *see also* State v. Reese, 436 S.W.3d 738, 742 (Mo. Ct. App. 2014) (pencil); State v. Rousselo, 386 S.W.3d 919, 924 (Mo. Ct. App. 2012) (ceramic bowl); State v. Coram, 231 S.W.3d 865, 868 (Mo. Ct. App. 2007) (telephone); State v. Arnold, 216 S.W.3d 203, 209 (Mo. Ct. App. 2007) (ink pen); State v. Eoff, 193 S.W.3d 366, 374 (Mo. Ct. App. 2006) (piece of wood); State v. Goodman, 496 S.W.2d 850, 852 n.1 (Mo. 1973) (champagne bottle); State v. Carpenter, 72 S.W.3d 281, 284 (Mo. Ct. App. 2002) (handcuffs); State v. Burch, 939 S.W.2d 525, 530 (Mo. Ct. App. 1997) (elbow); State v. Tankins, 865 S.W.2d 848, 851–52 (Mo. Ct. App. 1993) (butter knife); State v. Terrell, 751 S.W.2d 394, 396 (Mo. Ct. App. 1988) (beer bottle); State v. Seagraves, 700 S.W.2d 95, 97 (Mo. Ct. App. 1985) (metal bar); State v. Davis, 611 S.W.2d 384, 386–87 (Mo. Ct. App. 1981) (metal sign nailed to a wooden board attached to a stake).

40. We should be clear that our argument is not that courts always hold that these things are dangerous instruments; it is that the logic of their decisions does not provide a principled way to prevent these things from becoming "dangerous."

distinctiveness vis-a-vis the other statutory term, "deadly weapon." It also threatens to make the statute vague.

The strategy for the remainder of this Article is two-fold. In this Part, we proceed by examining the three cases we started with – cases, in fact, that happened in Missouri and led some courts to get themselves into interpretive difficulties in deciding them. We try to tease out the possible absurd conclusions that can come about when one pursues an overly broad interpretation of "dangerous instrument," as some courts have done when interpreting these. In the next Part, we offer a rather simple solution, a solution some courts have offered, in order to remove most of the absurd results and to give a coherent sense to the statute. That solution involves isolating a crucial circumstance that courts *must* consider when deciding whether something is a dangerous instrument, which is the *intent* with which the person uses that object. In many cases, this is what courts are already doing implicitly; that is, they are already taking the fact that a person was *purposely using* the object in such a way to cause physical injury or death as good and possibly decisive evidence that the (ordinary) object had become a dangerous instrument. But courts are not as transparent as they could be. When they are, they usually reach the right result. When they are not, or when they do not consider purpose or intent at all, they fall into the interpretive muddles that we point out in this Part. The addition of purpose solves most of the interpretive muddles and, more importantly, provides the adequate notice ordinary people need to be able to steer clear of additional criminal punishment – the punishment that comes from using an ordinary object in a way intended to create a risk of serious physical injury or death.

A. Are Cars Dangerous Instruments?

A recent case from 2017, *Jacobson*, illustrates well some of the key interpretive challenges faced by judges when construing what is or is not a dangerous instrument.[41] The facts are, briefly, these.[42] A man after the close of a basketball game exited the gym where the game was played. He was intoxicated, and it was late at night. He nonetheless got into his car and began to drive through a heavily congested pedestrian area (the other fans were leaving the arena at the same time). Although he was not driving very fast, he hit and injured a mother and her child who were crossing at a crosswalk. He was charged with second degree assault and also (predictably) with Armed Criminal Action – committing a felony (the assault charge) with a dangerous weapon, viz., his car.[43] He was convicted, and the conviction was affirmed on appeal.

41. State v. Jacobson, 526 S.W.3d 228 (Mo. Ct. App.), *transfer denied*, (Mo. Oct. 5, 2017).

42. *Id.* at 230–31.

43. *Id.* at 231.

Jacobson is just one in a long line of cases in which cars were found to be dangerous instruments.[44] Nonetheless, the court in *Jacobson* took pains to point out the unique facts of the case: it is not that cars are always dangerous instruments, but under *these* circumstances, *this* car was.[45] The driver was drunk, he was driving late at night, and the area was crowded. He was reckless. In these circumstances, even though he may not have intended to use the car as an instrument to cause serious physical injury or death, he clearly knew that the car – again, in those circumstances – was *readily capable* of causing serious physical injury or death. And this "knowledge" requirement, the Supreme Court of Missouri has held, is all that is needed. That is, if one does not intend to use a car as a dangerous instrument, one does have to know that a car is *readily capable* of causing serious physical injury or death to satisfy the definition of "dangerous instrument."[46] The facts of *Jacobson* satisfy this condition – they show that the man did know (or that a jury could reasonably find that he knew) that the car could easily have killed or badly hurt someone given that he was drunk, it was night, and he was driving in a crowded pedestrian area.

The requirement that one "know" that a car is capable of causing serious physical injury or death may seem to constrain the application of the statute.[47] It gives the appearance of requiring the fact finder to show that the person who was driving the car had an awareness of its deadly capability, and this means pointing to those facts that ostensibly demonstrate that capability. By pointing to these facts repeatedly, the *Jacobson* court attempts to provide

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44. *See, e.g.*, State v. Williams, 126 S.W.3d 377, 380, 382, 385 (Mo. 2004) (en banc); State v. Fortner, 451 S.W.3d 746, 758 (Mo. Ct. App. 2014) ("A car can be a dangerous instrument when used in circumstances where it is readily capable of causing death or serious injury.").

45. *Jacobson*, 526 S.W.3d at 234 ("Contrary to Jacobson's argument on appeal, it is not the mere fact that he was involved in an accident while operating a vehicle while intoxicated that supports his conviction for armed criminal action but the operation of that vehicle, while intoxicated, *in addition to* the extensive attendant circumstances, explained above, that made his vehicle readily capable of causing death or serious physical injury."); *see also id.* ("We reach our decision based upon the unusual facts of this case.").

46. *Williams*, 126 S.W.3d at 384 ("Missouri courts have repeatedly held that a seemingly innocuous item may constitute a dangerous instrument by considering the circumstances under which the object is used. In these cases, the standard for determining whether an ordinary object constituted a dangerous instrument *turned on whether the defendant knowingly used the object in a manner in which it was readily capable of causing death or serious physical injury*." (emphasis added)). We deal with this point in greater detail in the next Section.

47. The requirement of "knowledge" is a lesser requirement than that of "purpose." As the *Jacobson* court wrote, "The State need not prove Jacobson subjectively intended to cause death or physical injury through the use of his vehicle, but that he 'knowingly used [his] vehicle in a manner or under circumstances in which it was readily capable of causing death or serious physical injury.'" *Jacobson*, 526 S.W.3d at 234 (alteration in original) (quoting *Fortner*, 451 S.W.3d at 758).

some limits to its holding.[48] Cars are not always dangerous instruments, but here, when used in this way and in these circumstances, they are. But the *Jacobson* court's appearance of providing a reasoned limiting principle is almost wholly illusory.

Consider that even if we take away some or all of the facts, one by one, from *Jacobson*, it still is the case that the driver should know that the car is a dangerous instrument, that is, readily capable of causing serious physical injury or death. A person driving drunk should know that driving intoxicated makes one a more dangerous driver. A person driving at night should have a heightened appreciation of the risks of driving when lighting is limited. A person should be on alert when driving in a crowded area – someone could dart out into the middle of the road or not be paying attention. Why don't each of these, *taken in isolation*, show that one "knows" that a car is readily capable of causing injury or even death? At least the driver was going slow in *Jacobson*. A person driving down the expressway at seventy or eighty miles an hour should know that his or her car *as such* is capable of causing serious physical injury or death if he or she is not careful. But a person backing out the driveway also *knows* that his or her car is readily capable of causing serious physical injury or death. That, after all, is why one exercises care in that situation.

The point is that the court in *Jacobson* was wrong when it emphasized that it was in those (unique) circumstances that the car became a dangerous instrument. Cars are *always* dangerous instruments when they are being operated, if one means by "dangerous instrument" that they are readily capable of causing serious physical injury or death.[49] The fact that the *Jacobson* court, following the Supreme Court of Missouri, added that the defendant needs to know that cars are readily capable of causing death or physical injury is a minor constraint, at best. Only in rare circumstances are cars not *almost immediately* able to cause death or physical injury: when no one is around, for instance, or when the car is stationary (parked in the garage, with no driver). In most cases, when one is driving on a highway with other cars or on a street in a residential area, a car, just by virtue of what it is, is something that is readily capable of causing death or physical injury.

Consider a further absurd result that is generated by the *Jacobson* interpretation of dangerous instrument. Take the same facts – it is late at night, the driver is drunk, and he is driving in a congested area. But add two twists.

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48. *See, e.g.*, *id.* at 234 ("The fact that he lied to law enforcement about his activities suggests he was, in fact, aware of the dangerous nature of his conduct.").

