COMMENTS

Dead Wrong: Why Washington's Deadly Weapon Criminal Sentencing Enhancement Needs "Enhancement"

James Harlan Corning[*]

"Let it be said that I am right rather than consistent."[1]
– Justice John Marshall Harlan

I. INTRODUCTION

The early 1990s saw a sharp increase in gun violence directed toward Washington's law enforcement community.[2] In the summer of 1994, the Puget Sound region was stunned by three separate, unrelated acts of violence against police officers and their families. On June 4th of that year, Seattle Police Detective Antonio Terry was gunned down on

* J.D. Candidate, Seattle University School of Law, 2012; B.A., Social Sciences, University of Washington. I am profoundly grateful to Professor Laurel Oates, who inspired this Comment through a fascinating legal-writing assignment in my first semester of law school and who has constantly encouraged, mentored, and advised me during my law school journey. I am deeply indebted to the staff of the *Seattle University Law Review* for their support; in particular, I thank Mike Costello, Joan Miller, Jacob Stender, Kyle Trethewey, and many others for giving so much time and effort to this piece. Lastly, I thank my incredible family and friends—and especially my wonderful fiancé, Eric Wolf—for their unwavering love, support, encouragement, and patience in all things.

1. *Quoted in* TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 77 (1995).

2. Ignacio Lobos, *Deputy's Death Another Reminder of Dangers of Law Enforcement Jobs*, SEATTLE TIMES, Aug. 17, 1994, http://community.seattletimes.nwsource.com/archive/?date=19940817&slug=1925831. Between 1990 and 1993, the number of firearm-related assaults against Washington police officers rose 56%, from forty-three to sixty-seven. *Id.*

Interstate 5 as he tried to aid a stranded motorist.[3] Just two weeks later, Dennis Griswold, a Tacoma tavern owner and the father of Tacoma Police Officer Danielle Griswold, was robbed and shot to death.[4] And on August 15th, Snohomish County Sergeant Jim Kinard was shot and killed as he responded to a reported homicide.[5]

In response to this wave of lethal attacks—and convinced that "[c]urrent law [did] not sufficiently stigmatize the carrying and use of deadly weapons by criminals"[6]—the law enforcement community and the victims' family members proposed an initiative to the state legislature. Initiative 159, the "Hard Time for Armed Crime" Act (HTACA), significantly increased the penalties for criminals who committed crimes while armed with a deadly weapon[7]—particularly firearms.[8] Believing these harsh sanctions would "[r]educe the number of armed offenders by making the carrying and using of the deadly weapon not worth the sentence received upon conviction,"[9] the legislature promptly enacted the HTACA, and the new law took effect on July 23, 1995.[10]

The HTACA significantly altered the "deadly weapon sentencing enhancement,"[11] a provision of Washington's felony sentencing guide-

---

3. Daryl Strickland et al., *Gun Found Near Site of Officer's Slaying—Three Men Held; Police Still Trying To Explain Shooting*, SEATTLE TIMES, June 6, 1994, http://community.seattletimes.nwsource.com/archive/?date=19940606&slug=1914252.

4. *Tavern Owner Shot to Death*, SEATTLE TIMES, June 19, 1994, http://community.seattletimes.nwsource.com/archive/?date=19940619&slug=1916377.

5. Karen Alexander, *Note Was Written By Suspect*, SEATTLE TIMES, Aug. 20, 1994, http://community.seattletimes.nwsource.com/archive/?date=19940820&slug=1926200.

6. Hard Time for Armed Crime Act, ch. 129, § 1, 1995 Wash. Sess. Laws 443, 444 (findings and intent).

7. Daryl Strickland, *'Hard Time' Initiative Lacks 20,000 Signatures—Terms Would Increase For Armed Criminals*, SEATTLE TIMES, Dec. 8, 1994, http://community.seattletimes.nwsource.com/archive/?date=19941208&slug=1946010.

8. *Compare* Hard Time for Armed Crime Act § 2, 1995 Wash. Sess. Laws at 446 (codified at WASH. REV. CODE § 9.94A.310(3)(a–c) (1996)) (penalties for being armed with a firearm), *with id.*, 1995 Wash. Sess. Laws at 447 (codified at WASH. REV. CODE § 9.94A.310(4)(a–c) (1996)) (penalties for being armed with a deadly weapon other than a firearm).

9. Hard Time for Armed Crime Act § 1, 1995 Wash. Sess. Laws at 444 (findings and intent).

10. 1995 FINAL LEGISLATIVE REPORT, Leg. 54-I159, Reg. Sess., at 1 (Wash. 1995).

11. The deadly weapon sentencing enhancement has been recodified several times since its enactment in 1983, but the enhancement has always consisted of two principal statutory elements: a definitions statute and a penalty statute. The definitions statute defines the term "deadly weapon," and it sets forth a process by which a prison sentence may be "enhanced" (or lengthened) when an offender possesses a deadly weapon during a crime. WASH. REV. CODE § 9.94A.125 (1984) (codified at WASH. REV. CODE § 9.94A.825 (2011)). The penalty statute creates two separate "levels" of enhancement—one specifically for firearms and one for all other deadly weapons—and it imposes additional prison time that must be added to an offender's prison sentence when that offender was armed during the commission of a crime. WASH. REV. CODE § 9.94A.510 (1984) (codified at WASH. REV. CODE § 9.94A.533 (2011)).

lines that had remained largely unnoticed since enactment in 1984.[12] The enhancement required courts to add a predetermined amount of time to a prison sentence for certain felony convictions ("predicate offenses") whenever a defendant was charged and convicted of committing the crime while armed with a deadly weapon.[13] But as originally enacted, the deadly weapon enhancement applied only in restrictive circumstances. The list of deadly weapons was statutorily defined,[14] as was the list of felonies that could be "enhanced."[15] Further, the State was required to show that the weapon was "easily accessible or readily available" for either offensive or defensive use during the crime.[16]

The HTACA dramatically expanded the scope and effect of the deadly weapon enhancement. It applied the enhancement to nearly all felonies,[17] well beyond the small list of predicate offenses already subject to enhancement (namely rape, robbery, kidnapping, and burglary).[18] Furthermore, under the HTACA, all deadly weapon enhancements became mandatory,[19] thus denying trial courts any ability to suspend a portion of the enhanced sentence. Moreover, the HTACA required all enhancements to be served in total confinement and consecutively to all other prison sentences.[20]

Shortly after the HTACA took effect—and apparently in response to the HTACA's sweeping changes and the expanded scope of the enhancement[21]—the Washington Court of Appeals imposed a significant new restriction on the enhancement.[22] Supplementing the previous requirement that a weapon must be easily accessible and readily available, the court also required a nexus between the defendant, the weapon, and the crime as a predicate to finding the defendant "armed."[23] But the vari-

12. Washington was one of the first states to enact a determinate sentencing scheme for felony convictions, which it accomplished in several steps between 1981 and 1983. *See infra* notes 39–42 and accompanying text. As originally enacted, the deadly weapon sentencing enhancement provision existed as a mere footnote to the sentencing grid. *See infra* note 43 and accompanying text.

13. *See* WASH. REV. CODE § 9.94A.510 (1984) (note following sentencing table).

14. § 9.94A.125 (1984).

15. § 9.94A.510 (1984) (note following sentencing table).

16. State v. Sabala, 723 P.2d 5, 8 (Wash. Ct. App. 1986).

17. *See* Hard Time for Armed Crime Act, ch. 129, § 2, 1995 Wash. Sess. Laws 443, 446 (codified at WASH. REV. CODE § 9.94A.310(3)(a)–(c) (1996)). The Act extended the enhancement to apply to nearly all felonies. *Id.* The severity of the additional prison sentence varied based on the statutory classification of the felony (A, B, or C). *Id.*; *see also infra* note 55 and accompanying text.

18. *See* § 9.94A.510 (1984) (note following sentencing table).

19. Hard Time for Armed Crime Act § 2, 1995 Wash. Sess. Laws at 446–47 (codified at WASH. REV. CODE § 9.94A.310(3)(e), (4)(e) (1996)).

20. *Id.*; *see also infra* notes 58–60 and accompanying text.

21. *See infra* note 92 and accompanying text.

22. *See infra* Part II.B.2; *see also* State v. Mills, 907 P.2d 316 (Wash. Ct. App. 1995).

23. *Mills*, 907 P.2d at 318.

ous divisions of the court of appeals initially disagreed on how to properly apply this "nexus" test.[24] And despite frequent attempts to clarify the nature of the nexus test, the Washington State Supreme Court instead cast further doubt on the scope of the nexus test with each subsequent decision.[25]

In 2007, after more than a decade of struggling to adequately explain to lower courts how to apply the nexus test, the Washington State Supreme Court granted review in *State v. Brown*,[26] ostensibly to clarify the test yet again. Instead, by a narrow five-to-four majority, the court implicitly found the nexus test to be no longer sufficient.[27] To supplement the nexus test, the court announced a new "intent" test, requiring the State to establish that the defendant intended to use the weapon in furtherance of the crime.[28]

Since the HTACA's passage in 1995, the deadly weapon sentencing enhancement has suffered from three major flaws. First, each formulation of the enhancement's "armed" requirement—the original "easily accessible" test, the nexus test, and *Brown*'s new intent test—suffers from serious constitutional or practical defects.[29] Second, the continuing doctrinal shifts by Washington's courts arise from a mistaken belief that a one-size-fits-all approach to the enhancement is best; on the contrary, a more nuanced approach is plainly required.[30] Finally, because the enhancement is overbroad, prosecutors can (and have) improperly relied on the enhancement to compel plea bargains and seek lengthier sentences for conduct the HTACA never intended to stigmatize.[31]

This Comment confronts the difficult question of how to reformulate the deadly weapon sentencing enhancement to better align it with the policy goals of deterring and punishing armed crime. Part II explores the constitutional and practical defects in each of the three formulations of the sentencing enhancement's armed requirement by delving into the enhancement's legislative history and the judicial struggle to interpret it. Part III analyzes the need for a more nuanced approach to the weapon

---

24. *See infra* Part II.B.2; *see also* State v. Schelin, 55 P.3d 632 (Wash. 2002).

25. *See, e.g.*, State v. Gurske, 118 P.3d 333, 340 (Wash. 2005) (Sanders, J., concurring).

26. State v. Brown, 139 P.3d 349 (Wash. 2006) (granting petition for review).

27. State v. Brown, 173 P.3d 245, 253 (Wash. 2007) (Madsen, J., dissenting) ("[T]he majority adds a new condition to the nexus requirement, holding that it is not satisfied unless there is evidence that the defendant intended to or was willing to use the weapon in furtherance of the offense. This condition cannot be reconciled with legislative intent or with our prior cases . . . .").

28. *Id.* at 249 (majority opinion) ("No evidence exists that [the defendant possessed a weapon] indicative of an intent or willingness to use it in furtherance of the crime.").

29. *See infra* Part II.

30. *See infra* Part III.A–B.

31. *See infra* Part III.C.

enhancement by exploring key criticisms about the enhancement's scope and application. Part IV argues that the Washington legislature must provide courts with more rigid guidance, specifically by restoring the crux of the easily accessible test in a form that also takes into account the nature of the crime and the weapon. Part V concludes by urging immediate legislative action and exploring the consequences of further inaction.

II. THE HISTORY OF WASHINGTON'S DEADLY WEAPON SENTENCING ENHANCEMENT

Washington has long maintained some form of sentencing guideline or enhancement for criminal conduct involving deadly weapons, although the scope of the deadly weapon enhancement has expanded considerably in the past two decades. Washington courts have struggled with how to interpret the enhancement precisely because of this recent expansion. This Part describes the legislative origin of the enhancement, as well as how and why the enhancement has recently expanded. This Part also explores how courts have struggled with determining when a suspect is armed with a deadly weapon for the purpose of applying the enhancement.

A. Legislative History of the Weapon Enhancement

From 1935 to 1981, Washington employed an indeterminate sentencing scheme[32] for all adult felony convictions.[33] Under this scheme, Washington courts fixed only the maximum possible period of incarceration during sentencing.[34] Once the offender was remanded to the custody of the penitentiary, the Board of Prison Terms and Paroles set the actual term of confinement.[35] Courts were obligated, however, to also set mandatory minimum periods of incarceration in certain circumstances. For example, if an offender possessed a deadly weapon during the commission of the crime, the court was required to impose a prison sentence of

32. Indeterminate sentencing refers to "the practice of not imposing a definite term of confinement, but instead prescribing a range for the minimum and maximum term, leaving the precise term to be fixed in some other way." BLACK'S LAW DICTIONARY 840 (9th ed. 2009). This "other way" often includes prisoner conduct (or misconduct) and evidence of rehabilitation, among other things. *Id*.

