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# Law and Order Without Justice: A Case Study of Gravity Knife Legislation in New York City

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# Law and Order Without Justice: A Case Study of Gravity Knife Legislation in New York City

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**LAW AND ORDER WITHOUT JUSTICE: A CASE  
STUDY OF GRAVITY KNIFE LEGISLATION IN  
NEW YORK CITY**

*Zamir Ben-Dan*<sup>†</sup>

INTRODUCTION..... 178

I. THE HISTORY OF GRAVITY KNIVES AND GRAVITY KNIFE  
LEGISLATION ..... 179

II. HOW THE LAW IS APPLIED ..... 182

    A. *What is Centrifugal Force?*..... 182

    B. *The “Wrist-Flick” Test* ..... 183

    C. *How the Courts Apply the Law* ..... 185

        1. Defending Against a Gravity Knife Charge..... 186

        2. Constitutional Challenges to New York’s Gravity  
        Knife Law. .... 189

        3. Dismissals on Grounds Other Than Merit..... 194

    D. *Arbitrary & Racist Enforcement* ..... 195

III. ATTEMPTS TO CHANGE NEW YORK’S GRAVITY KNIFE  
LAW ..... 203

    A. *Supporters of Gravity Knife Law Reform* ..... 203

    B. *Opponents of Gravity Knife Law Reform*..... 206

        1. Cyrus Vance, Jr., Manhattan District Attorney .... 209

        2. Bill de Blasio, Mayor of the City of New York .... 213

        3. The New York City Police Department ..... 218

        4. Andrew Cuomo, Governor of the State of New  
        York ..... 221

CONCLUSION..... 224

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## INTRODUCTION

On March 26, 2017, Errol Gerber<sup>1</sup> visited a friend who lived in the Bronx and installed a wall mount shelf for her. After he finished, he left her house to drive to his home in Brooklyn. Before getting on the road, he decided to stop at a grocery store to buy food.

As Errol walked back to his car, a police officer stopped him. The officer saw something clipped to his jeans pocket, reached into his pocket and pulled out a folding knife. With an aggressive flick of his wrist, the officer opened the knife, and the blade locked into place. Errol never opened his knife in that manner, nor did he ever see his knife opened that way. Errol worked as a superintendent for an apartment building in Brooklyn and used the knife in the course of his employment duties. Even though Errol had no criminal record and was never convicted of any kind of offense, the officer arrested him on a misdemeanor weapons possession charge and processed him through Central Booking. The following day, Errol was brought before a judge and arraigned on one count of Criminal Possession of a Weapon in the Fourth Degree, for allegedly possessing a gravity knife. That he used the knife for lawful purposes, and that he was unaware that his knife, which he bought in a retail store in New York, could be classified as an illegal weapon, was irrelevant. As the law is written by the legislature and interpreted by the courts, Errol was guilty of the charge. After several unsuccessful attempts to dismiss the case, Errol reluctantly pled guilty to Disorderly Conduct, a violation, in exchange for a conditional discharge.

Errol's case is a classic example of the unfairness of New York's gravity knife law. This is a recurring tale for thousands of people across the city. Many hardworking New Yorkers are prosecuted for possessing knives that they innocently bought from legitimate business establishments, while the stores themselves have never been prosecuted. The manner in which courts in New York interpret the law has made it virtually impossible to either successfully defend against it or challenge its constitutionality. Searches and seizures involving gravity knives are also difficult to challenge because of bizarre and unreasonable guidelines set forth by New York's highest court. Recent and repeated efforts to change the law have been unsuccessful. Thus, thousands of New Yorkers, most of them either Black or Latino, continue to be prosecuted for possessing knives used as tools for their trade or other lawful purposes, not knowing

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<sup>1</sup> Names of former clients have been changed for purposes of maintaining confidentiality.

that such knives could be deemed illegal in New York. Simply put, this reality is unjust.

This article is divided into three parts. Part I addresses the history of gravity knives and gravity knife legislation in New York. Part II summarizes how the law is applied, both by law enforcement officers on the street, and by the courts; and the implications of how the law is enforced. This part also presents efforts to challenge the constitutionality of the law, as well as the difficulties of getting such charges dismissed on grounds other than merit. Part III documents the attempts made to change the law and explains why such attempts have been unsuccessful. The article then concludes and sets forth the reasons why New York's gravity knife law, as it is enforced in New York State and almost exclusively in New York City, promotes injustice.