49. As the United States Supreme Court put it in a different context, "Motor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property." Hess v. Pawloski, 274 U.S. 352, 356 (1927); *see also* Hilyer v. Hartford Life & Accident Ins. Co., No. 2:09–cv–00843–JHH, 2011 WL 925027, at *14 (N.D. Ala. Jan. 31, 2011) ("Given that driving a car is a dangerous activity that requires the utmost focus, Plaintiff's choice to get behind the wheel belies her assertion that the pain medication inhibits her ability to function, especially with respect to driving.").

First, he does not hit anybody. Second, he is actually on his way to a friend's house to give him a check that, it turns out, is forged. The car, by the reasoning of *Jacobson*, is still a dangerous instrument. It is still readily capable of causing serious physical injury – one does not actually have to *hurt* someone with an object for that object to be a dangerous weapon, although actually killing or causing someone serious physical injury is good proof that the item was capable of so doing. So the car is a dangerous instrument. The felony, in this case, is the forgery of the check,[50] and because the driver used a dangerous weapon to *aid* in the commission of the felony (driving to the friend's house), this is sufficient for an ACA conviction as well. We think that this gives a *reductio ad absurdum* of treating cars as dangerous instruments. So long as we assume that the driver *knew* his car was capable of causing serious physical injury or death (which, as we have suggested, almost everybody does in almost all circumstances) – and so long as the car was being used to help commit a felony, an ACA conviction should be practically automatic. This cannot be the real intent of the drafters of the legislation, no matter how broad a reading we assume that they *did* intend.[51]

Note what is happening in this analysis of cars as dangerous instruments. The analysis basically makes cars into the equivalent of deadly weapons by not being able to effectively limit the circumstances in which cars can be "readily capable" of causing serious harms. Recall deadly weapons are presumed, always and everywhere, as being capable of causing harm – that is why we do not really care about the odd case where a gun is unloaded; in those cases, the presumption of harm trumps the temporarily non-dangerous nature of the unloaded gun. But the plain meaning of the statutes suggests that dangerous instruments are supposed to be different. There, the definition covers objects that could be different things in different contexts – ordinary objects that become dangerous because of the way they are used.[52] A pen, for example, may not ordinarily be readily capable of causing harm, but it could be if it were placed under one's neck in a threatening manner.[53]

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50. A class D felony in Missouri. MO. REV. STAT. § 570.090 (Cum. Supp. 2017). More precisely, it would be the "transfer" of the forged check.

51. *See* State *ex rel.* Bulloch v. Seier, 771 S.W.2d 71, 76 (Mo. 1989) (en banc) (Blackmar, J., concurring), *overruled en banc by* State v. Blackman, 968 S.W.2d 138 (Mo. 1998) (per curiam).

52. "Unlike a deadly weapon, a dangerous instrument is not designed for use as a weapon and may have a normal function under ordinary circumstances." State v. Rousselo, 386 S.W.3d 919, 923–24 (Mo. Ct. App. 2012) (quoting State v. Williams, 126 S.W.3d 377, 384 (Mo. 2004) (en banc)).

53. In *Arnold*, the court stated:

> In this context, given the soft tissue vulnerabilities of the neck and throat, the jury could have reasonably inferred that the pen was, in fact, capable of causing serious injury and death when the sharp point of that pen was pushed forcefully to that area of Officer Fields' neck, just as the Defendant threatened that it could. Defendant believed the pen was capable of killing Officer Fields, because he intended that Reynolds actually use it to kill her. Thus, the

Cars, though, seem to be *always and everywhere* dangerous; that is just how they are.[54] One could be going slow and hit someone, seriously injuring him; one could be going fast, and driving more or less carefully and still hit someone, killing him. Cars are ordinary objects that seem to be more or less *always* dangerous – readily capable of causing serious harm – at least under the court's jurisprudence. No Missouri court, as of yet, has said as much, even though the logic of its jurisprudence seems to lead it to that conclusion, and the *Jacobson* court went out of its way to emphasize that it was not saying that cars are always dangerous instruments. But the various courts who have found cars to be dangerous instruments have been unconvincing in showing how, given their interpretation of the statute, they could exclude cars – again, in all but the rarest of circumstances – from being what deadly weapons are: intrinsically or inherently dangerous items.

B. Ice Picks

Our second case is based on the facts in *State v. Baumann*, where a person used a folding knife, rather than an ice pick, to slash the tires on a former employer's car.[55] The facts work better, initially, if we use an ice pick, rather than a knife, to remove any initial inference that the knife could somehow fit under "deadly weapon" because it is close enough to a dagger or a switchblade knife. Slashing tires amounts to tampering with a vehicle, which is a felony.[56] And if an ice pick/knife counts as a dangerous instrument, then an ACA charge could also be added – as it was in *Baumann*. The question in the *Baumann* case was, under the circumstances, could an ice pick, or a folding knife, be considered a dangerous instrument? If it were a *dagger* that Baumann used, the case would be an easy one because daggers are deadly weapons and merely *using* a deadly weapon during the commission of a felony is enough for an ACA conviction. But here the court had to engage in the further inquiries of 1) whether the object could harm someone in the circumstances and 2) whether he (Baumann) knew that. As the court explained, citing precedent, "[T]he standard for determining whether an ordinary object constitute[s] a dangerous instrument turn[s] on whether the defendant know-

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> threat of using the pen to harm her under those circumstances transformed it into a dangerous instrument.

State v. Arnold, 216 S.W.3d 203, 208–09 (Mo. Ct. App. 2007).

54. Again, this makes them more like deadly weapons, which are – in the terms we used – inherently dangerous. Deadly weapons can always cause harm (even if a switchblade knife was designed as a piece of art, it can still cause harm, which is the important thing, not what the purpose of the designer was). More to the point, the fact of the deadly weapon's *ability* to cause harm still makes a deadly weapon, even in a context where it cannot cause harm – an unloaded gun, for instance.

55. State v. Baumann, 217 S.W.3d 914, 916–17, 919 (Mo. Ct. App. 2007).

56. MO. REV. STAT. § 569.080.1(2) (Cum. Supp. 2017).

ingly used the object in a manner in which it was readily capable of causing death or serious physical injury."[57]

The defendant, in this case, argued that what he used to slash the tires could not have been a dangerous instrument because he did not intend to use the knife in a way that would cause anyone serious physical harm or death.[58] But this is not quite the test, as the Missouri courts have articulated it. The test is not whether a person intends to use an ordinary object as a dangerous instrument – "purpose" is not a part of the definition of "dangerous instrument" (although we will argue below that it probably should be read to include it). Rather, as the Missouri courts have outlined the test for a dangerous instrument, the only requirement is that the person be aware of – or "know" – the object's nature as a dangerous instrument, that is, the defendant has to be aware that he or she *has* an object that is readily capable of causing harm in the circumstances, not that she intends to *use* the object *as* a dangerous instrument.[59] The fact that Baumann was not using the object to threaten someone, but rather to slash the tires of a car, is not entirely to the point. The questions under Missouri precedent are, again, 1) whether the knife in those circumstances was objectively "readily capable of causing death or other serious physical injury" and 2) whether the defendant *knew* that.[60]

Surprisingly, the court found in *Baumann* that the knife was not a dangerous instrument, despite the obvious objective characteristics of a knife – knives can be used to cut people as well as to slash tires, and we might think: if a car is almost always a dangerous instrument, as we concluded above, then why not a knife?[61] Moreover, to rebut once more the defendant's argument, under Missouri precedent knives are not made dangerous (that is, readily capable of causing harm) depending on the *intention* of the user of the knife. If one is holding a knife, it would seem that one is holding a dangerous instrument, no matter what the circumstances. That is why people are, or at least should be, very careful when carrying knives! A person's intention does not make the knife more or less dangerous *intrinsically*. As one lower court put it, there is no language in the statute

> that requires a subjective intent of the defendant to use the object with an intent to cause death or serious physical injury. In fact, this requirement is contrary to the legislature's *objective* standard in the stat-

57. *Baumann*, 217 S.W.3d at 918.

58. Appellant argued "under the circumstances of this particular case that there was never a showing [that he used the knife] with an intent [to cause] death or bodily harm." *Id.* (alterations in original). He maintained that the "mental state of knowingly or intentionally using the instrument to cause death or bodily harm is required to convert it from an innocent article to a dangerous instrument." *Id.*

59. *Id.*

60. *Id.*; MO. REV. STAT. § 556.061.20 (Cum. Supp. 2017).

61. *Baumann*, 217 S.W.3d at 919.

> ute, apparent from its use of the language "readily capable of causing death or serious physical injury."[62]

How then, did the court find that, given the circumstances in the case, a knife was *not* a dangerous instrument, given the "objective" fact that knives can cut people and hurt them?