33. *Sentencing Reform Act: Historical Background,* WASH. SENTENCING GUIDELINES COMM'N, *available at* http://www.ofm.wa.gov/sgc/documents/historical.pdf (last visited Apr. 1, 2012).

34. *See* Act of Mar. 20, 1935, ch. 114, § 2, 1935 Wash. Sess. Laws 308, 309 (establishing the Board of Prison Terms and Paroles).

35. *Id.*, 1935 Wash. Sess. Laws at 310.

at least five years.[36] In 1961, the legislature established procedural protections for this sentencing provision by mandating that only the fact finder (and not the sentencing judge) could determine whether the defendant was armed with a deadly weapon at the time the offense was committed.[37]

Washington's criminal sentencing policies changed radically during the early 1980s. In response to a growing public outcry for fiscal responsibility and fairness in prison sentences,[38] Washington became one of the first states to adopt a determinate sentencing scheme[39] when the legislature enacted the Sentencing Reform Act of 1981.[40] The Act created the Sentencing Guidelines Commission (SGC) and charged the commission with proposing standard sentencing ranges and guidelines for all felony sentences.[41] In 1983, after several years of meticulous work, the SGC

---

36. Although this Comment focuses on the weapon enhancement as it was implemented following the Sentencing Reform Act of 1981, the mandatory minimum sentence for being armed with a deadly weapon dates back to 1935 when the Board of Prison Terms and Paroles was first created. *Id.*, 1935 Wash. Sess. Laws at 308. An offender with no prior convictions was required to serve at least five years, but an offender with any prior felony conviction received a minimum seven and one-half years sentence. *Id.*, 1935 Wash. Sess. Laws at 311. The term deadly weapon was defined to include:

> [A] black-jack, sling shot, billy, sand club, sand bag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three (3) inches, any razor with an unguarded blade and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas . . . .

Id., 1935 Wash. Sess. Laws at 311–12. That list of predefined deadly weapons remains unchanged seventy-six years later, although today's definition now has a "catch-all" category that includes any "instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." WASH. REV. CODE § 9.94A.825 (2011).

37. Act of Mar. 16, 1961, ch. 138, § 1, 1961 Wash. Sess. Laws 1682, 1682–83.

38. WASH. SENTENCING GUIDELINES COMM'N, THE SENTENCING REFORM ACT AT CENTURY'S END 4 (2000), *available at* http://www.cfc.wa.gov/PublicationSentencing/Research/SentencingReformActReportCenturyEnd.pdf.

39. In Washington's determinate sentencing scheme (sometimes called a "presumptive scheme"), courts sentence offenders within a range (or guideline) based on the seriousness of the offense and the previous criminal history of the offender. *Id.* at 9. The primary goal of this scheme is "to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences." *Id.* Courts are, however, allowed some flexibility to depart from the proscribed sentencing range if there are "substantial and compelling reasons to do so." *Id.* (internal quotation marks omitted).

40. *Id.*

41. *Id.* Effective July 1, 2011, the Sentencing Guidelines Commissions has been eliminated as an independent agency of the Washington state government. WASH. SENTENCING GUIDELINES COMM'N, http://www.ofm.wa.gov/sgc/ (last visited Apr. 1, 2012). The Commission has been reestablished within the Office of Financial Management, albeit with a significantly reduced role. *Id.* Many of the Commission's former duties—including collection and analysis of sentencing statistics, production of annual sentencing reports, and drafting of court sentencing manuals—has been transferred to the Caseload Forecast Council (CFC). *Id.*

issued its proposed sentencing guidelines, which the legislature quickly adopted.[42]

Among other changes, the sentencing guidelines enacted by the legislature included a new deadly weapon sentencing enhancement. The enhancement, which amounted to a footnote to the proposed sentencing guidelines grid, required that certain "[a]dditional time [be] added to the presumptive sentence if the offender was armed with a deadly weapon" during the commission of certain felonies.[43] The enhancement provision did not alter the preexisting statutory definition of a deadly weapon,[44] nor did it change the process by which possession of a deadly weapon was alleged and proved.[45] Instead, the enhancement established the concept

---

42. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 85–92 (2001).

43. Act of Apr. 22, 1983, ch. 115, § 2, 1983 Wash. Sess. Laws 546, 548. The enhancement provision appears immediately below a textual note at the bottom of the sentencing grid that explains how to read and interpret the grid:

> Additional time added to the presumptive sentence if the offender was armed with a deadly weapon as defined in this chapter:
>
> 24 months (Rape 1, Robbery 1, Kidnap[p]ing 1)
>
> 18 months (Burglary 1)
>
> 12 months (Assault 2, Escape 1, Kidnap[p]ing 2, Burglary 2 of a building other than a dwelling)

Id.

44. *Compare* Act of May 11, 1983, ch. 163, § 3, 1983 Wash. Sess. Laws 713, 717 (originally codified at WASH. REV. CODE § 9.94A.125 (1983), recodified at WASH. REV. CODE § 9.94A.825 (2011)), *with* Act of Mar. 16, 1961, ch. 138, § 1, 1961 Wash. Sess. Laws 1682, 1682–83 (originally codified at WASH. REV. CODE § 9.95.015 (1962)).

45. *See supra* note 44. Prior to the passage of the Sentencing Reform Act, the State was required to allege and prove that the accused was "armed with a deadly weapon at the time of the commission of the crime." WASH. REV. CODE § 9.95.015 (1962). Furthermore, only the fact finder could determine whether the State had met its burden of proof. *Id.* The only substantive change following the enactment of the sentencing guidelines in 1983 was that deadly weapon enhancements could also be applied when the defendant's accomplice was armed with the weapon. *Compare id.*, *with* WASH. REV. CODE § 9.94A.125 (1983).

At the time of enactment, the enhancement was unique as a form of increasing the duration of criminal sentences, in that only the fact finder could make specific findings that the accused possessed a deadly weapon. Otherwise, courts were afforded broad latitude to increase sentences based on "aggravating circumstances," which included such factors as the commission of crimes with deliberate cruelty or with the knowledge that the victim was particularly vulnerable. Act of Apr. 22, 1983 § 2, 1983 Wash. Sess. Laws at 554. That distinction became quite significant in 2000, when the United States Supreme Court held that only the fact finder could make the specific findings required to impose an exceptional sentence beyond the maximum statutory sentence. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

In response to *Apprendi* and to *Blakely v. Washington*, 542 U.S. 296, 304 (2004), a closely related case decided just a few years later, Washington was forced to alter many of its sentence-enhancement procedures. Jason Amala & Jason Laurine, *An Exceptional Case: How Washington Should Amend Its Procedure for Imposing an Exceptional Sentence in Response to* Blakely v. Washington, 28 SEATTLE U. L. REV. 1121, 1122–23 (2005). In particular, Washington adopted a "bifurcated" trial process that enabled juries to hear and evaluate evidence in support of aggravating fac-

of adding an additional period of incarceration to certain felony sentences if the accused committed the crime while armed with a deadly weapon.[46]

As enacted in 1983, the enhancement applied to only eight specific felonies, and it imposed an additional sentence of twelve, eighteen, or twenty-four months, depending on the felony.[47] The legislature modestly expanded the list of predicate felonies several times between 1983 and 1992.[48] By the end of 1994, the enhancement applied to eleven specific felonies, as well as to all drug-related felonies.[49]

Initiative 159, the Hard Time for Armed Crime Act (HTACA), disposed of the enhancement's list of predicate felonies.[50] Instead, the HTACA split the enhancement into two categories: one for firearms and one for other non-firearm deadly weapons.[51] Within each category, all felonies could be enhanced,[52] except for a small number of weapons-related felonies.[53] The firearm category, however, imposed significantly lengthier periods of incarceration than the periods imposed by the non-firearm category.[54] The HTACA also created three tiers of potential en-

---

tors and enhancements. *Id.* The deadly weapon enhancement, however, remained immune from these changes because the factual findings required to impose the weapon enhancement had always been the sole province of the fact finder. *See* § 9.94A.125 (1983).

46. *See supra* note 43 and accompanying text. The concept of sentence enhancements—specifically, deadly weapon enhancements—is not limited to Washington; however, a great deal of disparity exists in how states punish crimes committed with deadly weapons. As of 2004, nearly every state has adopted some form of enhanced punishment for defendants who commit crimes while armed with a deadly weapon. *See* DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION: 2004 242–45 tbl.43 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf.

47. Act of Apr. 22, 1983 § 2, 1983 Wash. Sess. Laws at 548.

48. In 1984, the legislature added delivery or possession with intent to deliver a controlled substance. Act of Mar. 27, 1984, ch. 209, § 16, 1984 Wash. Sess. Laws 1050, 1064. Two years later, the specific crimes of delivery and possession were broadly supplanted by any drug-related offense. Act of Apr. 3, 1986, ch. 257, § 22, 1986 Wash. Sess. Laws 905, 926. In 1988, theft of livestock was added. Act of Mar. 23, 1988, ch. 218, § 1, 1988 Wash. Sess. Laws 998, 1000. In 1992, assault of a child in the second degree was also added. Act of Apr. 1, 1992, ch. 145, § 9, 1992 Wash. Sess. Laws 616, 639.

49. WASH. REV. CODE § 9.94A.310 (1994).

50. Hard Time for Armed Crime Act, ch. 129, § 2, 1995 Wash. Sess. Laws 443, 446–47 (codified at WASH. REV. CODE § 9.94A.310(3)(a)–(c), (4)(a)–(c) (1996)).

51. *Id.*

52. *Id.*

53. The HTACA specifically exempted a short list of felonies: possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony. *Id.*, 1995 Wash. Sess. Laws at 446 (codified at WASH. REV. CODE § 9.94A.310(3)(f) (1996)). The HTACA offers no reason for the exclusion of these felonies.

54. *Compare, e.g.*, *id.* (codified at WASH. REV. CODE § 9.94A.310(3)(b) (1996)) (three years for a firearm enhancement of a Class B felony), *with id.*, 1995 Wash. Sess. Laws at 447 (codified at

hancements within each category based on the felony's statutory classification as either a class A, B, or C felony.[55] Each classification of felony was subject to a different period of incarceration, depending on severity. For non-firearm and firearm enhancements, class C (lowest severity) felonies could be enhanced six months or eighteen months, respectively,[56] whereas class A (highest severity) felonies could be enhanced two years or five years, respectively.[57]

The HTACA also required the enhancement to run consecutively[58] to all other prison sentences.[59] The Act required courts to impose the sen-

---

WASH. REV. CODE § 9.94A.310(4)(b) (1996)) (one year for a non-firearm enhancement of a Class B felony).

55. *See id.*, 1995 Wash. Sess. Laws at 446–47 (codified at WASH. REV. CODE § 9.94A.310(3)(a)–(c),(4)(a)–(c) (1996)). Washington employs these three statutory classifications of felonies for purposes of sentencing. WASH. REV. CODE § 9A.20.010 (2011). A felony's classification determines the maximum possible fine and period of incarceration. *See* § 9A.20.021 (2011).

56. Hard Time for Armed Crime Act § 2, 1995 Wash. Sess. Laws at 446–47 (codified at WASH. REV. CODE § 9.94A.310(3)(c), (4)(c) (1996)).

57. *Id.* (codified at WASH. REV. CODE § 9.94A.310(3)(a), (4)(a) (1996)).

58. When an offender receives more than one sentence—either for different crimes or, in this context, for the underlying felony and for the weapon enhancement—the court may order the sentences to be served concurrently or consecutively. When sentences are served concurrently, each day of incarceration is credited against each sentence; therefore, the offender will serve a total period of confinement equal to the longest sentence he has received. In contrast, consecutive sentences may not be served simultaneously; instead, each day of incarceration is credited toward only one sentence. Thus, the offender serves a total period of confinement equal to the *sum* of all sentences he has received. Accordingly, the sentencing court's determination of whether multiple sentences should run concurrently or consecutively significantly impacts the overall length of the incarceration period.

59. Hard Time for Armed Crime Act § 2, 1995 Wash. Sess. Laws at 446–47 (codified at WASH. REV. CODE § 9.94A.310(3)(e), (4)(e) (1996)). The original 1983 sentencing guidelines proposed by the SGC and enacted by the legislature specified when courts were required to impose consecutive or concurrent sentences. *See* Act of Apr. 22, 1983, ch. 115, § 11, 1983 Wash. Sess. Laws 546, 555–56. When an offender was convicted of two or more nonviolent offenses, all sentences ran concurrently regardless of whether those offenses arose from the same "criminal transaction." *Id.* If one or more of the offenses was violent, but they all arose from the same criminal transaction, then the sentence was also concurrent. *Id.* Thus, by requiring the enhancement to be served consecutively to all other sentences, the HTACA had the potential to significantly lengthen prison sentences.