#### I. THE HISTORY OF GRAVITY KNIVES AND GRAVITY KNIFE LEGISLATION

An examination of the history of gravity knife legislation takes us back to the year 1909. In that year, the New York State legislature enacted a per se ban on a number of enumerated weapons, including “slungshot[s], bill[ies], sandclub[s] or metal knuckle[s].”<sup>2</sup> Possession of any of these weapons was a felony, and the possessor's intent was irrelevant.<sup>3</sup> This list was expanded in 1930 to include other weapons, as well as various kinds of knives possessed with the intent of unlawful use.<sup>4</sup> Twenty-four years later, New York banned the sale and possession of switchblade knives, defined as knives with “a blade which opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife . . . .”<sup>5</sup> Supporters of the new law claimed that switchblade knives were commonly used to commit violent crimes.<sup>6</sup> This law was amended in 1956 to prohibit possession of switchblade knives for work-related purposes.<sup>7</sup>

After the criminalization of switchblade knives, a new kind of knife emerged as the “legal” successor to the switchblade . . . .”<sup>8</sup> The gravity knife:

[H]as a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force and

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<sup>2</sup> *United States v. Irizarry*, 509 F. Supp. 2d 198, 206 (E.D.N.Y. 2007) (quoting N.Y. PENAL LAW § 1897 (Banks Law Publishing Co. 1909)).

<sup>3</sup> *Id.* (citing N.Y. PENAL LAW § 1897).

<sup>4</sup> *Id.* (citation omitted).

<sup>5</sup> *Id.* (quotation omitted).

<sup>6</sup> *See id.* (quotation omitted).

<sup>7</sup> *Id.* (citation omitted).

<sup>8</sup> *Irizarry*, 509 F. Supp. 2d 198, 206 (E.D.N.Y. 2007) (citation omitted).

which, when released, is locked in place by means of a button, spring, lever, or other device.<sup>9</sup>

Gravity knives were understood to be knives “in which a long blade slides by its own weight out of a hollow handle and locks in place.”<sup>10</sup> These knives were also understood to include knives “with a button that keeps the blade concealed. When the button is pushed, disengaging the blade, a flip of the wrist or simply holding the knife pointed down will set the blade in place for cutting.”<sup>11</sup> The manner in which the blade ejected from the handle was the same, regardless of how the knife was opened. This suggests that gravity knives, as understood back then, opened *both* on force of gravity and with a flip of the wrist. Unlike switchblade knives, these new kinds of knives did not rely upon buttons or levers for opening, but only for disengaging the blade itself.<sup>12</sup>

Gravity knives were quickly decried as the “new tool for teenage crime,” and calls to ban the knives grew.<sup>13</sup> In late 1957, the newly formed “Committee to Ban Teen-age Weapons” began lobbying for a ban and campaigned to collect 250,000 signatures in support of a law codifying the ban.<sup>14</sup> Proposals of a ban had widespread support among law enforcement.<sup>15</sup> In February 1958, the New York City Council passed a resolution calling on the New York State legislature to ban gravity knives.<sup>16</sup> That same month, the New York Court of Special Sessions handed down a decision opining that gravity knives were in the same category as switchblade knives and convicted a salesperson for violating New York’s switchblade knife prohibition.<sup>17</sup> The following month, the New York State legislature heeded the call from the City Council, the Queens Grand Jurors Association, and other organizations, and banned the possession and sale of gravity knives.<sup>18</sup> The prohibition of both gravity and switchblade knives is embodied in section 265.01(1) of the Penal Law, and the definition of “gravity knife” remains the same as when the law was first

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<sup>9</sup> *Id.* at 207.

<sup>10</sup> *Ban Asked on Teen-agers’ Weapons*, N.Y. TIMES, 12 (Feb. 7, 1958), <https://perma.cc/9UHE-V3>.

<sup>11</sup> *Court Bans Sales of Gravity Knives*, N.Y. TIMES, 21 (Feb. 6, 1958), <https://perma.cc/QS5V-BKDF>.

<sup>12</sup> See Emma Harrison, *Group Seeks Ban on Gravity Knives*, N.Y. TIMES (Dec. 19, 1957), at 42, <https://perma.cc/Q2HK-KSJ4>.

<sup>13</sup> *Irizarry*, 509 F. Supp. 2d at 207.