The court's answer to this was, *because there were no people around*.[63] In circumstances where one is using a knife, even using a knife to cut something, and no one is around to cut or to kill, the knife is not a dangerous instrument, the court concluded. *In those circumstances*, the knife is not *readily* capable of causing harm because one would have to go find someone (or someone would have to come near) to make the knife a dangerous instrument.[64] The standard is still an objective one and not dependent on the intention of the person using the knife because it is a function of the circumstances that the knife is or is not dangerous, not on whether the person is intending to use the weapon in a dangerous way. While the court in *Baumann* acknowledged that the statute does not have a requirement that a person be present in order for an object to become a dangerous instrument, it did seem to draw the implication that applying the statute has just such a requirement. "[T]he key consideration in determining whether an object is a dangerous instrument," the court concluded, "is whether it can kill or seriously injure 'under the circumstances in which it is used,' [g]iven the particular facts at issue there was but a remote possibility that any other individual could have been injured by Appellant's use of the dangerous instrument."[65]

This conclusion fits with our analysis above, which after all, did agree that a car is not *always* a dangerous instrument – not when one is driving on an empty and open street, or when a car is off and inside a garage. Things change when one is driving on a highway with other cars or in an area where there are pedestrians whom one could hit or kill – which is to say, most of the time when people are driving their cars they are dangerous instruments (and people *know* that). Knives, under the *Baumann* analysis, are not always dangerous instruments. For example, when no one is around and one is slashing the tires on a car with a knife or an ice pick, one is not using a dangerous instrument, rather, one is using an ordinary object – even in the circumstances possibly a "seemingly innocuous" one.[66] Again, one has to take the knife closer to someone, or a person has to come closer to the individual committing the felony. As the court noted in *Baumann*, no one was around against whom the knife could have been used.

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62. State v. Williams, No. WD 60855, 2003 WL 1906460, at *11 (Mo. Ct. App. 2003) (emphasis added), *transferred en banc to* 126 S.W.3d 377 (Mo. 2004).

63. *Baumann,* 217 S.W.3d at 919.

64. *See id.* at 918–19.

65. *Id.* at 919 (citation omitted) (quoting State v. Eoff, 193 S.W. 366, 374 (Mo. Ct. App. 2006)).

66. *Id.* at 918.

Is this a plausible result? The language of the *Baumann* court is illuminating in this regard. The court wrote that there was only a "remote possibility"[67] that any other individual could have been injured by Baumann's use of the knife in slashing the tire. The idea here, presumably, is that a remote possibility of injury is not enough to make the knife into an object that is in fact readily *capable* of causing someone injury. There was no one around against whom the knife could "readily" be used to cause harm – in this regard, it was like having a slingshot with no rocks around. But suppose someone was around, close by, watching. Suppose it was a co-conspirator who was ready to spell Baumann when his arm got tired from slashing. Would that change the knife into a dangerous instrument?[68] It should, supposing we keep with the same objective analysis that the Missouri courts have favored. Now that someone is close by, the knife could *readily cause* that other person injury. It is a knife, and a knife that can cut a tire could cut another person, causing him or her "serious physical injury." It should not matter that the other person is in on the tire-slashing with him because that would covertly add an element of intent or purpose into an analysis: Baumann would not want to cut a person who was helping him, that would not be his intent. But objectively speaking, if a person comes close, even if it is a person he does not know, or better, knows and has no intention of harming, the knife is now suddenly transformed into a dangerous instrument. All that should matter is that there is a person present because presence creates a possibility of harm.[69]

We should forestall one objection here, although we will have to return to it shortly. Whether one is using a dangerous instrument *intentionally* is surely relevant to whether an object is a dangerous instrument – for example, threatening to kill someone with a knife. None of the courts disagree with

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67. *Id.* at 919.

68. We might also ask, what about the risk of Baumann hurting *himself*?

69. This point was recently demonstrated in the case of *State v. Brittain*, where the fact that a person was "within 12 feet" of someone holding a metal pipe was sufficient – along with some threatening remarks – to show that the pipe was a "dangerous instrument." State v. Brittain, 539 S.W.3d 925, 927, 930 (Mo. Ct. App.) (man who beat a person's car with a "four-foot metal pipe" found guilty of first degree property damage and Armed Criminal Action because "if Victim had stayed put or tried to prevent the damage to the Chevrolet, Defendant *could have used* the metal pipe on Victim in a manner readily capable of causing serious physical injury or even death" (emphasis added)), *transfer denied* (Mo. Mar. 1, 2018); *see also id.* at 929 ("[I]t is a reasonable inference that Defendant *would have* used the pipe on Victim if he had remained." (emphasis added)). Note how hypothetical, even counter-factual the reasoning is – *if the victim had stayed the pipe would have been used*. In fact, the person Brittain confronted ran away almost immediately, and Brittian only used the pipe to damage property (a truck). *Id.* (owner of the truck testifying that "[t]hey started beating my truck *because they couldn't come after me*." (alteration in original) (emphasis added)). It is not too much to speculate that under this reasoning, *Baumann* really should have come out the other way, because *if* someone had come up to Baumann when he was slashing the car's tires, he *could* have used the pick to cause serious physical injury or death.

this.[70] Yet the car cases and the knife cases are important because they show that the statutory definition of a dangerous instrument – as the courts have interpreted it – does not *require* this element. They only require that one *knows* that one is dealing with a dangerous instrument and that in the circumstances in which the object is used, the object is, in fact, a dangerous instrument. One may know one has an object that, in the circumstances, is readily capable of causing harm to another person without it being the case that one *intends* to harm anyone with that object, and the courts have insisted on this distinction in cases where that intention to harm is absent.[71]

The upshot, to emphasize, is that (most) knives under this analysis come very close to being deadly weapons – they are those things that are, in most every circumstance, readily capable of causing serious physical harm or death. This may not be too surprising. Regular, ordinary knives are very nearly (and in some cases, the exact same as) daggers or switch-blade knives – objects that are on the list of "deadly weapons" in the Missouri statute. Plain, ordinary knives, in other words, are objects that are close to being intrinsically harmful (as are deadly weapons). Yet the same thing is true of almost anything with a point on it that is sharp – like an ice pick. These are things that will, if a person is around, be capable of causing real and sometimes serious harm to that person. All that is required is that the person knows that the object is capable of causing that harm, which in nearly every case will be true.

C. Fists

We now arrive at our final example, which can be simply described: a man beats a person with his fists so that the person suffers a serious injury – some sort of permanent impairment. Has the man used his "fists" as a deadly weapon? It seems clear, especially in the case where it was the intention of someone to cause serious physical injury, that the fists, in this case, were certainly *readily capable* of causing such injury: in a case called *Evans*, they clearly did.[72] But the court in *Evans*, after a lengthy and impressive analysis by the judge, concluded that fists could not be dangerous instruments under the ACA statute because they were not "instruments" at all.[73] They could not fit under the statute because the statute required – if it was read according to

70. *See Brittain*, 539 S.W.3d at 930; *Baumann,* 217 S.W.3d at 918; State v. Williams, 126 S.W.3d 377, 384 (Mo. 2004) (en banc).

71. *Williams*, 126 S.W.3d at 384 ("The statutory definition of 'dangerous instrument' in section [556.061(20)], requires only that the defendant knows he is using the instrument under circumstances that are 'readily capable of causing death or serious physical injury' and does not require that the defendant have the subjective intent to use the object with an intent to cause death or serious physical injury."); *see also Baumann*, 217 S.W.3d at 918–19 (circumstances indicated defendant did not have an intent to harm a person; conviction for Armed Criminal Action reversed).

72. State v. Evans, 455 S.W.3d 452, 460 (Mo. Ct. App. 2014).

73. *Id.* at 458–61.

its ordinary meaning – that a person use something *separate* from him or herself to cause the damage, and a body part was not (or not sufficiently) separate. We do not speak, the court reasoned, of a person's hands as an "instrument, article, or substance." Moreover, the court went on, the purpose of the ACA statute is to "impose greater punishment on those individuals who choose to use an item or weapon to commit a crime than those who do not."[74] Because a hand is not a separate *thing* one uses to commit a crime – as the opinion also notes, it is not as if one could be armed with his or her "fists" – body parts cannot be dangerous *instruments* under the statute, however dangerous they might be. If dangerous instruments are meant to be given a broad definition, the definition at least has *some* limits.

Still, it is not obvious that the court in *Evans* is right, despite its erudition. At least one other Missouri court found that "elbows" could be used as instruments.[75] The court's analysis in the *Burch* "elbows" case is rather sparse, but one can see how the court may have reached its decision. In ordinary circumstances, an elbow is just a body part – not especially dangerous. One can, however, *wield* one's elbow and *use it* in a way that it can be quite harmful. This is the same as with other, ordinary objects. A belt is not usually dangerous, but it can be used in a dangerous way. And so too with one's hands – ordinarily they are just hands. But when bundled up to make a fist, they can be very harmful, especially when used to cause harm. As the court described in *Burch*, "The repeated striking [of the elbow] caused bleeding, swelling and bruising to [the victim's] head and neck."[76] In dicta, the *Burch* court extended this reasoning to fists: "[f]ists can be a force likely to produce death or great bodily harm within the meaning of the statute defining assault in the first degree."[77]

Of course, the fact that something can cause serious physical injury or death does not transform it into a dangerous instrument – and indeed, this is where the *Evans* court lays the most emphasis. As an earlier court wrote in *Seiter*, "Although it is true an assault with fists may be a force likely to produce death or great bodily harm . . . this is not the same as classifying hands as dangerous instruments or deadly weapons . . . ."[78] Fists can be deadly, but they are still not instruments. But was *Evans* right on this point? It is, after all, not entirely odd to speak of using one's *fists* as an instrument of another's demise – even if the use here verges on the metaphorical. Other Missouri courts have not hesitated to find that boots can be categorized as dangerous instruments when used to stomp on someone, even when there was no indication that the boots had steel toes or were reinforced.[79] Indeed, one court

74. *Id.* at 459. The language of *choice* here is illuminating.