Statistical data about the effect of the HTACA on prison terms are somewhat mixed. The Sentencing Guidelines Commission began tracking sentences imposed for weapon enhancements separately from the sentence length in only 1996. WASH. SENTENCING GUIDELINES COMM'N, 20 YEARS IN SENTENCING: A LOOK AT WASHINGTON STATE ADULT FELONY SENTENCING, FISCAL YEARS 1989–2008, 34 (2010) [hereinafter 20 YEARS IN SENTENCING], *available at* http://www.cfc.wa.gov/PublicationSentencing/Research/TwentyYearsInSentencing_WASentenceTrends.pdf. Between 1996 and 1998, the total sum of months imposed under the weapon enhancement increased by 141%. *Id.* The Commission largely attributes this increase to the HTACA. *Id.*

But after 1998, the total number of months imposed under the enhancement remained fairly constant each year. *Id.* at 35. And despite the significant increase in total months imposed under the enhancement between 1996 and 1998, the overall average prison sentence length in Washington increased by less than half a month during that period. *Id.* Moreover, following 1998, when the

tence whenever the enhancement was proved, and it further required all prison time to be served in total confinement.[60] The HTACA also removed any possibility of "good time" credits or early release for good behavior for any portion of a sentence resulting from the sentence enhancement.[61] Courts were denied any discretion to reduce or suspend imposition of the enhancement, even when presented with mitigating circumstances.[62]

The HTACA thus represented a stunning expansion of the deadly weapon enhancement.[63] Not only did the Act expand the scope of the enhancement to include nearly all felonies but it also substantially increased the penalty for firearm-related violations, and it removed the ability of courts to exercise discretion in imposing the enhancement. It also doubled the period of incarceration whenever an offender had previously received a weapon enhancement.[64]

The statutory language of the deadly weapon enhancement has not significantly changed since the enactment of the HTACA.[65] Neither the fact finder's role in determining whether the defendant was armed[66] nor

---

number of months imposed under the weapon enhancement leveled out year-over-year, the average prison sentence length began to slowly decrease. *Id.*

To be fair, the effects of the HTACA measured against overall prison sentence averages is probably not an apt comparison. In 1996, at the HTACA's "peak," only 7% of all criminal sentences received weapon enhancements; and since 2005, the number of sentences receiving weapon enhancements has hovered near 4%. *Id.* The HTACA—and the weapon enhancement in general—therefore represents a proverbial "drop in the bucket" when compared with overall sentence averages. These data suggest that while the HTACA did initially impact sentence length, the effects have become attenuated over time.

60. Hard Time for Armed Crime Act § 2, 1995 Wash. Sess. Laws at 446–47 (codified at WASH. REV. CODE § 9.94A.310(3)(e), (4)(e) (1996)).

61. *Id.* § 7, 1995 Wash. Sess. Laws at 455–56 (codified at WASH. REV. CODE § 9.94A.150 (1996)).

62. Interestingly, the HTACA reflects an intent to "[b]ring accountability and certainty into the sentencing system by tracking individual judges and holding them accountable for their sentencing practices in relation to the state's sentencing guidelines for serious crimes." *Id.* § 1, 1995 Wash. Sess. Laws at 444. Yet, the Act does not track and hold judges accountable for the imposition of the weapon enhancement; instead, it removes all judicial discretion about whether or how to apply the enhancement. *See id.* § 2, 1995 Wash. Sess. Laws at 446–47 (codified at WASH. REV. CODE § 9.94A.310(3)(e), (4)(e) (1996)).

63. The legislature cited several "key reasons" for sentencing armed individuals more harshly, namely that weapons can be used by criminals in "[f]orcing the victim to comply with their demands; injuring or killing anyone who tries to stop the criminal acts; and aiding the criminal in escaping." *Id.* § 1, 1995 Wash. Sess. Laws at 444 (findings and intent).

64. *Id.* § 2, 1995 Wash. Sess. Laws 446–47 (codified at WASH. REV. CODE § 9.94A.310(3)(d), (4)(d) (2006)).

65. *Compare* WASH. REV. CODE § 9.94A.533(3)(a)–(f), (4)(a)–(f) (2011), *with* WASH. REV. CODE § 9.94A.310(3)(a)–(f), (4)(a)–(f) (1996).

66. WASH. REV. CODE § 9.94A.825 (2011).

the list of per se deadly weapons[67] has been altered.[68] The incarceration periods have remained unchanged.[69] And repeated constitutional challenges to the weapon enhancement have fallen on deaf ears.[70] But, despite legislative inertia since enactment, the deadly weapon enhancement has been the object of constant judicial reinterpretation.

B. Judicial History of the Weapon Enhancement

Ever since the creation of the deadly weapon enhancement in 1983, Washington courts have struggled to provide a coherent definition of when a defendant is armed for the purpose of invoking the enhancement statute.[71] Over time, courts have adopted three distinct interpretations of the enhancement's prerequisite that an offender be armed with a weapon: the easily accessible test, the nexus test, and the intent test. Each test was adopted to provide a clear, objective standard. But instead, each test has proved too broad, too narrow, or too confusing. This section discusses each of the three tests in turn.

1. The Easily Accessible Test

Initially, courts defined the enhancement's armed requirement by the degree of the offender's weapon possession. In *State v. Sabala,*[72] the court confronted the question of whether constructive possession of a weapon equates to being armed with that weapon for the purpose of applying the weapon enhancement.[73] In *Sabala*, police officers stopped the defendant's vehicle after he was observed making a controlled-substance purchase.[74] During the search of the defendant's vehicle, police found a

67. *Id.*

68. In fact, neither of these statutory requirements has changed since the enhancement was created in 1983. *Compare* § 9.94A.825 (2011), *with* § 9.94A.125 (1996).

69. *Compare, e.g.*, § 9.94A.533(3)(a)–(c) (2011), *with* § 9.94A.310(3)(a)–(c) (1996).

70. The sentencing enhancement has withstood Double Jeopardy challenges, *see, e.g.*, State v. Canha, No. 27426-8-III, 2011 WL 240680, at *5–6 (Wash. Ct. App. Jan. 27, 2011) ("If the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause." (citing Missouri v. Hunter, 459 U.S. 359, 366, 368 (1983))); Equal Protection challenges, *see, e.g.*, State v. Pedro, 201 P.3d 398, 405 (Wash. Ct. App. 2009); and Second Amendment challenges, *see, e.g.*, *id*. at 406; State v. Johnson, 974 P.2d 855, 861 (Wash. Ct. App. 1999).

71. State v. Hauck, 651 P.2d 1092, 1092–93 (Wash. Ct. App. 1982) (explaining that the robbery statute, section 9A.56.200 of the Washington Revised Code, required only that a defendant "display[] what appears to be a firearm or other deadly weapon," but that the penal enhancement statute required the defendant to actually be armed); *see also* State v. Tongate, 613 P.2d 121 (Wash. 1980).

72. State v. Sabala, 723 P.2d 5 (Wash. Ct. App. 1986).

73. *Id.* at 6.

74. *Id.*

handgun under the driver's seat.[75] The defendant asserted that mere possession did not amount to being armed,[76] but the court rejected that interpretation.[77] Relying on the definition of "armed" used by several other states,[78] the *Sabala* court held that a defendant is armed if the weapon is "easily accessible and readily available for use by the defendant for either offensive or defensive purposes."[79] *Sabala*'s easily accessible test quickly gained adherence in the different divisions of the Washington Court of Appeals,[80] and it eventually received the blessing of the Washington State Supreme Court.[81]

Similarly, *State v. Valdobinos*[82] provided clear guidance to lower courts about when weapon possession was insufficient to justify imposition of the weapon enhancement. In *Valdobinos*, police executed a search warrant at the defendant's home and arrested him there.[83] After the defendant was taken to jail, his bedroom was searched, and police located an unloaded rifle under his bed.[84] The supreme court reversed the trial court's imposition of the enhancement, noting that "an unloaded rifle . . . found under the bed in the bedroom, without more, is insufficient to qualify [the defendant] as 'armed' in the sense of having a weapon accessible and readily available for offensive or defensive purposes."[85]

The most substantial criticism of the easily accessible test was that, taken alone, the test inadequately safeguarded the constitutional right to bear arms.[86] Although the right to bear arms does not extend to one who

---

75. *Id.*

76. *Id.*

77. *Id.* at 8.

78. *Id.* at 7. The court noted that state courts in Arizona, California, Connecticut, Maine, New York, and Wisconsin had all "defined 'armed' in terms of a defendant who has a weapon which is readily available and easily accessible to his use for either offensive or defensive purposes." *Id.*

79. *Id.* at 8.

80. *See, e.g*., State v. Gotcher, 759 P.2d 1216 (Wash. Ct. App. Div. 1 1988); State v. Hall, 732 P.2d 524 (Wash. Ct. App. Div. 3 1987); State v. Randle, 734 P.2d 51 (Wash. App. Ct. Div. 1 1987).

81. *See, e.g.*, State v. Valdobinos, 858 P.2d 199, 206 (Wash. 1993).

82. *Id.*

83. *Id.* at 202.

84. *Id.* at 202, 206.

85. *Id*. at 206.

86. *See* State v. Johnson, 974 P.2d 855, 862 (Wash. Ct. App. 1999) (excoriating a previous decision from another division of the court of appeals that failed "to require a nexus between the crime and weapon possession [thus creating] a danger of intrusion on defendants' constitutional right to bear arms"); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1537 (2009) (acknowledging that "[t]he right to keep and bear arms in lawful self-defense doesn't include the right to use those arms in a crime," but also pointing out that "keeping a gun for self-defense in a way that's unconnected to the crime should generally be seen as the exercise of one's constitutional right" to bear arms).

is in the process of committing a crime,[87] people are entitled to possess weapons without risking that the State will "subsequently use the mere fact of possession against [them] in a criminal trial unrelated to their use."[88] In other words, if weapon possession is unrelated to a crime and is otherwise lawful, the State may not impose punishment for that possession without infringing on the constitutional right to bear arms.[89] This constitutional concern gave rise to the second interpretation of the enhancement's armed requirement: the nexus test.

2. The Nexus Test

The foundation for the nexus test was actually laid before the legislature enacted the HTACA. In *Sabala*—the benchmark case for the easily accessible test—the court observed in dicta that "there was no nexus between the [weapon] and the crime."[90] This prescient observation gained little attention, however, until the HTACA was enacted in 1995. The HTACA's broad expansion of the deadly weapon enhancement[91] ultimately pushed Washington's courts to formalize the nexus test as a requirement above and beyond the easily accessible test.[92]

---

87. State v. Sabala, 723 P.2d 5, 8 (Wash. Ct. App. 1986).

88. State v. Rupe, 683 P.2d 571, 596 (Wash. 1984).

89. *See id.* at 596–97. The defendant in *Rupe* did not receive a weapon enhancement, but the case is important doctrinally because it identifies the outer constitutional boundaries for when the State may rely on the mere presence of firearms to support a weapon enhancement. In *Rupe*, the Washington State Supreme Court overturned a death penalty sentence based almost exclusively on the fact that the State introduced evidence of the defendant's gun collection during the sentencing phase of the trial. *Id.* The court concluded that the State attempted to draw adverse inferences during sentencing based solely on the defendant's possession of these weapons, which violated the Washington constitution. *Id.* at 596. The court held that the State could not assert constitutionally protected behavior—lawful weapon possession—as a basis for punishment. *Id.* at 597. When applied to the deadly weapon enhancement, this principle still stands: the government cannot punish a defendant with an enhanced sentence based on what would otherwise be lawful, constitutionally protected possession of a weapon.

90. *Sabala*, 723 P.2d at 8. The *Sabala* court's concern about the lack of a nexus was based in large part on *Rupe*, 683 P.2d at 596. The formalized two-part nexus test—a nexus between the weapon and the crime *and* a nexus between the offender and the weapon—along with the various formulations of how to measure that nexus, did not materialize until after the HTACA was enacted. *See* State v. Mills, 907 P.2d 316 (Wash. Ct. App. 1995). Further, the nexus test was explicitly adopted to "protect[] against violation of the right to bear arms." State v. Schelin, 55 P.3d 632, 639 (Wash. 2002).

91. *See supra* Part II.A.