<sup>14</sup> Harrison, *supra* note 12; *Ban Asked on Teen-agers’ Weapons*, *supra* note 10.

<sup>15</sup> *Irizarry*, 509 F. Supp. 2d at 207 (quotation omitted).

<sup>16</sup> *Id.*

<sup>17</sup> *Court Bans Sales of Gravity Knives*, *supra* note 11.

<sup>18</sup> *Irizarry*, 509 F. Supp. 2d at 207.

enacted.<sup>19</sup> Later that year, the federal government passed a law prohibiting the importation and interstate transport of gravity knives and switchblades.<sup>20</sup> This ban “effectively killed the domestic market . . . “ and led to gravity knives “largely vanish[ing] from store shelves.”<sup>21</sup>

An examination of New York’s prohibition of switchblade knives and gravity knives has a common theme. Both are knives with fully concealed blades that open quickly and easily, and lock into place. It also appears that the blades of the gravity knives designed during that time “shoot forth” much in the same way that the blades of switchblade knives do; the only difference is the mechanism by which the blade ejects from the handle.<sup>22</sup> Because of the ease in opening the blades, there is a clear logic behind why people with criminal intentions would like such knives, and why the state would seek to ban them. However, pocketknives and folding knives were never uniformly banned in New York.<sup>23</sup> The ban on gravity and switchblade knives was not designed to include ordinary pocketknives and folding knives, knives where the blade folds into the handle.

The history of pocketknives predates the Common Era.<sup>24</sup> Pocketknives were historically used for peasant occupations and skills such as farming and craftsmanship, and the construct of pocketknives has evolved over time.<sup>25</sup> Some pocketknives have locking mechanisms for released or opened blades, while others do not. Knives with blade-locking mechanisms are preferred by many people because it allows for safe usage and carriage. For example, a person can use the knife without fear that the blade might close up on them during use. Additionally, when the knife is not in use, a person can conceal the blade to prevent accidental injury. Pocketknives existed long before gravity and switchblade knives were banned, and in most of New York, are still considered legal folding knives. New York City, however, is a different story.

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<sup>19</sup> N.Y. PENAL LAW §§ 265.00(5), 265.01 (McKinney 2018).

<sup>20</sup> Federal Switchblade Act, Pub. L. No. 85–623, 72 Stat. 562. (1958) (codified as amended 15 U.S.C. § 1241–1244 (2018)).

<sup>21</sup> See Jon Campbell, *How a ‘50s-Era New York Knife Law Has Landed Thousands in Jail*, VILLAGE VOICE (Oct. 7, 2014), <https://perma.cc/WP9K-5GCZ>.

<sup>22</sup> See, e.g., Harrison, *supra* note 12 (“Judge Cone selected a sleek, silverfish object from weapons that the committee had on display. He flicked his wrist sharply downward and the long blade *shot forth* and anchored firmly in position” (emphasis added)).

<sup>23</sup> See *Irizarry*, 509 F. Supp. 2d at 205-08; *New York Knife Laws*, KNIFE UP, <https://perma.cc/TL8L-U83S>.

<sup>24</sup> *The Complete History of the Pocket Knife*, GALLANTRY (Aug. 2, 2016), <https://perma.cc/HR7E-D7NG>.

<sup>25</sup> *Id.*

## II. HOW THE LAW IS APPLIED

When the anti-gravity knife law was passed in 1958, gravity knives referred to particular kinds of knives which opened quickly and easily, and were primarily used as weapons.<sup>26</sup> Since the state and federal bans, gravity knives have all but disappeared in New York.<sup>27</sup> Now, people in New York City are arrested under this law for possessing pocketknives that bear little resemblance to the knives targeted by that law.<sup>28</sup> This is partly due to how New York City courts and law enforcement define “centrifugal force.”<sup>29</sup> This also came about because of how difficult the New York judiciary has made it to defend against the law and challenge its constitutionality.

A. *What is Centrifugal Force?*

The term, “centrifugal force” is not defined in the Penal Law.<sup>30</sup> The *Merriam-Webster* dictionary defines centrifugal force as “the apparent force that is felt by an object moving in a curved path that acts outwardly away from the center of rotation.”<sup>31</sup> Usually, an explanation of centrifugal force requires a discussion or explanation of “centripetal force.” Centripetal force is viewed as the opposite of centrifugal force and refers to “the force that is necessary to keep an object moving in a curved path and that is directed inward toward the center of rotation.”<sup>32</sup> Centrifugal force, as demonstrated by the dictionary definition, is an *apparent* force—in some sources, it is even described as a fictitious or pseudo force.<sup>33</sup> How exactly these concepts apply in the opening of folding knives, however, is unclear.