75. State v. Burch, 939 S.W.2d 525, 530 (Mo. Ct. App. 1997).

76. *Id.*

77. *Id.* (citing State v. Wheadon, 779 S.W.2d 708, 711 (Mo. Ct. App. 1989)).

78. Seiter v. State, 719 S.W.2d 141, 143–44 (Mo. Ct. App. 1986) (citation omitted).

79. *See* State v. Taylor, 645 S.W.2d 199, 202 (Mo. Ct. App. 1982) (cowboy boot is a dangerous instrument); *see also* State v. Johnson, 182 S.W.3d 667, 671

found leather-soled shoes to be a dangerous instrument.[80] Would a leather glove transform a fist into a deadly weapon merely because it added something in addition to a body part? Couldn't one's feet by themselves be deadly weapons? It does not seem especially odd to think of *elbows* (as opposed to fists) as instruments, and of using them as instruments. The *Evans* court's reasoning would also license the result that although one's actual hands cannot be dangerous instruments, a prosthetic hand might, in fact, be because it is "something more than his or her own body."[81]

And although we cannot infer that something is an instrument from the fact that it caused serious harm, the motivation behind this inference is not entirely wrong.[82] If the goal behind various dangerous instrument statutes is to deter crimes that involve a heightened risk of harm in the circumstances, then certainly a fist is more dangerous than, say, an open hand or a pointed finger. At least one state court, in Alaska, runs its analysis in precisely this way. In one decision, it held that the state could prove a fist was a dangerous instrument by showing that there was "particularized evidence from which reasonable jurors could conclude beyond a reasonable doubt that the manner in which the hand was used . . . posed an actual and substantial risk of causing death or serious physical injury, rather than a risk that was merely hypothetical or abstract."[83] Such a broad reading of the statute in light of the purpose to deter people who commit felonies in an especially dangerous way does not seem prima facie implausible. It gets beyond the formalism of requiring that there be some extra (and detached or separable) object that causes the harm, rather than focusing on the real risk of harm in the circumstances. It is not, after all, *always* the case that one can inflict more harm with an object in one's hand than with one's fists alone.

Finally, how does *Evans* fit with the Missouri courts' other cases that have held *cars* are "instruments"? It does not exactly correspond to our ordinary way of speaking to view a car as an instrument – except again, in the metaphorical way in which it makes sense also to speak of fists as "instru-

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(Mo. Ct. App. 2005) (using boots to stomp or kick "would meet the dangerous instrument requirement to support a conviction for armed criminal action").

80. State v. Brinkley, 193 S.W.2d 49, 53 (Mo. 1946).

81. State v. Evans, 455 S.W.3d 452, 459 (Mo. Ct. App. 2014). As an Arizona state court held, "[W]e conclude that although a prosthetic device is designed to be used as a substitute for a body part, such a device is not a 'body part' within the meaning of [the state's ACA statute and subsequent caselaw]." State v. Schaffer, 48 P.3d 1202, 1206 (Ariz. Ct. App. 2002).

82. It is a commonplace of statutory interpretation that when a statute is capable of more than one interpretation, courts can refer to the underlying purpose of the statute and look beyond the "plain and ordinary meaning" of the statute. State *ex rel*. Md. Heights Fire Prot. Dist. v. Campbell, 736 S.W.2d 383, 387 (Mo. 1987) (en banc).

83. Konrad v. State, 763 P.2d 1369, 1374 (Alaska Ct. App. 1988).

ments."[84] And, to again echo the *Evans* court, it seems strange to speak of being "armed" with a car. Nor are cars (like fists) really "articles" or "substances." If fists are to be rejected because they cannot be instruments, then so too could cars be rejected – despite the obvious capability of both cars and fists to cause serious harm and even death.[85] A Missouri court similarly rejected taking "fire" to be an instrument or a substance when looked at in light of "everyday language" alone.[86] If it is possible that cars or fire *could* be instruments, despite our ordinary use of the word "instrument," then it seems at least as possible that fists could be. The point is not that it is obvious that fists *must* be considered instruments, only that it is not obvious that they *must not* be considered instruments.[87] As we shall see in the next Part, we think that there is a stronger argument for excluding fists from being instruments – not based on the meaning of the word "instrument" but rather on the *intent* with which one is using one's fists.

IV. INSTRUMENTS AND INTENTIONS

The previous Part served two major purposes. The first was to show how current interpretations of "dangerous instrument" have led Missouri courts into various dead ends or at least bizarre and strange conclusions. Cars are dangerous instruments in most every circumstance.[88] Things with sharp blades, if they are not daggers or switchblade knives, are dangerous instruments but only if someone is close by.[89] Fists are not dangerous instruments, but boots are, and elbows might be.[90] The second, broader, purpose of the

84. It is an instrument in the narrow sense that a car is separate from one's body – but that would make everything apart from one's body an *instrument*, which also seems odd.

85. In other words, it seems hard to thread the needle between holding that fists are not instruments and that cars are.

86. State v. Idlebird, 896 S.W.2d 656, 663 (Mo. Ct. App. 1995), *overruled en banc by* State v. Williams, 126 S.W.3d 377 (Mo. 2004). The court went on to hold that fire *could* be a dangerous instrument under the statute if it were used with the intent to cause harm. *Id.* at 665.

87. A point made in *State v. Johnson* in finding that it was not necessarily error for a prosecutor in closing arguments to remark, "[H]e did it with a dangerous instrument, his hands and his feet." State v. Johnson, 182 S.W.3d 667, 670–71 (Mo. Ct. App. 2005).

88. *See, e.g.*, *Williams*, 126 S.W.3d at 384–85; State v. Ise, 460 S.W.3d 448, 456 (Mo. Ct. App. 2015) (evidence sufficient to find motor vehicle driven as dangerous weapon).

89. *See, e.g.*, State v. Jackson, 865 S.W.2d 678, 680 (Mo. Ct. App. 1993) (knife held against victim's throat in threatening manner is dangerous instrument); State v. Hyman, 11 S.W.3d 838, 841 (Mo. Ct. App. 2000) (same); State v. Baumann, 217 S.W.3d 914, 919 (Mo. Ct. App. 2007) (knife used to slash tires not a dangerous instrument because no one present at time offense committed).

90. *See* State v. Evans, 455 S.W.3d 452, 460–61 (Mo. Ct. App. 2014) (fists not dangerous instruments despite causing serious physical injury to victim); State v.

last Part was to show the contours of Missouri's jurisprudence surrounding dangerous instruments. The court tries to restrict the seemingly limitless range of dangerous instruments (remember that most ordinary objects *in some circumstances* can cause someone harm) by focusing on the current circumstances and the actual use of the object in those circumstances. But we have seen that this is not that great of a constraint. It will constrain the ice pick or knife from being dangerous when no one is around, but this change when someone is no longer "remote." It is even harder to specify when cars are *not* readily capable of causing serious harm to someone. Courts have further stated that the person must *know* that the object is capable of causing harm.[91] But who does not know this about a car, or a knife, or an ice pick? Again, the purported constraint does not really constrain.

In this Part, we begin to chart a different, and we think better, course. First, we make clear that the court's jurisprudence on dangerous instruments is not bad just because it leads to some questionable results – it may be that most statutes have this implication to some extent. The problems seem to us, deeper. The current method for interpreting "dangerous instruments" threatens to obscure the distinction between deadly weapons and dangerous instruments by implying that there are some dangerous instruments that are in fact intrinsically harmful – which is what deadly weapons are *supposed* to be. In other words, it turns out that under the current interpretation of "dangerous instruments" there will be some things that are *always and everywhere* dangerous, no matter how carefully they are used, or with what intent. At the very least, there remains considerable ambiguity under the court's current jurisprudence over what exactly the category of "dangerous instruments" includes – and this is a problem of vagueness. A term is vague when it is no longer clear what is, exactly, the reach of the statute – when its boundaries become excessively fuzzy, and no one knows, precisely, what conduct falls under the statute.[92] Such is the case, we believe, with "dangerous instruments" under current Missouri law.

Burch, 939 S.W.2d 525, 530 (Mo. Ct. App. 1997) (elbow qualifies as dangerous instrument); *Johnson*, 182 S.W.3d at 672 (jury had sufficient evidence to conclude boots were dangerous instruments); State v. Taylor, 645 S.W.2d 199, 202 (Mo. Ct. App. 1982) (cowboy boot is dangerous instrument).

91. The canonical statement of the standard is in *State v. Williams*: "[t]he statutory definition of 'dangerous instrument' in section [556.061(20)] requires only that the defendant knows he is using the instrument under circumstances that are 'readily capable of causing death or serious physical injury.'" *Williams*, 126 S.W.3d at 384.