92. *See* State v. Gurske, 118 P.3d 333, 342 (Wash. 2005) (Chambers, J., concurring). The HTACA became effective July 23, 1995, and it became a tool of choice for prosecutors within a matter of days. *See* Karen Alexander, *Three Face Extra Five Years in Jail Under 'Hard Time,'* SEATTLE TIMES, Aug. 2, 1995, http://community.seattletimes.nwsource.com/archive/?date=19950802&slug=2134518. The court of appeals issued its opinion in *Mills,* the first such opinion to explicitly set out the defendant-weapon-crime nexus requirement, less than five months later. *Mills*, 907 P.2d at 316.

In 1995, the Washington Court of Appeals first explicitly adopted the nexus requirement in *State v. Mills*, chastising a lower court for considering only the proximity of the weapon to drugs and ignoring the proximity of the weapon to the defendant.[93] In *Mills*, police arrested the defendant for possession of a small amount of methamphetamine, and while detaining the defendant, police discovered a key for a motel room.[94] The police obtained and executed a search warrant for the motel room, where they discovered a large quantity of drugs with a firearm lying nearby.[95] The trial court found that the defendant was armed with a deadly weapon, and it added a twelve-month enhancement to the defendant's sentence.[96] The court of appeals, however, reversed the sentence enhancement because the trial court did not consider whether a nexus existed between the defendant and the weapon.[97] Because the defendant was miles away from his weapon at the time of his arrest, the *Mills* court concluded that no nexus existed between the defendant and the weapon."[98] This new nexus requirement was quickly adopted by other Washington courts.[99] As later formulated by the Washington State Supreme Court, the nexus test requires the State to show "a nexus between the weapon and the defendant and between the weapon and the crime."[100]

Following *Mills*, however, none of the three divisions of the Washington Court of Appeals could agree on the exact point in time at which the nexus should be measured. Division Two adopted a broad interpretation in *State v. Simonson*,[101] holding that the presence of loaded guns on the defendant's premises during the six-week period when he was manufacturing narcotics was sufficient to find him armed at the time of the offense.[102] Despite the fact the defendant was in jail when police discovered the drug-manufacturing operation, the court reasoned that in ongoing crimes, defendants can access their weapons at any point during the

93. *Mills*, 907 P.2d at 318.

94. *Id.* at 317.

95. *Id.*

96. *Id.*

97. *Id.* at 318.

98. *Id.*

99. *See, e.g.*, State v. Schelin, 14 P.3d 893, 895 (Wash. Ct. App. 2000) ("The mere presence of a weapon is not enough [because] [t]he defendant, the deadly weapon, and the crime must all connect."), *aff'd*, 55 P.3d 632 (Wash. 2002); State v. Johnson, 974 P.2d 855, 860 (Wash. Ct. App. 1999) ("[A] person is *not* armed simply because a weapon is present during the commission of a crime [because] there must be some nexus between the defendant and the weapon.").

100. *Schelin*, 55 P.3d at 636.

101. State v. Simonson, 960 P.2d 955 (Wash. Ct. App. 1998).

102. *Id.* at 960.

period of the offense.[103] Thus, the court found that the defendant was continuously armed for purposes of applying the enhancement.[104]

Division One balked at *Simonson*'s expansive interpretation of the nexus test.[105] In *State v. Johnson*,[106] the court instead adopted a more limited interpretation of the nexus consistent with its theory of the purpose of the enhancement—namely, protecting the police at the time they discover the crime:

> The theory behind the deadly weapon enhancement is that a crime is potentially more dangerous to the victim, bystanders, or the police if the defendant is armed while he is committing the crime because someone may be killed or injured. Thus, the crime is more serious than it would have been without the weapon. Where no officers, victims or bystanders are present, the potential danger is also absent, and the rationale for greater punishment based on greater danger to others does not apply. The underlying rationale can only apply where there is a possibility the defendant would use the weapon . . . . [In] drug possession cases, the only people endangered by the defendant's weapon possession [are] arresting officers. It follows that if the defendant is not near his weapon when an officer discovers a crime, the purposes of the deadly weapon sentence enhancement are not implicated.[107]

Adding fuel to the fire, in *State v. Schelin*,[108] Division Three rejected both *Simonson*'s broad at-any-point-during-the-crime nexus interpretation and *Johnson*'s limited when-police-discover-the-crime interpretation.[109] While recognizing that *Johnson*'s requirement of both a physical and temporal nexus was sound, the *Schelin* court reasoned instead that officer safety—"the policy behind the deadly weapon enhancement, at least, when other potential victims or bystanders are absent"[110]—is best served "if the court's focus is on . . . the time police enter a residence, or first contact the suspect, rather than when they discover the gun or the crime."[111] *Schelin* thus adopted yet another, discordant view of the time

---

103. *Id.*

104. *Id.*

105. State v. Johnson, 974 P.2d 855, 861 (Wash. Ct. App. 1999) ("In our view, the *Simonson* court has expanded the deadly weapon inquiry to include the entire span of alleged criminal activity, a result that diverges from precedent and ignores the constitutional foundation for the [nexus] rule.").

106. *Id.*

107. *Id.* at 861–62.

108. State v. Schelin, 14 P.3d 893 (Wash. Ct. App. 2000), *aff'd*, 55 P.3d 632 (Wash. 2002).

109. *Id.* at 900.

110. *Id.* at 893.

111. *Id.*

at which the nexus should be measured: the moment police first make contact with a criminal suspect.[112]

In light of the diverging views of the nexus requirement by the various divisions of the court of appeals, the Washington State Supreme Court granted review in *Schelin* to clarify the nexus requirement.[113] But no such clarity was forthcoming. In a plurality opinion, accompanied by one concurrence and three dissents, the state supreme court adopted a catch-all totality-of-the-circumstances definition.[114] The court held that the "nature of the crime, the type of the weapon, and the circumstances under which the weapon is found" are all relevant to finding a nexus between a weapon and a crime.[115] The court affirmed that "[u]nder a two-part analysis, there must be a nexus between the weapon and the defendant and between the weapon and the crime."[116] Regrettably, however, the court declined to weigh in on the internecine disagreement within the court of appeals over when the moment of the nexus should be measured.[117] Instead, the court adopted the broadest possible interpretation, concluding that the legislature intended the statute to "deter armed crime, and to protect victims from armed crimes, as well as to protect police during investigations of crimes."[118]

The *Schelin* court's expansive interpretation of the nexus requirement has ultimately done more harm than good. The court missed a critical opportunity to give necessary, meaningful guidance to lower courts.[119] Unsurprisingly, the court was soon forced to grant review in a steady stream of nexus cases, as lower courts unsuccessfully attempted to apply *Schelin*'s totality-of-the-circumstances interpretation.[120] These sub-

112. *Id.*

113. State v. Schelin, 25 P.3d 1020 (Wash. 2001) (order granting petition for review).

114. State v. Schelin, 55 P.3d 632, 637 (Wash. 2002).

115. *Id.*

116. *Id.* at 636.

117. *Id.* at 638 ("The Court of Appeals . . . was concerned about whether the critical time for [nexus] analysis should be determined by the time when the offense is committed or when police discover a crime has been committed. This discussion is misdirected . . . .").

118. *Id*.

119. While the *Schelin* court seemed to recognize the merit of both *Simonson*'s and *Johnson*'s view of the temporal requirement, *id.*, *Schelin* never definitively resolved the question. State v. Hufferd-Ouellette, No. 29512-5-III, 2012 WL 983135, at *4 (Wash. Ct. App. Mar. 13, 2012). The Washington State Supreme Court eventually "tabled" the dispute over the temporal component of the nexus test in 2007, holding that "[t]he defendant does not have to be armed at the moment of arrest," and instead opining that "the State need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible." State v. O'Neal, 150 P.3d 1121, 1123 (Wash. 2007).

120. *See, e.g.*, State v. Eckenrode, 150 P.3d 1116 (Wash. 2007); State v. Gurske, 118 P.3d 333 (Wash. 2005).

sequent cases were replete with plurality opinions, concurrences, and dissents.[121]

Ultimately, two main critiques of *Schelin*'s nexus test have emerged. First, the nexus has never been adequately defined. As Justice Richard Sanders observed, courts "have not further defined the nexus requirement or elaborated exactly what makes a nexus. Instead [they] have defined the term nexus by what it is not."[122] In *State v. Gurske*,[123] one of the many post-*Schelin* nexus cases, a majority of the Washington State Supreme Court expressly reaffirmed that "mere proximity or constructive possession is *insufficient* to establish that a defendant was armed at the time the crime was committed."[124] But defining the nexus by what it is *not* has proven no more functional than *Schelin*'s catch-all totality-of-the-circumstances definition. Indeed, "the [court's] attempt to illuminate this 'nexus' . . . ends up turning on [the] proximity [of the defendant to the weapon], even though the [court] has already stated that 'mere proximity' is insufficient . . . ."[125]

If mere proximity or constructive possession is insufficient, then how can the State prove a nexus between the defendant and the weapon when the defendant is not physically holding the weapon in hand? *Gurske*'s inadequate answer to this question is that as long as a weapon is "there [at the crime scene] to be used" and "the weapon [is] easy to get to for use against another person," then the nexus is satisfied.[126] But those explanations simply mirror the easily accessible test—the very same test the nexus test was designed to supplement. In his *Gurske* concurrence, Justice Sanders also noted the absurdity of basing the nexus test on whether a weapon is "there to be used":

> One presumes that a nearby weapon is usually kept near for a purpose, and the purpose of the weapon is to be "used." Unless it has been converted into a planter and has a rose sticking out of the barrel, it is highly unlikely that any gun will be available other than for "use."[127]

---

121. *See, e.g.*, State v. Brown, 173 P.3d 245 (Wash. 2007) (plurality with one concurrence and one dissent); *Eckenrode,* 150 P.3d at 1116 (three concurrences); *O'Neal*, 150 P.3d at 1121 (one dissent); State v. Easterlin, 149 P.3d 366 (Wash. 2006) (one opinion concurring in result only and one dissent); *Gurske*, 118 P.3d at 333 (two concurrences).

122. *Gurske*, 118 P.3d at 339 (Sanders, J., concurring).

123. *Id*. at 333 (majority opinion).

124. *Id.* at 335 (citing *Schelin*, 55 P.3d at 637; State v. Valdobinos, 858 P.2d 199, 206 (Wash. 1993)) (emphasis added).

125. *Id.* at 340 (Sanders, J., concurring).

126. *Id.* at 336 (majority opinion).

127. *Id.* at 340 (Sanders, J., concurring).

A second criticism of the nexus test is that it shifts the burden of applying the murky nexus doctrine to juries who are least qualified to resolve the doctrine's ambiguities. Washington's pattern criminal jury instructions provide that a defendant is armed with a deadly weapon only when there is a "connection between the defendant, the weapon, and the crime."[128] Although blatantly substituting the more commonplace word "connection" for the legalistic term "nexus," the drafters of this pattern jury instruction have not shed light—or for that matter, even defined—what a nexus or connection actually is. The instruction cannot reasonably preclude two juries from reaching two different conclusions when confronted with the same set of facts regarding weapon possession.

Indeed, juries appear to have no greater understanding of how to interpret the nexus requirement than the Washington State Supreme Court does. In the recent case of *State v. David*,[129] when instructed on both the easily accessible test and the nexus test, the jury twice balked at determining whether a connection was present between the defendant and the weapon:

> During deliberations, the jury submitted two questions to the court. First, the jury asked, "In the opinion of the court, [does] possession of a weapon at the time of the crime satisfy the definition that the connection exists[?]" The court responded, "Please refer to the instructions already given." Later, the jury asked, "What is the law about possessing a deadly weapon that is not used during a crime? We are struggling with the word connection. May we have a legal explanation please[?]" The court responded, "The court can only refer you back to the instructions already given."[130]

Apparently confounding juries and state supreme court justices alike, the nexus test is highly subjective and lacks both clear definition and meaningful guidance. Some jurists have candidly acknowledged these shortcomings,[131] which may well explain the Washington State Supreme Court's recent departure from the nexus test in favor of a new standard.[132] Without explicitly acknowledging the death of the nexus test, and without explicitly adopting a new test in its place, a majority of the

---

128. 11 WASH. PRACTICE, PATTERN JURY INSTRUCTIONS – CRIMINAL § 2.07 (3d ed. 2010).

129. State v. David, No. 61048-1-I, 2008 WL 4902599 (Wash. Ct. App. 2008).

130. *Id*. at *1.

131. *Gurske*, 118 P.3d at 338 (Sanders, J., concurring).