Centrifugal and centripetal force are physics concepts, so perhaps it would make sense to consult a physics expert. But this author did confer with physics experts while preparing for trial on a gravity knife case, and the answers received—while admittedly few—did little to shed light on these concepts. One physics professor concluded that the folding knife in question in the case—a folding knife sold by AutoZone stores in New York City—opened by “inertial force,” although she could not rule out

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<sup>26</sup> See Harrison, *supra* note 13; *Ban Asked on Teen-agers’ Weapons*, *supra* note 11.

<sup>27</sup> Campbell, *supra* note 22.

<sup>28</sup> *Id.*

<sup>29</sup> See *supra* definition of “gravity knife” accompanying note 9.

<sup>30</sup> See N.Y. PENAL LAW § 265.00 (McKinney 2018); see also *United States v. Irizarry*, 509 F. Supp. 2d 198, 206 (E.D.N.Y. 2007).

<sup>31</sup> *Centrifugal force*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/E4ZE-M9ER>.

<sup>32</sup> *Centripetal force*, MERRIAM-WEBSTER DICTIONARY (2018), <https://perma.cc/R6GK-UW43>.

<sup>33</sup> *Centrifugal force*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/56Y4-2HV3>.

centrifugal force as a possible means of opening.<sup>34</sup> A second physics expert opined that knives which are readily opened with one hand likely constitute gravity knives, while knives that opened with two hands are utility knives.<sup>35</sup> He also wrote as follows: “Acceleration, in particular *centripetal* acceleration, can often be used to simulate gravity, so a knife that could be opened by acceleration, caused by the motion of one hand, could (should) also be classified as a form of gravity knife.”<sup>36</sup> Yet another professor, while acknowledging his lack of expertise in this particular field of physics, noted that “what you are up against is one of the long-running terminological issues in basic physics: ‘centrifugal force’ is a not well defined term that basically refers to a combination of inertia (conservation of linear momentum) and conservation of angular momentum.”<sup>37</sup> A fourth expert surmised that the type of knife in question was a variation of a switchblade knife.<sup>38</sup> Thus, even amongst physics experts, there is a lack of clarity as to the definition of centrifugal force in the context of opening a knife. Consequently, there is no certainty that the pocketknives that police officers seize from New Yorkers actually open based on the application of centrifugal force.

#### B. *The “Wrist-Flick” Test*

With no definition of the term by the legislature, and with no clear agreement on a definition of centrifugal force, how do police officers decide whether pocketknives which do not open on the force of gravity are, in fact, gravity knives? The method used is the “Wrist-Flick” test. This test purports to operate exactly as the name suggests: if the knife opens with the flick of a wrist, then the NYPD classifies the knife as a gravity knife.<sup>39</sup> This might sound reasonable, considering that the historical gravity knife was opened with the flip of the wrist and/or on the force of gravity. However, applying this test to common folding knives is unreasonable because such knives can be classified as illegal weapons if *anyone* can open it with a more aggressive flick of a wrist, even if the person who

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<sup>34</sup> Telephone Interview with Rachel Rosen, Assistant Professor, Columbia Univ. (Jan. 4, 2017).

<sup>35</sup> Email from Joel Gersten, Adjunct Summer Lecturer, Columbia Univ., to author (Dec. 28, 2016, 13:09 EST) (on file with author).

<sup>36</sup> *Id.*

<sup>37</sup> Email from Andrew Millis, Professor, Dep’t of Physics, Columbia Univ., to author (Dec. 28, 2016, 10:42 EST) (on file with author).

<sup>38</sup> Email from Andre Adler, Clinical Professor, New York Univ., to author (Dec. 27, 2016, 16:02 EST) (on file with author).

<sup>39</sup> *Copeland v. Vance*, 230 F. Supp. 3d 232, 238-242 (S.D.N.Y. 2017).

possesses such a knife is unable to do so. The absurdity of such a classification can be aptly demonstrated by examining the arrests of Clayton Baltzer, Pedro Perez and John Copeland.