92. *See, e.g.*, Beckles v. United States, 137 S. Ct. 886, 892 (2017) ("This Court has held that the Due Process Clause prohibits the Government from taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. Applying this standard, the Court has invalidated two kinds of criminal laws as void for vagueness: laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses. For the former, the Court has explained that the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what

We think that there is a solution to these problems, but it requires going back to some cases that the Supreme Court of Missouri has recently and wrongly overruled. Those cases, *Pogue* and *Idlebird*, focused on the fact that what makes a dangerous object dangerous is when one intends to use that object to cause harm.[93] This is not a perversion of the statute, by any means, which the Supreme Court of Missouri in *Williams* alleged. Rather, it is to point out that the most salient circumstance in deciding whether something is dangerous is *the intent with which someone is using that object*. If one has the purpose of causing harm with an ice pick, then that ice pick is readily capable of causing physical harm; indeed, it is the intention that (ultimately) makes it capable in this way.[94] An ice pick is relatively innocuous when it is used merely to pick at ice. What is more, adding a requirement of purpose solves the vagueness problem. If the state has to show that one really intended to use an object to cause harm, one can hardly complain about not having "fair warning" that one could be punished for using an object that could cause serious harm or death. In the final Section of this Part, we chart a course for Missouri courts to bring back the dangerous instrument statute – and by extension, the ACA statute – into line with this understanding.

A. Deadly Weapons and Dangerous Instruments, Again

Let us return to the distinction between deadly weapons and dangerous instruments. For starters, the deadly weapons statute is a list; the dangerous instruments statute is more a description of some particular objects. The deadly weapons statute is therefore rather easy to apply – at least in most

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conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (internal quotation marks omitted) (citations omitted)).

93. State v. Idlebird, 896 S.W.2d 656, 664 (Mo. Ct. App. 1995) (asserting the key issue for determining whether something is a dangerous instrument is whether circumstances demonstrate an intent and motive to cause death or serious harm), *overruled en banc by Williams*, 126 S.W.3d 377; State v. Pogue, 851 S.W.2d 702, 706 (holding motor vehicle not a dangerous instrument because it was not used with intent to cause harm), *overruled en banc by Williams*, 126 S.W.3d 377.

94. As one state court did in dealing with an ice pick:

> While an ice pick is not a weapon in the strict sense of the word and is not "dangerous or deadly" to others in the ordinary use for which it is designed and therefore may not be said as a matter of law to be a "dangerous or deadly weapon," nevertheless *when it appears that such instrumentality is capable of being used in a "dangerous or deadly" manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon, should the circumstances require, its character as a "dangerous or deadly weapon" may be thus established, at least for the purpose of the occasion.*

People v. Klimek, 341 P.2d 722, 725–26 (Cal. Dist. Ct. App. 1959) (emphasis added) (citing People v. Raleigh, 16 P.2d 752 (Cal. Dist. Ct. App. 1932)).

cases. Was the item used in the crime on the list of deadly weapons? If it was, or if it was something *close enough*, then the item is a deadly weapon; there is really no further inquiry – except perhaps the question of whether one knew one had a deadly weapon, which again should be easy enough to satisfy.[95] One only needs to know, for example, that one was *holding a gun*. But with dangerous instruments, the inquiry is considerably more complex. We have to ask whether, in this particular circumstance, the object was readily capable of causing serious physical injury or death. Here we cannot just put together a list of objects, or so it would seem. We would have to see how the object is being used in those circumstances to determine whether it was really *dangerous* or whether it was, instead, an "innocuous" object.[96]

The contrast between the two, as articulated in Part II, seems to be that deadly weapons are inherently or intrinsically dangerous – we do not want people carrying them or using them, period – and dangerous instruments are not, or not necessarily. That is why if a deadly weapon is used *at all* in the commission of a crime, that is enough to get an ACA charge and likely conviction. The statute reflects the policy determination that deadly weapons are *always* bad to have.

Not so with dangerous instruments. In many cases, they involve objects that are usually *good or useful* (shoes, champagne bottles, boots). That is why it is an essential part of a dangerous instrument that it actually be *closely related* to the possibility of hurting someone, not just that one has the object at hand. More precisely, the object has to be "under the circumstances" "readily capable" of causing a person harm.[97] Some situations will involve an object that is potentially a dangerous instrument but is not one because the circumstances do not make it so (a knife or an ice pick when no one is around, for example). That is why we have to look closely at the circumstances to see what the object was, in fact, capable of doing – it is not enough just to say that the object had the potential to be dangerous. We have to show that in the circumstances it was in fact dangerous.

But then we are faced with the court's current jurisprudence, where some things do in fact seem immune to the circumstances because they are always or at least usually dangerous. So some things become *de facto* deadly weapons because they take on the intrinsic or inherently harmful nature of deadly weapons. Cars really do seem to be ordinary objects that are always readily capable of causing serious harm or death. Knives of all sorts (and ice picks) are as well. If the analysis is truly one that is objective and looks at the circumstances and (at most) one's knowledge of the ready capability of the

95. There is some question whether the deadly weapon inquiry really requires this much – or if it is only enough that one had a deadly weapon and used it in the commission of the crime. If so, this would make the deadly weapon inquiry that much more objective than the one regarding dangerous instruments, where Missouri courts have been explicit that one must at least know that one has an object that is readily capable of causing serious physical harm or death.

96. *See* State v. Evans, 455 S.W.3d 452, 457 (Mo. Ct. App. 2014).

97. MO. REV. STAT. § 556.061(20) (Cum. Supp. 2017).

object to cause harm, then an object can be dangerous *even if it is the furthest thing from one's mind to use it to cause harm*.

It is possible that we could just accept this conclusion. There is an easy rejoinder, however: if some objects are always dangerous, why were these objects not simply included on the list of deadly weapons? This has some force when it comes to knives, because (perhaps oddly) only some kinds of knives were included on the list of deadly weapons – and some courts have pushed "daggers" to include most knives. But this only enables us to see the distinction between the deadly weapons and dangerous instruments more clearly. The intention behind the distinction must be that the legislature did not want *all knives* to be considered as *always* dangerous. Just having a knife when one is committing a felony does not make that knife dangerous. We need to pay attention to see when the knife is in fact readily capable of causing harm – not resting merely on the fact that something is a knife. Nor can we rest on the fact that someone was driving a car to conclude that a car is a dangerous instrument. We need to find something in addition that *makes* the knife, or the car, in the circumstances dangerous.

It is the court's approach to the circumstances where we think it has taken a problematic turn. It has tried to limit these circumstances using mostly *objective* rather than *subjective* criteria. As the lower court wrote in the *Williams* case, the legislature in its view has adopted an "objective standard."[98] So we look to whether the car was driven in a heavily populated area or at night, or when the driver was drunk, as in the *Jacobson* case.[99] Or we look to see whether someone is around the person who is slashing the car tires, as in the *Baumann* case.[100] We do not look to whether the driver *wanted* to run someone over, nor do we look to whether someone wanted to *cut* a person or just a tire. We look to see whether, in light of the objective circumstances, the *object itself* could be "readily capable" of causing harm, quite independent of the intent of the person using the object. Of course, intent can be relevant – and in many cases, it will be – but the point is it is not *required* by the objective analysis. It is enough if, in the given circumstances, someone could have been harmed by the object. *That* is what makes an object dangerous or not. But if we take this seriously, it is hard – as we endeavored to show – to see in what circumstances cars would *not* be rather dangerous, or most knives for that matter. If a person is close by, he or she could be hit and killed by a car, or cut by a knife and seriously injured. Nor will it do to emphasize that the object must be "readily capable" of causing physical injury. The car cases do not help us with this, as they seem to allow the possibility that merely driving badly in a heavily populated area makes a car a dangerous instrument. *Baumann* again simply looks at whether someone is nearby – if a person is

98. State v. Williams, No. WD 60855, 2003 WL 1906460, at *11 (Mo. Ct. App. 2003), *transferred en banc to* 126 S.W.3d 377 (Mo. 2004).

99. State v. Jacobson, 526 S.W.3d 228, 234 (Mo. Ct. App. 2017).

100. State v. Baumann, 217 S.W.3d 914, 919 (Mo. Ct. App. 2007).

near, then this seems enough to show a knife is readily capable of causing injury.[101]

In the cases where a finding of a dangerous instrument is more plausible, the courts look especially at the intent of the person using the object – which is the approach we endorse. If someone is *threatening* someone with a knife, rather than merely holding or using a knife, then it seems that the knife is *in those circumstances* readily capable of causing harm.[102] It is the agent and that agent's intentions that create the circumstance that make something – an ordinary object – into a dangerous instrument. In addition, this approach draws much more clearly the line between deadly weapon and dangerous instrument. If one has a deadly weapon (and one knows it) then one is liable under the ACA. The list (for the most part) could not be more clear. With a dangerous instrument, however, *the actor must make it into something dangerous* – that is, one must *by what one intends to do* transform the object from something ordinary into something dangerous and harmful. Objective circumstances may contribute to this analysis, but they should not be decisive.[103] It does matter, of course, whether the object is sharp or blunt or heavy – one cannot by one's intentions alone make a pillow into something that can cause serious harm or death (although perhaps one could use a pillowcase to strangle someone). And there must be someone around who can be harmed by the object. But beyond these aspects of dangerousness is what the purpose of the user is, and this, we think, should be taken into account. When we do this, we can make better sense of the car cases and the knife cases than the current court's jurisprudence does and do so in a way that is arguably consistent with a plain reading of the statute.[104] A focus on the agent's intent shows, plausibly, in what circumstances cars really are being used *as weapons* – which is not when they are just being driven, or even recklessly driven. Cars really become weapons when they are being driven purposely *at* someone. We expand on our positive proposal later in this Section;

101. *Id.*

102. *See* State v. Jackson, 865 S.W.2d 678, 680 (Mo. Ct. App. 1993). "A knife used in a threatening manner is a dangerous instrument." *Id.* (affirming the conviction of Armed Criminal Action when the defendant confessed to using a steak knife to force victim into bedroom, where knife was found). In a similar case, "[t]he record show[ed] that [the defendant] took the knife from the victim and then held it to the victim's throat." Martin v. State, 187 S.W.3d 335, 341 (Mo. Ct. App. 2006). "This was sufficient to show that he used the knife in a threatening manner, and, therefore, it constituted a dangerous instrument." *Id.*

103. It therefore seems incorrect to say, as did the Missouri Court of Appeals, that "[i]t is not important whether the object is in fact capable of producing harm." State v. Tankins, 865 S.W.2d 848, 852 (Mo. Ct. App. 1993) (butter knife with serrated edge).