132. *See* State v. Brown, 173 P.3d 245, 250 (Wash. 2007) (insisting that several of the court's prior cases "demonstrate that the defendant's intent or willingness to use [a weapon] is a condition of the nexus requirement that does, in fact, appear in Washington cases").

state supreme court in *State v. Brown*[133] unmistakably imposed a new standard for applying the deadly weapon enhancement: the intent test.[134]

3. The Intent Test

Faced with growing concerns about the improper use of deadly weapon sentencing enhancements,[135] the *Brown* court announced a new intent test to limit the broad reach of the enhancement.[136] In *Brown*, the trial court applied the deadly weapon enhancement to an unarmed defendant who had attempted to burglarize an unoccupied home.[137] During the burglary, the defendant removed a rifle from underneath a bed but left it on the bed when leaving the property.[138] In a five-to-four decision, the Washington State Supreme Court reversed the deadly weapon enhancement verdict, finding that "[n]o evidence exist[ed] that Brown . . . handled the rifle in a manner indicative of *an intent or willingness to use it in furtherance of the crime*."[139]

The *Brown* majority was quick to characterize their opinion as entirely consistent with the court's prior cases.[140] Reexamining both *State v. Eckenrode*[141] and *Schelin*,[142] the court found that facts presented in each

133. *Id.* at 245.

134. *See infra* Part II.B.3.

135. *Brown*, 173 P.3d at 251.

136. *Id.* at 249 ("No evidence exists that [the defendant possessed a weapon] at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime.").

137. *Id.* at 246–48.

138. *Id.* at 249.

139. *Id.* (emphasis added).

140. *Id*. at 250 (disagreeing with the dissent's contention "that inquiry into the defendant's intent or willingness to use the rifle is a condition in the nexus requirement that does not appear in any of this court's prior cases"). The majority suggested that its analysis into the defendant's intent could readily be harmonized with prior nexus cases.

141. State v. Eckenrode, 150 P.3d 1116 (Wash. 2007).

142. State v. Schelin, 55 P.3d 632 (Wash. 2002). While the *Brown* court insisted its decision could be harmonized with *Schelin*, the foundational case for the nexus test, the composition of the five-justice majority in *Brown* suggests otherwise. The *Brown* majority consisted of Chief Justice Alexander and Justices Chambers, Sanders, J. Johnson, and C. Johnson (who authored the majority opinion). But in *Schelin*, Justices Chambers, C. Johnson, and Sanders each dissented (by separate opinions). Chief Justice Alexander filed a concurring opinion in *Schelin*, reducing the majority opinion to a plurality and expressing the view that "the State should have been required to show more than what the trial court's jury instruction required it to show," *Schelin*, 55 P.3d at 640 (Alexander, J., concurring), but he ultimately sided with the State because the defendant failed to allege instructional error on appeal. The final member of the *Brown* majority, Justice J. Johnson, did not join the court until 2004—more than two years after *Schelin* was decided. Thus, none of the five justices who joined the majority in *Brown* signed the plurality opinion in *Schelin*. In sum, the court's post hoc reading of an intent requirement into its previous deadly weapon enhancement decisions is unpersuasive.

case would have allowed both juries to infer that weapons were present "to protect the criminal enterprise."[143]

The *Brown* dissent, however, adopted a different view of the majority's new standard, observing that "the majority adds a new condition to the nexus requirement, holding that it is not satisfied unless there is evidence that the defendant intended to or was willing to use the weapon in furtherance of the offense."[144] The dissent recognized that the majority's sub silentio departure from the nexus test would effectively impose a new intent requirement on all future deadly weapon cases, which could significantly hinder prosecutors from seeking weapon enhancements for violent crimes.[145]

Although *Brown* was decided in late 2007, the Washington Court of Appeals has demonstrated some reluctance to apply the intent test.[146] In *State v. David*,[147] decided less than one year after *Brown*, the court of appeals instead relied on *State v. Easterlin*,[148] a pre-*Brown* nexus case, for the principle that the State need not "produce direct evidence of the defendant's intent."[149] The *David* court flatly rejected the defendant's contention that *Brown* mandated a reversal of his sentence enhancement in the absence of proof that he intended to use the weapon in furtherance of the crime.[150] Notably, *Brown* has not yet gained significant adherence, either in Washington or in other states.[151]

---

143. *Eckenrode*, 150 P.3d at 1118–19.

144. *Brown*, 173 P.3d at 253 (Madsen, J., dissenting).

145. *Id.*

146. *See infra* note 151 and accompanying text. Of particular note is State v. Knaus, No. 36203-1-II, 2008 WL 2503651 (Wash. Ct. App. June 24, 2008). The *Knaus* court went so far as to conclude that "[t]he State does not have to produce direct evidence of the defendant's intent," *id.* at *3, which seems to contradict the plain mandate of *Brown*. *Knaus* did actually cite to *Brown,* but remarkably, the *Knaus* court dismissed *Brown*'s intent test by way of a "but see" citation as contrary authority. *Id.* (instead relying on State v. Easterlin, 149 P.3d 366, 370 (Wash. 2006)).

147. State v. David, No. 61048-1-I, 2008 WL 4902599 (Wash. Ct. App. Nov. 17, 2008).

148. State v. Easterlin, 149 P.3d 366 (Wash. 2006).

149. *David,* 2008 WL 4902599, at *2.

150. *Id*. at *8 n.2. Although it is difficult to square the *David* court's decision with the test in *Brown*, the Washington State Supreme Court declined to review *David* thus letting stand the apparent incongruity. State v. David, 208 P.3d 1124 (Wash. 2009) (order denying petition for review). However, the *David* decision remains unpublished and thus unavailable as citable authority, *see* WASH. CT. G.R. 14.1(a), for any future argument that the state supreme court has backed away from *Brown*'s intent test.

151. *Brown*'s intent test has been explicitly considered and rejected by courts in other states. *See, e.g.*, State v. Olten, 326 S.W.3d 137, 141 (Mo. Ct. App. 2010); State v. Sales, 255 S.W.3d 565, 570 (Mo. Ct. App. 2008). *But see* People v. Montez, No. 10SC294, 2012 WL 439692, at *3 (Colo. Feb. 13, 2012) (adopting an intent test similar to *Brown*'s test, but based solely on Colorado's unique statutory definition of a deadly weapon).

In fact, as of April 1, 2012, only four Washington appellate court decisions have even acknowledged *Brown*'s intent requirement. *See* State v. Hufferd-Ouellette, No. 29512-5-III, 2012 WL

It may be some time before *Brown*'s impact on deadly weapon enhancements is fully known. In the meantime, *Brown*'s intent test does not appear to have resulted in a reduced conviction rate for deadly weapon enhancements,[152] and the pattern jury instruction that reflects the nexus test has not been updated to reflect the *Brown* court's holding.[153] Nonetheless, *Brown* continues to stand for the principle that intent is a required element for which the State must present sufficient evidence to obtain a weapon enhancement.[154]

These three judicially crafted tests for applying the weapon enhancement are actually a symptom—not the cause—of disagreement about the proper role and scope of the deadly weapon enhancement. The

---

983135, at *1 (Wash. Ct. App. Mar. 13, 2012) (acknowledging the intent test, but affirming the trial court on different grounds); State v. Lander, Nos. 39578-9-II, 39585-1-II, 2011 WL 198829, at *10 (Wash. Ct. App. Jan. 11, 2011) (distinguishing *Brown* based on the defendant's actual possession of firearm during crime); State v. David, No. 61048-1-II, 2008 WL 4902599, at *2 n.2 (Wash. Ct. App. Nov. 17, 2008) (distinguishing *Brown* in a footnote based on the fact that the defendant brought the weapon to the crime scene); State v. Knaus, No. 36203-1-II, 2008 WL 2503651, at *3 (Wash. Ct. App. June 24, 2008) (acknowledging but not applying the intent test). Even Washington's Sentencing Guidelines Commission has not commented on the apparent doctrinal shift. *See* WASH. SENTENCING GUIDELINES COMM'N, ADULT SENTENCING GUIDELINES MANUAL 2008 II-374 (2008), *available at* http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2008.pdf (listing *Brown* in its digest of recent court cases interpreting the Sentencing Reform Act, but not mentioning the court's apparent adoption of an intent requirement).

The most significant acknowledgement of *Brown* recently came in an unpublished decision from Division 3 of the Washington Court of Appeals, released shortly before this Comment went to press. In *State v. Hufferd-Ouellette*, the defendant challenged the sufficiency of the evidence for his guilty plea to the firearm enhancement. *Hufferd-Ouellette*, 2012 WL 983135, at *1. After comprehensively reviewing Washington's weapon enhancement cases, the court concluded that "[u]nder *Brown*, it is a condition of the nexus requirement that [the defendant's] possession of the handgun was with the *intent and willingness to use it* [in furtherance of the crime]." *Id.* at *7 (emphasis added). The court expressed serious reservations about whether the admitted facts of the case were sufficient to establish the intent element. *Id.* Ultimately, however, the court upheld the conviction on different grounds, concluding that the defendant could not withdraw his guilty plea to only the weapon enhancement portion of his sentence. *Id.* at 8.

Hufferd-Ouellette is the only Washington case to candidly acknowledge the full import of *Brown*'s intent test. The decision also indicates that, at the very least, *Brown* is giving trial courts pause when applying the enhancement. *Id.* at 6 (noting that the *Brown* decision "gave the trial court the greatest pause in resentencing" because of the intent requirement).

152. In fact, just the opposite has occurred. In the year preceding the *Brown* decision, a total of 328 deadly weapon sentencing enhancements were imposed. WASH. SENTENCING GUIDELINES COMM'N, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2007 18 (2008), *available at* http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2007.pdf. In the year following the *Brown* decision, that number rose to 360 (an increase of about 9.8%). WASH. SENTENCING GUIDELINES COMM'N, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2009 19 (2010), *available at* http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2009.pdf.

153. 11 WASH. PRACTICE, PATTERN JURY INSTRUCTIONS – CRIMINAL § 2.07 (3d ed. 2010).

154. State v. Brown, 173 P.3d 245, 249 (Wash. 2007); *see also Hufferd-Ouellette*, 2012 WL 983135, at *1.

real cause of this uncertainty is the legislature's aversion to modifying the enhancement to better serve the policy goal of deterring and punishing armed crime. Because the enhancement is overbroad, Washington's courts have been forced to devise increasingly convoluted tests to determine whether the enhancement should be applied in certain situations. As the next Part explains, the one-size-fits-all approach to deadly weapon sentencing enhancement is flawed and must be replaced.

III. CRITICISMS OF THE DEADLY WEAPON SENTENCING ENHANCEMENT

The HTACA can be blamed for the one-size-fits-all system of deadly weapon sentence enhancement.[155] One of the primary reasons why courts have struggled to define and redefine the enhancement's armed requirement is precisely because the sentencing enhancement applies to nearly all felonies. As this Part demonstrates, the uniform application of the deadly weapon enhancement to all felonies through use of a single legal test is unworkable. This Part will examine three major criticisms of this uniform approach and will demonstrate why the enhancement does not presently achieve its policy objectives.

A. First Criticism: The Enhancement Should Not Apply When the Weapon Possession Is Incidental or Unrelated to the Predicate Felony

Although the nexus test ostensibly measures the connection between the weapon and the crime,[156] a connection alone should not be sufficient to support a deadly weapon enhancement. In some circumstances, the weapon may be the object of a theft or robbery, rather than a tool used to facilitate the crime. In addition, the weapon may be possessed lawfully and in a manner completely unrelated to criminal activity. Because some weapons—knives, for example—have a utilitarian character, possession of the weapon even during the commission of a crime may be unrelated to the crime. This section explores these possibilities further.

1. Possession as the Object (Not the Facilitator) of a Crime

While deadly weapons are commonly used to facilitate crimes, certain weapons—particularly firearms—may be valuable in and of themselves, enough so that they may become the object of a crime rather than a facilitator of it.

---

155. Although the enhancement does distinguish between firearms and other weapons, as well as between classifications of felonies, the enhancement applies to all felonies within each class, save for a few special exclusions. *See supra* notes 50–57 and accompanying text. This is what I mean by "one-size-fits-all."

156. State v. Schelin, 55 P.3d 632, 636 (Wash. 2002).

Brown itself provides an example of this concept.[157] Although the defendant in *Brown* handled an AK-47 rifle found within a burglary victim's home, the defendant left the weapon behind when the homeowners returned home unexpectedly.[158] When Brown and his accomplice were discussing the burglary later, one of them remarked that "the guns were nice" and he "wished they could have gotten them."[159] Brown expressed that "he could get a lot of money for the guns."[160] These sentiments demonstrate that the connection between the defendant, the weapons, and the crime was monetary gain, not armed violence. Theft of weapons, particularly unloaded or nonfunctional ones, does not present the same type of threat that actual violent armed crime does; therefore, applying the deadly weapon enhancement to the theft of such weapons does not necessarily satisfy the enhancement's policy rationale.