Clayton Baltzer, a bible-college student in Pennsylvania, took a field trip to New York City with his fine arts class in March 2012.<sup>40</sup> He and his class were at the Times Square subway station when a police officer grabbed him and seized a pocketknife clipped to his pants.<sup>41</sup> The officer tried several times with no success to open the knife using the Wrist-Flick test, so he called another officer over.<sup>42</sup> The second officer was able to open the knife after several tries using the test.<sup>43</sup> Baltzer was arrested and charged with misdemeanor weapons possession.<sup>44</sup> Ultimately, Baltzer pled guilty to a violation and received two days of community service.<sup>45</sup>

Pedro Perez, a resident of Manhattan, purchased a folding knife in early 2008 to use in his craft as an artist.<sup>46</sup> Two years later, a police lieutenant who observed the knife clipped to his pocket stopped Perez in a subway station.<sup>47</sup> What happened next is a matter of dispute; the lieutenant claims that the knife opened upon his application of the Wrist-Flick test, while Perez asserts that the officers were unable to open the knife with that method, but arrested him anyway “based on the possibility that someone could do so . . . .”<sup>48</sup> Either way, Perez was arrested and charged with misdemeanor weapons possession.<sup>49</sup> He ultimately accepted an Adjudgment in Contemplation of Dismissal (A.C.D.) and agreed to perform seven days of community service.<sup>50</sup>

John Copeland, also a resident of Manhattan, purchased a folding knife in October 2009 to use in his profession as a painter and sculptor.<sup>51</sup> Shortly after purchasing the knife, he showed the knife to two different police officers, both of whom attempted to open the knife using the Wrist-Flick test and were unable to do so.<sup>52</sup> Copeland was never able to open

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<sup>40</sup> Murray Weiss, *NYPD's Zero Tolerance Stop-and-Frisk Policy Lands Seminary Student in Cell*, DNA INFO (May 21, 2012, 7:06 AM), <https://perma.cc/D745-2D22>.

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> Weiss, *supra* note 40; Murray Weiss, *Seminary Student Sentenced to Community Service in Stop-and-Frisk Plea Deal*, DNA INFO (May 21, 2012, 7:28 PM), <https://perma.cc/ZY2S-QJJT>.

<sup>46</sup> *See Copeland*, 230 F. Supp. 3d at 245.

<sup>47</sup> *Id.* at 245-46.

<sup>48</sup> *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 380 (2d Cir. 2015); *see Copeland*, 230 F. Supp. 3d at 246.

<sup>49</sup> *Copeland*, 230 F. Supp. 3d at 246; *Knife Rights, Inc.*, 802 F.3d at 380.

<sup>50</sup> *Copeland*, 230 F. Supp. 3d at 244.

<sup>51</sup> *Id.* at 244-45.

<sup>52</sup> *Id.* at 244.

the knife himself with the flick of a wrist.<sup>53</sup> One year after Copeland purchased the knife, he was stopped by two NYPD officers who noticed the knife clipped to his pocket.<sup>54</sup> One of the officers applied the Wrist-Flick test to the knife and opened the blade on the first attempt.<sup>55</sup> Consequently, Copeland was arrested and charged with possession of a gravity knife.<sup>56</sup>

Copeland's story, in particular, demonstrates the absurdity of the use of the Wrist-Flick test as the means for gravity knife classification. In 2009, Copeland was in possession of a legal folding knife; one year later, with no indication that the knife was improperly altered in any way, that same knife was classified as an illegal device.<sup>57</sup> The change between the knife failing the test in 2009 and passing the test in 2010 was purportedly because of "usage over time"<sup>58</sup> over the course of a year. Assuming that to be true, this exemplifies another major problem with the Wrist-Flick test: a newly manufactured folding knife that does not open with the flick of a wrist when it is first purchased may eventually be opened that way as a result of normal wear and tear that comes with frequent and regular use. As a result, unsuspecting New Yorkers who buy folding knives run the risk of: a) having their knives be considered "gravity knives" because an officer can open it with the flick of a wrist, even if they cannot; and b) having their knives be deemed "gravity knives" because an officer can eventually open them in that manner after usage over time, even if they initially did not open with the flick of the wrist at the time of purchase. If and when these unsuspecting New Yorkers are arrested and arraigned on criminal charges, their problems are only beginning, since it is nearly impossible to mount a defense to the law as it is currently interpreted.