104. An older case illustrates how easy the transition from "circumstances of use" to "intent" is: "[t]he sufficiency of the evidence turns not merely upon whether the knife was itself a deadly weapon. It turns upon the evidence of how it was used, i.e., *what appellant intended when he held it against [victim's] stomach*." State v. Shannon, 467 S.W.2d 4, 5 (Mo. 1971) (emphasis added).

for now, we turn to another problem with the court's interpretation of "dangerous instrument": vagueness.

B. Vagueness[105]

A statute is vague, according to accepted doctrine, if it frustrates the person of ordinary intelligence and his or her desire to act according to the law.[106] That person may *want* to obey the law, but if the law is vague he or she cannot truly know what the law is. If it is against the law to loiter, and loitering is given a vague definition by statute or by interpretation, the law will be struck down as void for vagueness. Laws are also vague if – by the same token – they give too much discretion to law enforcement officials to apply the law, and so they may do so arbitrarily. If there is "play" in the statute because it is vague, which gives police, for example, the ability to pick and choose *who* disobeys the law, then the law will also be overturned. The Missouri courts' interpretation of "dangerous instruments," especially in the context of the ACA statute, comes close to making the phrase vague. If ordinary people cannot know when they are using a dangerous instrument (as opposed to an ordinary object), then certainly police and judges will be free to, arbitrarily, decide that *some* things count as dangerous instruments, while others do not.

Consider how a vagueness objection would apply in the case of cars. Are all cars dangerous instruments? We have argued that there is no reason – no limiting principle – in the court's interpretation of "dangerous instrument" that dictates that some cars are dangerous instruments and others are not. But no Missouri court has of yet explicitly stated this rule, and indeed the *Jacobson* court was keen to maintain that it was *not* holding that cars, just by virtue of being cars, count as dangerous instruments.[107] Then who decides, and how do we know, which cars are going to be held to be dangerous and which cars are merely "innocuous"? The decision in *Baumann* also raises vagueness concerns. The knife in *that* situation was not a dangerous instrument, but how close would another person have to be in order for the knife to become "dangerous"?[108] The definition of "deadly weapon" does not face such vagueness dangers, at least not to the same degree, as it is reasonably clear what is meant by a "firearm" or a "dagger." It is precisely the contextual

105. In *State v. Bentzen*, the Missouri Court of Appeals addressed the issue of vagueness as it relates to dangerous instruments, but in only a cursory manner. State v. Bentzen, 646 S.W.2d 802, 803 (Mo. Ct. App. 1982) (denying defendant's contention that a related statute on dangerous instruments was "impermissibly vague").

106. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); *see also* City of Festus v. Werner, 656 S.W.2d 286, 287 (Mo. Ct. App. 1983) ("Due process requires that laws provide notice to the ordinary person of what is prohibited and that such laws provide law enforcement officials with standards so as to prevent arbitrary and discriminatory enforcement.").

107. *See* State v. Jacobson, 526 S.W.3d 228, 234 (Mo. Ct. App. 2017).

108. *See* State v. Baumann, 217 S.W.3d 914, 919 (Mo. Ct. App. 2007).

nature of the dangerous instrument determination, especially as the Missouri courts have construed it, that makes it so susceptible to a vagueness challenge. It is a dangerous instrument only if *in the circumstances* it is an object that is readily capable of causing serious physical injury or death. But how are we supposed to tell *which* circumstances are these?

We can quickly address one objection here, which is that the person who is guilty of Armed Criminal Action is *already* doing something criminal – remember that the ACA statute is predicated on committing a felony – so he or she should already be on notice that his or her conduct is criminal. That is, the person cannot complain that the statute is unfair or hard to understand because an ordinary person would already be on notice that what he or she was doing was criminal and so subject to punishment. What, exactly, can be the basis of this complaint? But courts have repeatedly held that notice not only goes to what conduct is or is not criminal but to fair warning of the actual *consequences* that attend a violation of the criminal law.[109] This, in part, is why an ex-post facto punishment is wrong[110] – in those cases, a person has already done the criminal wrong, so what grounds for complaint does he or she have if the punishment suddenly increases? Yet those charged under the ACA statute *do* have a basis for complaint, which is that they were not adequately informed that a violation of this law would carry not only a punishment for the underlying felony but also an *additional* sanction for committing a felony with the use of a dangerous instrument. Indeed, this point may counsel in favor of a narrower interpretation of the ACA statute because the state is, as it were, piling on. The state has already punished the person for the predicate crime; now it is just multiplying the penalties – even if it is doing so in a way that does not give rise to double jeopardy concerns. Why shouldn't the state have to meet a narrower definition of "dangerous instrument," one which the person who committed the crime had ample and unambiguous notice of?

And in fact, there is a ready way to read the statute so as to cure it of the defect of vagueness, which is to fix it by adding a requirement of showing *purpose*. A Missouri case, *Koetting*, provides a good example of this.[111] In *Koetting*, a person prosecuted under a harassment statute that made it a crime to "annoy" people complained that it was overly vague: different people are annoyed by different things, so how was he to know what was or was not "annoying"?[112] The court responded that if this indeed were how the statute

109. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in [this Court's] constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

110. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Weaver v. Graham, 450 U.S. 24, 30 (1981).

111. State v. Koetting, 616 S.W.2d 822, 824–25 (Mo. 1981) (en banc).

112. *Id.*

was best read, then the defendant was right – "annoy" did not give notice to the person under the statute and gave too much discretion to law enforcement officers to prosecute for harassment anyone *they* felt to be annoying.[113] But the statute did not merely prohibit annoying speech – it prohibited speech that was made with the *purpose* to annoy. This, the court said, gave the person enough notice. He may not know what annoys some people, but surely he could know when *he* was *intentionally* trying to annoy others.[114] The statute was not vague because a person of ordinary understanding could certainly tell when he had the purpose to annoy, regardless of whether what he was doing was actually annoying to others – something that he may not be able to predict.

In the case of dangerous instruments, we can say that what really makes a dangerous instrument *dangerous* is when someone intends to use it to hurt someone – to cause serious physical injury or death. Not only does this seem to be a plausible reading of the statute (as we began to argue in the last Section and will argue in more detail in the next), it does away with any problems of notice. Maybe a person cannot *know* the exact circumstances in which a car becomes objectively a dangerous instrument, or when a person is close enough to be harmed by a knife, but he or she *can* know when he or she has the purpose of running someone over with a car or when he or she threatens to cut someone with a knife. There is no problem in finding that the person in those circumstances is guilty of something worse than the underlying felony – that by his or her purpose with the object, he or she has made the situation that much more dangerous (we give an example of this in the next Section).

The court has held that purpose is not required, rather something like knowledge is, but the type of knowledge that it has required is insufficient to give fair notice. It only requires that the person knows that an object is readily capable of causing serious physical injury in the circumstances – not that the person has the purpose of causing serious physical injury. That is, the person only needs to know that a car can kill someone or that a knife can cut someone. But a person can *always* be presumed to have this knowledge – whether he or she is driving fifty-five miles per hour on the highway or using a butcher knife to cut some meat. Too much notice is akin to no notice at all and (again) gives too much discretion to the authorities to decide when this general knowledge *really will* make the car or the knife a dangerous instrument. Indeed, too much notice – that one is always "on notice" that the ordinary object one is using is a dangerous instrument – is precisely vagueness in another guise (and marks the point where overbreadth and vagueness meet). A statute that says one cannot "do bad things" puts one on notice, in a way, but gives absolutely no guidance to citizens and officials. So too does a statute that prohibits the *knowing* use of dangerous instruments when one lacks any certainty as to when ordinary objects – the car one is driving, the knife

113. *Id.*
114. *Id.*

one is cutting with – will be "transmogrified" (in the words of one court)[115] into a dangerous instrument given the objective, rather than the subjective, circumstances.[116] A requirement of *purposeful* use of an object to dangerous ends, however, provides sufficient notice.