The enhancement does not distinguish between a weapon used in furtherance of a crime and a weapon that is the object of a crime itself.[161] Furthermore, using the inadequate pattern jury instructions in place today, a jury could readily find a "connection" between a thief, the theft, and the object of his theft, as the court did in *Brown*.[162] This is the problem with the amorphous definitions of the words "nexus" and "connection."

Critics of this argument have pointed out that even when a weapon is the object of a theft crime, the weapon has the capability to be instantaneously turned on innocent victims, bystanders, or police if the theft goes awry.[163] But without requiring evidence of intent to use the weapon, as *Brown* does, the enhancement does not distinguish between a thief who uses a firearm to further his theft and an unarmed thief who attempts to steal an antique, nonfunctional firearm. Furthermore, this "capability" argument leads to a proverbial slippery slope: because any weapon conceivably has the capability to be used to further a crime, mere possession would always equate to being armed because the weapon could always

157. *Brown*, 173 P.3d at 245.

158. *Id.* at 246–47.

159. *Id.* at 247.

160. *Id.*

161. The statute prohibits the enhancement from being applied to the felony of "theft of a firearm." WASH. REV. CODE § 9.94A.533(3)(f) (2011). But prosecutors have no incentive to charge that felony when other burglary, robbery, and theft statutes are available and eligible to receive a deadly weapon enhancement.

162. *Brown*, 173 P.3d at 247.

163. *See id.* at 254 (Madsen, J., dissenting) (arguing that the enhancement should be applied to the burglary because "one of the defendants had the rifle in hand and could have used it for offensive or defensive purposes, for example, if they had been interrupted by the homeowner or a law enforcement officer while they were still in the house committing the crime of burglary").

be used. Yet, the Washington State Supreme Court has repeatedly cautioned that "mere proximity or constructive possession is *insufficient* to establish that a defendant was armed at the time the crime was committed."[164] Mere possession, coupled with unsubstantiated speculation about possible criminal uses for a firearm—with no direct or inferred evidence about the offender's actual or planned conduct—should not justify imposing the sentence enhancement.[165]

This argument is by no means an endorsement of *Brown*'s intent test—in fact, just the opposite. *Brown* tips the scales too far in the other direction by requiring evidence of intent, regardless of the nature of the crime. *Brown*'s holding was not explicitly limited to crimes like burglary, robbery, or theft, where a weapon may be the object of the crime and where some additional evidence of violent intent should be required before applying the enhancement.[166] *Brown*'s failure to distinguish between predicate offenses demonstrates precisely why the one-size-fits-all approach taken by both the nexus test and the intent test does not work. Other states have considered the unique nature of a theft or burglary crime when a weapon is the object of the crime, and these states have formulated an armed requirement specific to those crimes.[167] *Brown*'s holding draws no such distinction. In fact, *Brown*'s broad application of the intent test has been broadly rejected by other states.[168]

---

164. State v. Gurske, 118 P.3d 333, 335 (Wash. 2005) (citing *Schelin*, 55 P.3d at 637; State v. Valdobinos, 858 P.2d 199, 206 (Wash. 1993)) (emphasis added).

165. Volokh, *supra* note 86 (arguing that such speculation cannot "suffice to turn constitutionally protected behavior into criminal behavior" when the weapon possession is lawful and consistent with the right to bear arms).

166. *Brown*, 173 P.3d at 259 (Madsen, J., dissenting) ("The majority's sub silentio overruling of our prior cases addressing the nexus requirement will make it virtually impossible to prove a defendant was armed in too many cases to contemplate.").

167. *See, e.g.*, Pardue v. State, 571 So. 2d 333 (Ala. 1990); Wesolic v. State, 837 P.2d 130 (Alaska Ct. App. 1992); People v. Loomis, 857 P.2d 478 (Colo. App. 1992); Hardee v. State, 534 So. 2d 706 (Fla. 1988); Hayes v. Commonwealth, 698 S.W.2d 827 (Ky. 1985); State v. Sales, 255 S.W.3d 565 (Mo. Ct. App. 2008); State v. Merritt, 589 A.2d 648 (N.J. Super. Ct. App. Div. 1991); State v. Luna, 653 P.2d 1222, 1223 (N.M. Ct. App. 1982); State v. McCaskill, 468 S.E.2d 81 (S.C. Ct. App. 1996); Britt v. State, 734 P.2d 980 (Wyo. 1987). A substantial "self-described split among the states" exists as to whether theft of weapons is enough to support a deadly weapon enhancement without any evidence the defendant intended to use them as weapons. State v. Padilla, 920 P.2d 1046, 1048 (N.M. Ct. App. 1996). A majority of states during the 1980s and 1990s elected to apply weapon enhancements to burglary and theft crimes involving firearms. *See id.* at 1048–49.

168. *Brown,* 173 P.3d at 257 (Madsen, J., dissenting) ("The majority is also out of step with the overwhelming majority of courts considering the issue, which have held that a defendant is armed if he or she enters a building unarmed and then acquires a firearm as 'loot.'").

2. Lawful Possession Unrelated to Criminal Activity

Many instances of weapon possession are not only legal but also constitutionally protected. By not requiring a firm link between an otherwise-lawful weapon and a criminal act, courts run the risk of intruding on a defendant's constitutional right to bear arms.[169] As noted constitutional scholar Eugene Volokh has observed:

> [K]eeping a gun for self-defense in a way that's unconnected to the crime should generally be seen as the exercise of one's constitutional right—consider, for instance, a person who possesses a gun for home defense while engaged in consensual sex with someone under the age of consent, or while committing a fraud at work.[170]

Without strong safeguards in place, any crime committed in the home would be subject to enhancement if the offender happened to own a firearm, which would effectively elevate the enhancement above constitutional protections.[171] In fact, this constitutional concern led to the adoption of the nexus test in the first place.[172] But scholars who have recognized this constitutional concern as the foundation of the nexus test also recognize that the nexus test "is far from perfectly clear, and needs more scholarly attention."[173] The nexus test's reliance on the word "connection"—the ambiguous word used to explain to juries how to determine whether a nexus is present[174]—simply creates too great a risk: that general public antipathy toward firearms will result in unjust impositions of the enhancement, thereby infringing on the constitutional right to bear arms.

A loaded firearm always exists for the purpose of being "used," even if that use is legitimate and legal.[175] But what about weapons with a

---

169. *See* State v. Johnson, 974 P.2d 855, 862 (Wash. Ct. App. 1999).

170. Volokh, *supra* note 86.

171. *Cf.* State v. Rupe, 683 P.2d 571, 596 (Wash. 1984). The danger of constitutional infringement is particularly strong when the weapons are located in an offender's own home. *See supra* note 89 and accompanying text.

172. *See* State v. Schelin, 55 P.3d 632, 639 (Wash. 2002) ("With no such temporal nexus requirement, the exercise of the constitutional right to bear arms could be negatively impacted."); *see also* Volokh, *supra* note 86, at 1537–38.

173. Volokh, *supra* note 86, at 1538.

174. 11 WASH. PRACTICE, PATTERN JURY INSTRUCTIONS – CRIMINAL § 2.07 (3d ed. 2010). Juries already struggle with how to interpret the word "connection" in the pattern jury instructions, particularly when there are facts to suggest the weapon is unrelated to the crime. *See* State v. David, No. 61048-1-I, 2008 WL 4902599, at *1 (Wash. Ct. App. 2008); *see also supra* note 130 and accompanying text.

175. State v. Gurske, 118 P.3d 333, 340 (Wash. 2005) (Sanders, J., concurring) ("One presumes that a nearby weapon is usually kept near for a purpose, and the purpose of a weapon is to be 'used' either to fire bullets or shot, to cut someone or something, or to bash someone or something.

more utilitarian character? A knife, for example, has legitimate (even vital) purposes in everyday life, including daily food consumption.[176] Although the list of deadly weapons is statutorily defined,[177] the statute does include a "catch-all" provision that allows virtually any object to become a deadly weapon: "[A]n implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death."[178] This catch-all provision has resulted in an increasingly eye-popping list of objects being alleged as deadly weapons, such as cars,[179] baseball bats,[180] golf clubs,[181] pencils,[182] umbrellas,[183] furniture,[184] and even hands and feet.[185]

An offender might have a perfectly legitimate, lawful purpose for possessing an object like a knife that technically qualifies as a deadly weapon. But the weapon enhancement statute makes no allowance for incidental or accidental possession. *State v. David* provides a ready-made example.[186] In *David*, an intoxicated, bleeding home intruder—who fled

---

Unless it has been converted into a planter and has a rose sticking out the barrel, it is highly unlikely that any gun will be available other than for 'use.'").

176. *See, e.g.*, Joseph Truini, *18 Uses for an Old Favorite, the Utility Knife*, POPULAR MECHANICS, Oct. 1, 2009, http://www.popularmechanics.com/home/reviews/4302765.

177. WASH. REV. CODE § 9.94A.825 (2011).

178. *Id.* While this definition appears rational, its scope is nearly unlimited. Prosecutors have been known to exercise considerable discretion (although perhaps not wisdom) in converting ordinary objects into deadly weapons for purposes of applying the enhancement. *See infra* notes 179–85 and accompanying text.

For example, under this definition, golf clubs are deadly weapons as long as the manner of use is likely to produce serious bodily injury. *See* Leslie E. Tolzin, *Firearm/Weapon Enhancements*, TOLZINLAW.COM, http://www.tolzinlaw.com/PracticeAreas/Firearm-Weapon-Enhancements.asp (last visited Apr. 1, 2012). Clearly, the drafters of the deadly weapon definition statute have never seen the author of this Comment wield a three wood in early spring. Many have described it as an occurrence likely to result in serious bodily injury to someone. But the deadly weapon enhancement has no deterrent effect on my peaceful (although not entirely safe) game of golf. Although applying the enhancement under such circumstances would be absurd, the only thing preventing the enhancement from being applied is prosecutorial discretion.

179. *Id.*

180. *Id.*

181. *Id.*

182. John E. Gross, *What Constitutes a "Deadly Weapon" By Law?*, SEATTLE CRIMINAL DEF. LAWYER (Sept. 13, 2009, 4:28 PM), http://jegattorney.blogspot.com/2009/09/what-constitutes-deadly-weapon-by-law.html.

183. *An All Out Assault on Assaults*, SQ ATTORNEYS (Apr. 23, 2010, 10:01 AM), http://sqattorneys.com/blog/?p=172.

184. *Id*.

185. One defendant entered a guilty plea to a sentencing enhancement based on his use of his hands and feet during an assault. State v. Hahn, 996 P.2d 1125, 1128–29 (Wash. Ct. App. 2000). The defendant later sought to have the enhancements stricken, and the State even conceded on appeal that hands and feet were not deadly weapons; nonetheless, the court of appeals held the defendant to the terms of the plea bargain. *Id.* at 1128.

186. State v. David, No. 61048-1-I, 2008 WL 4902599, at *1 (Wash. Ct. App. 2008).

when the victim began screaming—was later arrested and found to have a folding knife in his back pocket.[187] The intruder did not use or display the knife during the incident,[188] and the jury understandably struggled to find the required nexus (although it eventually did).[189] Yet, there was no evidence that the defendant had any intent or willingness to use the knife—or, for that matter, that he even remembered he had a knife in his pocket.

Certain occupations or groups of people—such as construction workers, woodcarvers, electricians, Boy Scouts, and maintenance workers—routinely possess and use occupational knives. For that matter, some people regularly carry pocket toolkits that include screwdrivers, mini-saws, and knives, all of which could potentially qualify as deadly weapons. If one of those people were to commit a crime—even a nonviolent crime that had nothing to do with the knife in their pocket—that person could be subject to a deadly weapon enhancement. And that enhancement would carry exactly the same prison sentence as it would for an actual violent criminal. Because certain "weapons" have a fundamentally utilitarian character, fact finders should be required to conduct a more searching analysis of whether the "weapon" in each case is intended to further the alleged offense. The nexus test, however, does not require such an analysis.

In each of the two scenarios discussed above—weapons as objects of theft crimes and lawful, constitutionally protected weapon possession—the weapon does not facilitate or enhance criminal behavior. Applying the enhancement in those scenarios does not further the policy objectives of the enhancement. Unfortunately, however, the current one-size-fits-all approach to deadly weapon sentencing enhancement does not allow courts to exercise discretion in those scenarios.

B. Second Criticism: The Enhancement Should Not Apply to Criminal Conduct that Cannot Be Furthered by Deadly Weapon Possession

Prior to the enactment of the HTACA, the deadly weapon enhancement applied to a specific list of felonies that could serve as predicate offenses for sentence enhancement.[190] Now, nearly any felony—including nonviolent and negligent felonies—can receive a weapon enhancement. Yet, in the case of both nonviolent and negligent felonies, it would be unlikely—if not outright impossible—for a weapon to facilitate

187. *Id.*
188. *Id.*
189. *See supra* note 130 and accompanying text.
190. WASH. REV. CODE § 9.94A.310 (1994).

a crime or encourage criminal behavior. This section addresses each of these felony categories in turn.

1. Nonviolent Felonies

Because the HTACA imposed the weapon enhancement on all felonies unless specifically exempted,[191] nonviolent felonies are now subject to the enhancement. The absurdity of applying the enhancement to these felonies is readily apparent, and yet, the enhancement does not preclude such a result. Washington's criminal statutes provide some interesting examples. Practicing law without a license in Washington is a class C felony.[192] The unlicensed practice of law could potentially result in a more "seedy" location for the law office and a list of more "unsavory" clientele. Conceivably, a prosecutor could convince a jury that an unlicensed attorney who owns a firearm and keeps it in his office should receive a weapon enhancement. After all, the weapon has a plausible "connection" to the felony because the firearm could conceivably be used to protect the attorney from such clients or to interfere with a lawful arrest.[193] Likewise, if the attorney used a penknife to open letters and packages, a jury might be persuaded to apply the enhancement because of the penknife's "connection" to the offense: it aided the attorney in the unlicensed practice of law.

Unlawful issuance of a bank check is also a class C felony,[194] as is unlawful redemption of food stamps.[195] Although these felonies are inherently nonviolent, nothing prevents an offender who commits these offenses from being subject to a weapon enhancement if they possessed—even accidentally—a weapon during the crime. Under the nexus test, a jury could always reach the conclusion that the enhancement was proved because the weapon could have been available for defensive use, to facilitate escape, or to compel cooperation.[196]

---

191. *See supra* notes 50–57 and accompanying text. As discussed in detail in Part II.A., the HTACA's approach contrasts markedly with the pre-HTACA approach of applying the enhancement to only those felonies explicitly named. *See supra* notes 47–49 and accompanying text.

192. WASH. REV. CODE § 2.48.180 (2011).

193. *Cf.* State v. Brown, 173 P.3d 245, 254 (2007) (Madsen, J., dissenting) (supporting application of the enhancement because the defendant "could have used it for offensive or defensive purposes, for example, if they had been interrupted by . . . a law enforcement officer while they were still . . . committing the crime").

194. WASH. REV. CODE § 9A.56.060 (2011).

195. WASH. REV. CODE § 9.91.144 (2011).

196. *Cf.* Brown, 173 P.3d at 254 (Madsen, J., dissenting). This is the problem with Justice Madsen's reasoning in her *Brown* dissent: once a weapon is possessed during a crime, one can *always* make an argument that the weapon could have used to evade police capture. Thus, a weapon enhancement can always be applied to mere constructive possession.

Furthermore, the enhancement also can be applied to violent felonies not directed at human victims.[197] In one recent California case, the court upheld a deadly weapon enhancement for a charge of felony animal cruelty because the enhancement statute was not expressly limited to violent crimes against humans.[198] Similarly, Washington's weapon enhancement is not limited to violent crimes against humans; and because the crime of animal cruelty is also a felony in Washington,[199] it could receive a weapon enhancement. Punishing animal cruelty is a legitimate societal goal, but the purpose of the weapon enhancement is to deter armed crime against human victims.

Supporters of the nexus test would likely argue that the nexus test would preclude these outcomes. After all, although the weapon may be easily accessible and readily available, and although there may be a nexus between the defendant and the weapon, a nexus between the weapon and the crime is still required. But these nexus-test proponents would be well-advised to recall the state supreme court's lack of precision in explaining the factors involved in finding a weapon-to-crime nexus: "the nature of the crime, the type of the weapon, and the circumstances under which the weapon is found."[200] As with all questions of whether a nexus exists, the issue is ultimately one for the jury to decide.[201] And given the nebulous word "connection" in the pattern jury instructions,[202] nothing prevents a jury from finding the requisite connection—however tenuous—to justify imposing the enhancement.

2. Negligent Felonies

If the purpose of the enhancement is to protect the public from armed crime, it naturally follows that the criminal must intend to commit a crime; otherwise, there is little or no risk that the criminal might use a weapon to further that crime. A person who commits a negligent felony lacks awareness that the conduct is wrongful.[203] Possession of a deadly

197. *California Court Upholds Deadly Weapon Sentencing Enhancement for Animal Cruelty Conviction,* CAL. BLOG OF APPEAL (May 1, 2007), http://www.calblogofappeal.com/2007/05/01/california-court-upholds-deadly-weapon-sentencing-enhancement-for-animal-cruelty-conviction/ (referencing People v. Smith, 57 Cal. Rptr. 3d 926 (2007)).

198. *Id*.

199. WASH. REV. CODE § 16.52.205(4) (2011).

200. State v. Schelin, 55 P.3d 632, 637 (Wash. 2002).

201. *See supra* notes 37, 45, and accompanying text.

202. 11 WASH. PRACTICE, PATTERN JURY INSTRUCTIONS – CRIMINAL § 2.07 (3d ed. 2010).

203. BLACK'S LAW DICTIONARY (9th ed. 2009) (defining negligence as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights").

weapon during a negligent felony should not be punished in the same way as possession during an intentional felony—if at all—because negligent felonies do not inherently present a risk to society that the weapon will be used to facilitate armed crime.

Moreover, because ordinary objects like vehicles can be treated as deadly weapons,[204] applying the enhancement to negligent offenses means that any negligent felony involving a vehicle could automatically result in a weapon enhancement. Texas recently confronted this very issue in *Crumpton v. State*.[205] In *Crumpton*, a defendant was charged and convicted of criminally negligent homicide as a result of "driving her motor vehicle, a deadly weapon . . . to . . . strike and collide with the [victim's] motor vehicle."[206] Because the indictment alleged negligent use of a deadly weapon as an element of the offense,[207] the Texas Court of Criminal Appeals concluded that a deadly weapon finding was implied in the jury's verdict.[208]

Deadly weapon enhancements for negligent or unintentional felonies are not limited to Texas. In *State v. Theilken*,[209] the Washington State Supreme Court unanimously held that the unintentional crime of first-degree manslaughter could receive a deadly weapon enhancement.[210] In *Theilken*, the defendant accidentally discharged a firearm, killing his friend.[211] Although the defendant argued that the legislature never intended to apply the enhancement to unintentional felonies, the court held that the statutory language was unambiguous and that the enhancement could be applied to unintentional felonies.[212]

One of the primary purposes of the deadly weapon enhancement is to deter armed crime.[213] But armed crime can be deterred only if offenders are aware they are engaging in armed criminal conduct and have the opportunity to consider the consequences of their acts. If the underlying

---

204. *See supra* notes 179–85 and accompanying text.

205. Crumpton v. State, 301 S.W.3d 663 (Tex. Crim. App. 2009).

206. *Id.* at 664.

207. *Id.*

208. *Id.* The court's decision resulted in a concurrence and two separate dissents, and the court's reasoning has been sharply questioned by some members of the Texas legal community. *See, e.g.*, Brandon W. Barnett, *Can an Affirmative "Deadly Weapon" Finding Be Implied?*, LIBERTY & JUSTICE FOR Y'ALL (Dec. 15, 2009), http://justiceforyall.blogspot.com/2009/12/can-affirmative-deadly-weapon-finding.html (observing that the court "seems to have checked its reasoning and precedent at the door in order to uphold a conviction at all costs").

209. State v. Theilken, 684 P.2d 709 (Wash. 1984).

210. *Id.* at 710–11.

211. *Id.* at 710.

212. *Id.* at 711–12.

213. Hard Time for Armed Crime Act, ch. 129, § 1, 1995 Wash. Sess. Laws 443, 443–44 (findings and intent).

criminal conduct is negligent, offenders are not on notice that they are engaging in armed crime; therefore, the enhancement has no deterrent effect.

C. Third Criticism: Uncertainty Over the Enhancement's Scope and Definition Can Result in Misuse During Plea Negotiations

Weapon enhancements have become an indispensible bargaining chip for prosecutors during plea negotiations.[214] Prosecutors often use weapon enhancements to extract guilty pleas to charged crimes by threatening to add an enhancement if no plea is reached.[215] Some prosecutors will instead charge an enhancement initially, even on tenuous grounds, and then offer to remove it in exchange for a plea to the underlying offense.[216]

Use of the weapon enhancement during plea negotiations can have a profoundly coercive effect for several reasons. First, the length of the enhancement is fixed by statute. While a first-time, non-firearm allegation carries a six-month sentence enhancement for a class C felony,[217] an offender who has previously received a deadly weapon enhancement could receive a one- or three-year enhancement for a second class C felony (depending on whether the weapon is a firearm).[218] Those penalties increase to two or six years for a class B felony[219] and to four or ten years for a class A felony (again, depending on whether the weapon is a firearm).[220]

The effects of the sentence enhancement on overall sentence length can be profound. For example, assume that an offender was convicted of

---

214. Deirdre M. Bowen, *Calling Your Bluff: How Prosecutors and Defense Attorneys Adapt Plea Bargaining Strategies to Increased Formalization*, 26 JUST. Q. 1, 4 (2009), *available at* http://dx.doi.org/10.1080/07418820802180432.

215. *See id.* (noting that if a defendant declines an initial plea offer, the defendant "faces the threat of additional charges, enhancements, or a recommendation of the high end of the sentencing range if convicted at trial").

216. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1165, 1166 (2001). *But see* Bowen, *supra* note 214, at 9 (observing that prosecutors in King County (Washington) do not typically add enhancements before trial to force pleas, and that, in the words of one senior prosecutor, "[p]adding enhancements and overcharging for the purpose of creating a reason to negotiate creates an unnecessary theatrical drama where defense attorneys are given to believe that they have legal skills they don't really possess").

217. WASH. REV. CODE § 9.94A.533(4)(c) (2011).

218. § 9.94A.533(3)(c), (4)(c) (2011) (base period for a class C felony); § 9.94A.533(3)(d), (4)(d) (2011) (doubling the enhanced sentence for subsequent weapon enhancements).

219. § 9.94A.533(3)(b), (4)(b) (2011) (base period for a class B felony); § 9.94A.533(3)(d), (4)(d) (2011) (doubling provision).

220. § 9.94A.533(3)(a), (4)(a) (2011) (base period for a class A felony); § 9.94A.533(3)(d), (4)(d) (2011) (doubling provision).

a class C felony—say, unlawful redemption of food stamps—with a knife enhancement ten years ago, and the offender is caught and convicted of the same offense with a firearm enhancement today. Assuming no other criminal conduct, the offender could face anywhere from a zero- to sixty-day sentence for the felony,[221] and an additional three years due to the enhancement.[222] Furthermore, the enhancement portion of the sentence cannot be suspended or reduced;[223] it must be served consecutively to the underlying zero-to-sixty-day sentence.[224] Unsurprisingly, prosecutors are able to use enhancements to effectively compel guilty pleas, because offenders are unwilling to accept the risk of substantially longer prison terms if the prosecutor later decides to add a weapon enhancement to the indictment.[225]

Second, enhancements can be applied even after a guilty plea has been entered.[226] Even if the State alleges the enhancement in the original indictment, a defendant is almost always precluded from challenging the application of the enhancement because pleading guilty requires pleading to the enhancement as well.[227] Moreover, when an enhancement is applied as a result of a guilty plea, the State need not show that the alleged deadly weapons were, in fact, deadly weapons at all.[228]

State v. Hahn provides a particularly egregious example of the misuse of plea agreements, specifically because of the nature of the "weapons" alleged by the State in that case.[229] In *Hahn*, the defendant pled

---

221. This hypothetical assumes an offender score of zero based on the lapse of the prior class C felony conviction, *see* § 9.94A.525(2)(c) (2011) (calculation of offender scores), and a seriousness level of one, *see* § 9.94A.515 (2011) (crimes included within each seriousness level); § 9.94A.510 (2011) (sentencing grid).