C. The Road Not Taken: Requiring a Showing of Purpose

The decision to go in a more "objective" dimension – where the subjective intent of the user of the object is relevant, but not required, for it to be a dangerous instrument – was by no means foreordained. Indeed, there was a split in how the lower Missouri appellate courts were considering what makes something a dangerous instrument. On one side were those courts that saw it as necessary to show that a person had the intent to use the "ordinary" object to cause harm if one was going to find that the object was a dangerous instrument.[117] It was the person's *intention* in using the object that was the key to making an "innocuous" ordinary object into one that was "dangerous" under the statute – the most important circumstance when looking at the object "under the circumstances." Ordinary objects remain ordinary objects if there is no purpose to use them to cause serious physical injury or death. On the other side was the position – ultimately endorsed by the Supreme Court of Missouri, thus settling the matter[118] – that the inquiry was supposed to be "objective": look at the circumstances, of which a person's purpose was one aspect, but not required, for a finding of dangerousness. The court took knowledge of the object's potential for harm to be enough, even if the user of the object had no intention to use it as a dangerous instrument. We think the Supreme Court of Missouri chose the wrong side in the debate.

One of the early cases finding subjective intent to be vital in proving something was a dangerous instrument, *Pogue*,[119] goes into great length in articulating the argument for that position. *Pogue*, like *Jacobson* (our first case in the introduction), dealt with the claim that, in the circumstances, a car had been used as a dangerous instrument. The facts were also somewhat

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115. State v. Anderson, 663 S.W.2d 412, 416 (Mo. Ct. App. 1983).

116. The *Anderson* court stated:

> In contrast to a "deadly weapon", a "dangerous instrument" is not designed to be employed as a weapon and under normal use may have a perfectly legitimate function. While a bottle of gasoline may be innocuous in the ordinary sense when used for a harmless purpose, it can readily be transmogrified into a dangerous instrument when employed in a threat to use it as an explosive to produce physical harm. Defendant's second point is denied.

Id. (citation omitted).

117. *E.g.*, State v. Pogue, 851 S.W.2d 702, 706 (Mo. Ct. App. 1993), *overruled en banc by* State v. Williams, 126 S.W.3d 377 (Mo. 2004).

118. *Williams*, 126 S.W.3d at 384–85.

119. *Pogue*, 851 S.W.2d at 705–07.

similar. Pogue was intoxicated, he ran a red light, and he collided with another car, killing the driver of that car.[120] He was charged with involuntary manslaughter and also with Armed Criminal Action – again, with the car as the dangerous instrument. The state argued that the mere fact that the car was "readily capable" of causing serious physical injury or death made it a dangerous instrument.[121] This is the position, we think, that the current court's jurisprudence leads it to – cars can kill people in most every circumstance, and so if we do not require that the person meant to *use* the car in a way that would cause death or serious physical injury, then we have no principled means of limiting those cases in which cars are *not* dangerous instruments. Cars, under this reading, would then simply be things that are inherently dangerous – that is, dangerous in almost every circumstance – and the dangerous instruments definition would operate in much the same way as the deadly weapons definition did, i.e., as a list of items that if used in conjunction with a felony leads to guilt under the ACA statute.

The *Pogue* court refused to go this route and indeed found the state's reading of the statute as contrary to the dangerous instrument statute's "plain or ordinary and usual sense."[122] In particular, the state – the *Pogue* court argued – was simply reading out of the statute the plain and ordinary meaning of the words "under the circumstances in which it [was] used."[123] The state focused just on the properties of the objects, rather than the circumstances, and the court said this approach was too narrow: "[t]he statute requires more than a showing that an article is readily capable of causing death or serious physical injury. It requires more than a showing that the article was the instrument that produced the death of a person."[124] The statute also requires a consideration of the circumstances, and "in determining the circumstances in which defendant used his automobile at the time in question," the court wrote, "the user's intent and motive *must be considered*."[125] Here the court relied on the analysis given by a D.C. court, which bears quoting in full:

> While certain objects are weapons by design, for instance, a handgun or a switch-blade, other objects become weapons only when there is some general intent for them to be a weapon. For instance, if an individual carries a bat to the baseball field for a game, the bat is certainly not a weapon. However, if the individual should swing the bat purposely at another, the bat then becomes a weapon. *Similarly, a car*

120. *Id.* at 703–04.
121. *Id.* at 705–06.
122. *Id.* at 706.
123. *Id.*
124. *Id.*
125. *Id.* (emphasis added).

> *driven for purposes of transportation is not a weapon, but a car driven with the purpose of injuring another definitely is a weapon*.[126]

The D.C. court divides the deadly weapon and dangerous instrument categories (to use Missouri's categories) along the line of purpose. Some things just are dangerous, and if you use them, it seems fair to hold you responsible for adding a further element of risk to the situation. Other things are not necessarily dangerous – but they *become* dangerous if you intend to use them in a way that makes them dangerous: you swing a bat *at* someone or you drive your car *at* someone. It is not the inherent "design" of the object that makes it dangerous – that a car is heavy and can go fast, for example, or that a knife is sharp – but what you do with it.[127] *That* is what changes the object into a dangerous instrument.

This way of looking at dangerous instruments does not mean that cars are never dangerous instruments, only that the person must have the purpose of using them that way. And this is the better way to analyze the knife cases, too. Do not just look – as *Baumann* seems to do – at whether anyone was around who could be harmed by the knife.[128] Look at how the knife was being used. Was it being used in a threatening manner? Then it is probably being used as a dangerous instrument. Indeed, even if the cases are not explicit on this point, what most courts do in the knife cases is look at whether the circumstances allow an *inference* of intent. Does the way the knife was used "under the circumstances" show that the person had the purpose of causing harm? If so, then the knife was being used as a dangerous instrument and not as an "ordinary object." One case (*Hyman*) proceeded in exactly this way. "Holding a knife to someone's throat in order to get them to remain silent," the court wrote, "is using that knife 'in a threatening manner.' Therefore, Appellant's use of the knife under these circumstances qualifies as use of a 'dangerous instrument.'"[129] The fact that the knife was not just being held, but held *against someone's throat* as a way of threatening that person, demonstrates the purpose of using the object as a dangerous instrument. It is not merely the fact that a person is present that makes the knife "readily capable" of causing harm but rather the intention of the person using the knife. In most cases – as the actual knife opinions reveal – this will be rather easy to show.

Another example might help. In *Coram*, the defendant was accused of using a telephone as a dangerous instrument by throwing it at someone.[130] In most contexts, just having a phone would not give rise to any inference that it can cause serious physical injury or death. However, a cell phone does be-

126. *Id.* (quoting Reed v. United States, 584 A.2d 585, 588–89 (D.C. 1990) (emphasis added)).

127. *See id.*

128. State v. Baumann, 217 S.W.3d 914, 919 (Mo. Ct. App. 2007).

129. State v. Hyman, 11 S.W.3d 838, 841 (Mo. Ct. App. 2000).

130. State v. Coram, 231 S.W.3d 865, 867 (Mo. Ct. App. 2007).

come dangerous if you throw it – hard – at someone. A person who throws a cell phone at someone does, probably, know that he or she is using the phone in a way that makes it "readily capable" of causing serious harm. But here the knowledge is almost certainly parasitic on the purpose the person had in throwing the phone – he or she threw the phone *in order to* cause the harm and was aware that it might do so. And indeed we can easily infer from the facts in *Coram* that the purpose of throwing the phone was to cause serious physical injury – "a phone was thrown at the head of an incapacitated, 93-year-old man from a close range with such force that it caused serious bruising and a black eye still noticeable four days after the event."[131] If a person "knowingly uses" an object in a way that is readily capable of causing serious physical injury, he or she will in nearly every case be found, also, to have "purposely" used the object in that way,[132] so long as the features of the object are such that it can cause serious physical injury or death.[133] What the emphasis on purpose rules out are those cases where actors know they have an object that can hurt people badly, but they have no intention of using the object in that way.

In the end, we suspect that most courts simply read "knowingly use" as meaning the same as "purpose." But the two are analytically distinct, and in fact, this distinction becomes apparent in the car cases (as well as some knife cases). Anyone who drives a car or holds a knife knows that he or she is using something that is readily capable of causing serious physical injury or death (if there are people around), but one may not intend in any way to use the car or the knife in order to cause serious physical injury or death. Consider one more example: a surgeon who is operating on someone is aware that he or she is using the knife in a circumstance in which one wrong move means serious physical injury or death. Is the knife a dangerous instrument

131. *Id.* at 868.

132. *See, e.g.*, State v. Hand, 305 S.W.3d 476, 481 (Mo. Ct. App. 2010) (citing State v. Eoff, 193 S.W.3d 366, 374 (Mo. Ct. App. 2006)) (referring to *Eoff* as a case in which the appeals court "found that when a stick or club was used in the course of a robbery as a bludgeon . . . no reasonable jury could have found that, under the circumstances in which it was used, the stick did not qualify as a dangerous instrument").