222. *See* § 9.94A.533(3)(c) (2011) (proscribing a base enhancement of eighteen months for being armed with a firearm); § 9.94A.533(3)(d) (2011) (doubling that sentence to three years for a second weapon enhancement conviction).

223. § 9.94A.533(3)(e) (2011).

224. *Id.* Consecutive simply means that the sentences cannot be served at the same time. The total sentence length under this hypothetical would therefore be three years, plus up to sixty days.

225. *See* Bowen, *supra* note 214, at 23 (discussing the "trial penalty" for defendants in rejecting plea offers because of "the combination of extra charges, enhancements, and a recommended high end of the sentencing range" that occurs when defendants pursue cases to trial).

226. "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." Blakely v. Washington, 542 U.S. 296, 310 (2004) (citing Apprendi v. New Jersey, 530 U.S. 466, 488 (2000); Duncan v. Louisiana, 391 U.S. 145, 158 (1968)).

227. *See, e.g.*, State v. Hahn, 996 P.2d 1125, 1128 (Wash. Ct. App. 2000).

228. *Id.* ("[F]actual or technical deficiencies underlying the [plea] agreement will not invalidate it.").

229. *Id.* The State initially alleged deadly weapon enhancements based on the fact that the defendant punched and kicked his victims in the head. *Id.* On appeal, the State conceded that "given the particular factual record in this case," neither hands nor feet qualified as deadly weapons. *Id.*

guilty to two charges of second-degree assault, but during his sentencing hearing, he challenged the application of two weapon enhancements to his sentence—enhancements that were based on the use of his fists and feet during the assaults.[230] The trial court imposed the enhancements, and the defendant appealed.[231] On appeal, the State readily conceded that neither the defendant's feet nor his fists "fit within the statutory definition of a deadly weapon";[232] however, the court of appeals affirmed the sentence, holding that Hahn was bound to the terms of his plea agreement.[233]

Similarly, in *State v. Hufferd-Ouellette*,[234] the court of appeals refused to allow a defendant to challenge a weapon enhancement after he pled guilty to the underlying offense.[235] Although the *Hufferd-Ouellette* court "question[ed] whether the admitted facts supported [a finding of intent and willingness to use a firearm] under *Brown*'s intent test,"[236] the court ultimately chose to resolve the case based on a technicality: the defendant's failure to move to withdraw his entire plea.[237]

Both *Hufferd-Ouellette* and *Hahn* demonstrate the systemic injustice in using the enhancement as a plea-bargaining tool. Prosecutors can threaten to add enhancements to an indictment—which will significantly lengthen potential prison sentences—to compel defendants to plead guilty. At the same time, prosecutors are not necessarily required to demonstrate the sufficiency of their allegations or whether the weapons alleged even qualify as deadly weapons. And once the plea has been accepted, defendants are bound by the terms of their plea agreement.

Some may argue that the use of enhancements during plea bargaining is a perfectly legitimate prosecutorial tool, both for ensuring adequate punishment and increasing judicial efficiency.[238] But when combined with some of the other substantive criticisms of the deadly weapon enhancement, the use of weapon enhancements during plea bargaining is simply too coercive. The nexus standard's lack of clarity and the defendant's inability to challenge the enhancement during sentencing ensures that defendants will continue to receive unwarranted enhancements, with no meaningful opportunity for judicial intervention.

---

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 1128–29.

234. State v. Hufferd-Ouellette, No. 29512-5-III, 2012 WL 983135 (Wash. Ct. App. Mar. 13, 2012).

235. *Id.* at *1.

236. *Id.* at *7.

237. *Id.* at *8.

238. This debate is ongoing, and ultimately outside the scope of this Comment.

The three criticisms identified in this Part—enhancements for incidental weapon possession, enhancements for nonviolent or negligent felonies, and misuse of enhancements during plea negotiations—are by no means exhaustive of the problems with the weapon enhancement. They do, however, provide a strong impetus to reevaluate the weapon enhancement. As the next Part demonstrates, the enhancement can be modified to address these criticisms while still serving the underlying policy of deterring and punishing armed crime.

IV. A PROPOSAL FOR CHANGE: THE "EASILY ACCESSIBLE PLUS" TEST

The primary goals of the HTACA are to deter and punish armed crime.[239] Statistics show that the punishment goal is being achieved, as the number of enhanced sentences has grown considerably since the HTACA's enactment.[240] But at what cost? The enhancement continues to suffer from structural, procedural, and fairness problems. Reform is clearly needed.

As this Part explains, the preferred way to address the criticisms of the deadly weapon sentencing enhancement is for the legislature to enact an "easily accessible plus" test. This test would incorporate basic elements of the easily accessible test but with several key additions to address constitutional and fundamental fairness concerns.

A. The Easily Accessible Test Is the Best Foundation

Although *Brown*'s intent test may have been a well-intentioned attempt to address the decade of confusion and inconsistency in the application of the nexus test, it seems to have gained little traction with Washington appellate courts.[241] On the whole, this result is probably for the best because a more stringent application of the intent test could actually hinder legitimate prosecutions for deadly weapon possession.[242] Furthermore, the few other states that have thus far considered *Brown* have refused to apply the intent test to their own weapon-sentencing enhancement schemes.[243] The *Brown* dissent was correct in at least one sense: a universal intent requirement for all weapon enhancements would "make

239. Hard Time for Armed Crime Act, ch. 129, § 1, 1995 Wash. Sess. Laws 443, 443–44 (findings and intent).

240. 20 YEARS IN SENTENCING, *supra* note 59, at 34–35.

241. *See supra* note 151 and accompanying text.

242. *See* State v. Brown, 173 P.3d 245, 253 (Wash. 2007) (Madsen, J., dissenting).

243. *See supra* note 151 and accompanying text.

it virtually impossible to prove a defendant was armed in too many cases to contemplate."[244]

The nexus test is also flawed, but its failings arise from the test's breadth and lack of clear definition.[245] Although the nexus test nominally existed before the HTACA was enacted,[246] it did not gain a significant foothold in the court of appeals until several months after the HTACA became law.[247] Furthermore, the primary driver behind the nexus test was an effort to avoid the constitutional pitfalls associated with what was perceived to be sweeping regulation of firearm possession. Assuming such pitfalls could be addressed in a different way, the nexus test becomes far less appealing. And given the Washington State Supreme Court's ongoing disagreement over the nexus test,[248] the time has come to retire the nexus test as well.

The easily accessible test represents the strongest of the three tests from which to derive a new standard. Courts and juries had little difficulty applying the test prior to the adoption of the nexus test.[249] However, certain constitutional and fundamental fairness concerns are not adequately addressed by the easily accessible test alone, so some minor structural additions are warranted. I refer to this approach as the "easily accessible plus" test.

B. The "Plus": A More Nuanced Framework to Deter and Punish Armed Crime

The easily accessible test, by itself, presents the same constitutional concerns today that it did fifteen years ago, which caused the *Mills* court to adopt the nexus test.[250] For that reason, something more is required to address the concerns raised in Part III of this Comment.

First, the easily accessible plus test must take into account when a deadly weapon is the object of a crime, rather than a facilitator of the crime.[251] Although a weapon present during a crime may always have

244. *Brown*, 173 P.3d at 253 (Madsen, J., dissenting).

245. *See supra* Part II.B.2.

246. *See, e.g.*, State v. Sabala, 723 P.2d 5, 8 (Wash. Ct. App. 1986) ("The evidence discloses there was a sufficient nexus between the location and position of the gun, the fact that it was fully loaded, and available for use by the [defendant].").

247. *See supra* note 92 and accompanying text.

248. *See supra* Part II.B.2.

249. *See supra* Part II.B.1.

250. State v. Mills, 907 P.2d 316, 316 (Wash. Ct. App. 1995).

251. Some states—for example, Pennsylvania—specifically exempt theft crimes from weapon enhancements when the stolen property is a firearm. 204 PA. CODE § 303.10(a)(3)(vii) (2011). Such a broad rule is not called for here because, as Justice Madsen's dissent in *Brown* correctly notes, a firearm theft may quickly turn into an armed confrontation. *See supra* note 155. But requiring evi-

potential to be used in furtherance of the crime,[252] the enhancement should not apply when such use is speculative or unsupported by evidence.[253] For crimes of burglary, robbery, or theft, when a weapon is the object of the crime, the State should be required to prove that either the defendant used, intended to use, or threatened to use the weapon in furtherance of the crime.

Likewise, addressing the concern raised in Part III.A.2, the easily accessible plus test must take into account whether the possessed weapon has a utilitarian character that may be unconnected with the crime. If the weapon was already present at the crime scene before the crime took place (for reasons not related to criminal activity), or if the possessed weapon has a utilitarian character and the defendant can show that possession was consistent with that utilitarian character, applying the enhancement does not serve the goal of deterring armed crime. As in situations where the weapon is the object of the crime, under these circumstances, the State should again be required to prove actual use, intended use, or threatened use of the weapon to further the crime.

Finally, to resolve the concerns raised in Part III.B, the easily accessible plus test should not be uniformly applied to all felonies. Instead, the scope of felonies to which the deadly weapon enhancement applies should be grouped into two categories based on whether the felony is substantially likely to be furthered by possession of a deadly weapon. Those felonies in which a weapon is likely to actively further the crime should be eligible for enhancement merely by proof of actual possession or by satisfying the easily accessible and readily available test for constructive possession. But for those felonies in which a weapon is not substantially likely to further the crime—including negligent and nonviolent felonies—the State should be required to prove that the defendant used, intended to use, or threatened to use the weapon in furtherance of the crime.

In summary, the easily accessible plus test restores the foundation of the easily accessible test—namely, actual or constructive possession, when the weapon is easily accessible and readily available for offensive or defensive purposes—as the baseline for application of the enhancement. But in several unique, specific circumstances, the State would be required to prove that the defendant used, intended to use, or threatened to use the weapon. Those circumstances include: (1) when the underlying

---

dence that the defendant viewed the weapon as a potential tool to facilitate the crime is not onerous and strikes an appropriate balance between the competing interests.

252. *See supra* note 163 and accompanying text.

253. *See* Volokh, *supra* note 86.

felony is theft-related, and the weapon was the object of the theft; (2) when the weapon was already present at the crime scene for lawful reasons unrelated to criminal activity; (3) when the weapon has a utilitarian character and the defendant can show that possession was consistent with that utilitarian character; or (4) when the predicate felony is one in which a weapon is not likely to actively further the crime.

Potential criticism that this new approach would weaken deadly weapon laws is unfounded. Severe, violent felonies would continue to be eligible for enhancement under the easily accessible plus test. In fact, by returning to the easily accessible test as a baseline standard, prosecutors would have an *easier* time obtaining deadly weapon enhancements where justified, as the nexus and intent requirements would be eliminated. And while the easily accessible plus test would require a higher threshold of proof in certain cases, this heightened standard is necessary to ensure the enhancement serves its policy goals. The heightened standard would also inhibit convictions for innocent possession of utilitarian weapons that should never be subject to enhancement.

V. CONCLUSION

Washington's deadly weapon sentencing enhancement has undergone several transformations over the last fifteen years, each well-intentioned, but each progressively more confusing and unjust than its predecessors. Instead of punishing and deterring armed crime, the enhancement now invites unintended and undesirable consequences. Defendants are compelled to plead guilty and accept longer criminal sentences, even when the weapon they possessed had little or nothing to do with the underlying offense.

After reviewing the convoluted legislative and judicial history of the enhancement, this Comment identified several key criticisms of the current enhancement that demonstrate how the enhancement in its current form is unjust. This Comment has also outlined a proposal to modify the enhancement, a proposal that calls for eliminating the current one-size-fits-all approach and adopting a more nuanced test. The easily accessible plus test would eliminate the inherently unfair aspects of the enhancement while still allowing prosecutors to aggressively pursue punishment of violent crime.

The proverbial ball is now in the legislature's court. Given the relatively large number of cases that have addressed the deadly weapon enhancement over the last fifteen years, Washington's courts have overwhelmingly demonstrated a need for legislative guidance on when and how the enhancement should be applied. To be sure, the easily accessible plus test is only the beginning of the conversation. But without instruc-

tive guidance from the legislature, Washington's judiciary will remain unable to implement a coherent, common-sense approach to the deadly weapon sentencing enhancement.

Further inaction by the legislature will lead to even more confusion, as both trial and appellate courts continue to struggle with how to interpret the weapon enhancement's armed requirement. To resolve this confusion—and to ensure that prosecutors remain empowered to pursue and seek punishment of violent offenders—the enhancement must be revamped to align with its original policy goals of punishing and deterring armed crime. This proposal offers a clear path forward.