133. For a bizarre case that seems to depart with this second requirement (i.e., that the object in the circumstances be able to cause harm), see State v. Ransburg, 504 S.W.3d 721, 724 (Mo. 2016) (en banc) (stick found to be dangerous instrument because "Ransburg's conscious object was, if he reached the man, to cause physical injury to the man by using the stick under circumstances in which it was readily capable of causing serious physical injury"). This extends the "circumstances of use" to absurdity, at least if read out of context. In fact, the case deals with the slightly different question of whether Ransburg had the "conscious object" to use the long stick as a dangerous instrument, not whether the stick was *in fact* in the circumstances a "dangerous instrument." *Id.* This has not stopped courts from using the case as precedent for the idea that a pipe could be a dangerous instrument, even if no one was around. *See* State v. Brittain, 539 S.W.3d 925, 929 (Mo. Ct. App.), *transfer denied* (Mo. Mar. 1, 2018).

under the statute?[134] Setting the standard at "knowing" means that it is; setting the standard at "purpose" means that it is not. We think the requirement of purpose gives the better answer – it is the *purpose* the surgeon has that makes the knife an instrument of healing, as opposed to a deadly weapon.

But there are some instances where the focus on "purpose" could lead to a finding of a dangerous instrument where the more "objective" reading would not. For example, it does not seem entirely wrong to say that one's fists are a dangerous object if one has the *intent* to use them in a way that can cause serious physical injury or death (if you repeatedly punch someone in the head). The subjective reading focuses less on the exact nature or characteristics of the object – and, perhaps, also whether the thing is exactly an "instrument, article, or substance" – and more on the intention of the person who employs that object.[135] As the court in *Idlebird* wrote, in finding that fire was in the circumstances a dangerous instrument, "what constitutes an instrument, article or substance does not depend on the basic physical characteristics or typical use of the thing in question, but rather on whether it was used by defendant as the mechanism (or instrument) for causing death or serious physical injury to the victim."[136] The subjective interpretation of "dangerous instrument," in focusing on the *purpose* for which the object was being used, allows this broader reading and so may encompass, for example, fists. And in doing so it arguably focuses on the thing that matters – whether the situation was being made more harmful by the defendant's *use* of the object, rather than just on the mere presence or attributes of the object, regardless of what the defendant was using the object for.

In *Williams*, the court explicitly overturned the cases in which intent was held to be a necessary factor in finding something to be a dangerous instrument.[137] The court's rejection of these cases can be challenged. The court says that cases like *Pogue* and *Idlebird* are mistaken insofar as they require an extra element of proof – proof of subjective intent – that is "not in the statute."[138] But *Pogue* has an answer to this. What is in the statute is a requirement that the state show that "under the circumstances" the object was

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134. Of course, the surgeon could not be charged with Armed Criminal Action, but the broader point still holds: intent seems to be crucial in figuring out whether the knife is really "dangerous" or not.

135. This is similar to the Alaska approach we canvassed earlier.

136. State v. Idlebird, 896 S.W.2d 656, 665 (Mo. Ct. App. 1995), *overruled en banc by* State v. Williams, 126 S.W.3d 377 (Mo. 2004).

137. *Williams*, 126 S.W.3d at 385.

138. The court stated:

> *Pogue* appears to add an element of proof – subjective intent to injure – for the prosecution that is not in the statute. To the extent that *Pogue*, *Idlebird*, and *Dowdy* would require a showing that the defendant had a subjective intent to cause death or serious physical injury, they should not be followed.

Id.

readily capable of causing serious physical injury or death. "Circumstances" is in the statute, and *Pogue* says that the most relevant circumstance, under a plain reading of the statute, is the purpose of using the object to cause harm.[139] Moreover, the *Williams* court violates its own admonition not to read an additional element of proof by saying that whether something is a dangerous instrument "turn[s] on whether the defendant *knowingly* used the object in a manner in which it was readily capable of causing death or serious physical injury."[140] Knowingly, like purposely, is a mental state that is not explicitly in the statute – the court infers that the legislature meant to put it there, same as the court did in *Pogue*. So the actual disagreement is whether knowledge or purpose makes better sense of the statute, not whether there is a mental element to the definition of "dangerous instrument."[141] It seems to us, again, that the *Pogue* court has the better argument. Merely *knowing* that something is readily capable of causing harm does not make it dangerous, does not turn it into a weapon rather than an ordinary object; it is rather the intent with which one is using the object that matters to the dangerousness inquiry.[142]

V. CONCLUSION

The use of Armed Criminal Action as a sentencing enhancement is ubiquitous in Missouri – it is an easy way to add a few more years to any sentence. For a while, it looked as if the ACA statute would fall under a double jeopardy challenge, but this was rebuffed by the United States Supreme

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139. According to the *Pogue* court:

> The state's argument does not attach sufficient significance to the words, "under the circumstances in which it is used," that are part of the definition of "dangerous instrument" in [section 556.061(20)]. The statute requires more than a showing that an article is readily capable of causing death or serious physical injury. It requires more than a showing that the article was the instrument that produced the death of a person. Phrases are considered "in their plain or ordinary and usual sense."
>
> In determining the circumstances in which defendant used his automobile at the time in question, the user's intent and motive must be considered.

State v. Pogue, 851 S.W.2d 702, 706 (Mo. Ct. App. 1993) (citation omitted), *overruled en banc by Williams*, 126 S.W.3d 377.

140. *Williams*, 126 S.W.3d at 384 (emphasis added).

141. We have already registered our skepticism that lower courts in most cases are reading "knowingly use" as the same as purpose.

142. We take it as a welcome – rather than unfortunate – implication of this interpretation of "dangerous instrument" that it implicitly makes the mens rea of Armed Criminal Action into "purpose" when it comes to an ACA/dangerous instrument charge.

Court.[143] As it is used now, the ACA statute is a good example of "overcriminalization" at work because it shows a criminal justice system increasing punishment in cases where a person is *already* guilty of a felony. The real crime has been proven – and if you can prove the underlying crime, you get the ACA charge tacked on for free. The more broadly the ACA statute is read, including the terms "deadly weapon" and "dangerous instrument," which form the basis of an ACA charge, the more overcriminalization becomes just a fact of the Missouri criminal justice system. Cases that look bad enough, such as when someone is charged with involuntary manslaughter for recklessly hitting a pedestrian with his or her car, become worse when an ACA charge is added. Again, the ACA conviction is almost automatic, provided the underlying felony has been proven. And the courts have made it even worse by reading the statute as requiring that the time be served, no exceptions.[144]

It is easy to attack overcriminalization in the abstract – there are too many criminal laws, which result in too many people being charged and convicted and put away into prison for too long. It is harder to point out specific instances where the criminal law needs to be cut back – commission of nearly any crime creates a victim who might object to lessening the punishment, narrowing the interpretation of the law, or eliminating the crime altogether. The ACA is a good example of a specific statute that can and probably should be narrowed. The ACA already represents a kind of overkill – a gift to prosecutors who have already secured the real prosecution for the felony offense. The statute itself looks redundant and so for that reason (as we suggested earlier) should probably be given a narrow reading. If the prosecution is going to get a few free extra years tacked onto the sentence, we should be careful about letting it have this benefit indiscriminately. The statute is broad enough as it is; courts should not be making it even broader (contra the court's opinion in *Jones*[145]). And the state should be required to prove that

143. The Court stated:

> Particularly in light of recent precedents of this Court, it is clear that the Missouri Supreme Court has misperceived the nature of the Double Jeopardy Clause's protection against multiple punishments. With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.

Missouri v. Hunter, 459 U.S. 359, 366 (1983).

144. "The armed criminal action statute prescribes its own penalty by setting a minimum sentence at 'a term of not less than three years.' Because armed criminal action has no classification and includes its own penalty, it is an unclassified code offense." State v. Hyman, 37 S.W.3d 384, 390 (Mo. Ct. App. 2001).

145. State v. Jones, 479 S.W.3d 100, 106 (Mo. 2016) (en banc).

the defendant *meant* to use the object in a dangerous way, not just that he or she knew he or she was dealing with something dangerous.[146]

But even apart from general worries about overcriminalization in the criminal justice system, our reading that focuses on the purpose of those who use ordinary objects as weapons seems to us to place the best interpretation of the statute. It is the best both in terms of the state's interest in getting tough on people who make criminal situations *worse* by making things more dangerous (intentionally) and of the defendant's interest in receiving adequate notice for what he or she will be punished for if he or she does certain things. What really makes the situation dangerous is not merely the object – again, the objects in the dangerous instrument statute are those that in *most* circumstances are relatively innocuous – but what is being done *on purpose* with the object. What makes the car or the knife or the ice pick or one's hands readily capable of causing harm is having a *person* who is ready and willing to use it to cause harm. It is by focusing on this, and not on the intrinsic or inherent or objective properties of the object and the circumstances, that we arrive at a more plausible, and we think fairer, reading of the statute.

146. In this respect, we argue on a more granular level what Gideon Yaffe has urged on a macro level. See his op-ed, Gideon Yaffe, Opinion, *A Republican Crime Proposal That Democrats Should Back*, N.Y. TIMES (Feb. 12, 2016), https://www.nytimes.com/2016/02/12/opinion/a-republican-crime-proposal-that-democrats-should-back.html (noting that "over the years, exceptions to the principle [that a crime should require proof of a guilty mind] have become common because mens rea requirements have not been consistently detailed in laws").