### C. *How the Courts Apply the Law*

New York courts make it complicated to successfully defend against a gravity knife charge; on both the state and federal level, it is increasingly difficult to attack the constitutionality of the gravity knife prohibition, mount an adequate defense, or have the case dismissed on grounds other than merit. New York federal courts have soundly rejected void for vagueness challenges to the law. State trial courts have also rejected Second Amendment challenges to New York Penal Law section 265.01(1).

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<sup>53</sup> Plaintiff's Opening Trial Brief and Proposed Findings of Fact and Conclusions of Law at 17-18, *Copeland v. Vance*, 230 F. Supp. 3d 232 (S.D.N.Y. 2017) (No. 1:11-cv-03918-KBF-RLE) [hereinafter Plaintiff's Opening Trial Brief].

<sup>54</sup> *Copeland*, 230 F. Supp. 3d at 245.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 244-45.

<sup>58</sup> *Id.* at 245.

Even search and seizure law is adversely impacted when it comes to the recovery of so-called gravity knives.<sup>59</sup>

### 1. Defending Against a Gravity Knife Charge

New York Penal Law § 265.01(1) reads as follows:

A person is guilty of criminal possession of a weapon in the fourth degree when: He or she possesses any firearm, electronic dart gun, electronic stun gun, *gravity knife*, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or “Kung Fu star”<sup>60</sup>

Generally, all crimes consist of a culpable act (“actus reus”), and most crimes consist of both an actus reus and a culpable mental state (“mens rea”). In New York, there are four culpable mental states: a person can act “intentionally,” “knowingly,” “recklessly,” or with “criminal negligence.”<sup>61</sup> Generally, where a statute fails to specify a particular mens rea, the prosecution still has to prove the defendant’s mental culpability.<sup>62</sup> Only where there is clear legislative intent to impose strict liability—i.e., liability for one’s conduct regardless of their mental state—is the prosecution relieved of their duty to prove mens rea.<sup>63</sup>

From early on in U.S. legal history, imposition of strict liability has been strongly discouraged, especially in criminal law.<sup>64</sup> The Supreme Court disapproves of strict liability offenses, noting:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.<sup>65</sup>

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<sup>59</sup> See *People v. Miranda*, 19 N.Y.3d 912, 914 (2012); *People v. Brannon*, 16 N.Y.3d 596, 602 (2011).

<sup>60</sup> N.Y. PENAL LAW § 265.01(1) (McKinney 2018) (emphasis added).

<sup>61</sup> *Id.* § 15.05.

<sup>62</sup> See *id.* § 15.15(2).

<sup>63</sup> *Id.*; see also *id.* § 15.10.

<sup>64</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21-22 (1769).

<sup>65</sup> *Morissette v. United States*, 342 U.S. 246, 250 (1952).

In U.S. law, “[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”<sup>66</sup> A contrary approach would empower governments to “criminalize a broad range of apparently innocent conduct.”<sup>67</sup>

The Supreme Court’s disfavoring of strict liability statutes is also evident in the court’s 1994 decision, *Staples v. United States*. There, the Supreme Court reversed the defendant’s conviction for possession of an unregistered machine gun, holding that the government was required to prove that the defendant “knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.”<sup>68</sup> In this case, the defendant was convicted of violating 26 U.S.C. § 5681(d), which makes it “unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.”<sup>69</sup> Despite no mention of a culpable mental state in the statute, the Supreme Court rejected the government’s argument that they need not prove a mens rea. The Court reasoned that such a construction “would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent.”<sup>70</sup> That guns are “highly dangerous” and “potentially harmful devices” was of no import to the Court, because of the “long tradition of widespread lawful gun ownership by private individuals” in the United States, and because “guns generally can be owned in perfect innocence.”<sup>71</sup> In short, guns “are not deleterious devices or products or obnoxious waste materials that put their owners on notice that they stand in responsible relation to a public danger.”<sup>72</sup>

It seemed as if New York courts understood at some point that it is wrong to hold a person strictly liable for innocently possessing a commonly used device.<sup>73</sup> Thus, it boggles the mind why courts in New York have radically departed from a legal tradition that disfavors strict liability when interpreting New York’s gravity knife law. After all, New York Penal Law section 265.01(1) reads almost identically to 26 U.S.C. § 5681(d) in that, on the face of both statutes, a person is guilty of the charged offense if they possess the enumerated weapon. No mens rea is specified in

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<sup>66</sup> *Dennis v. United States*, 341 U.S. 494, 500 (1951).

<sup>67</sup> *Liparota v. United States*, 471 U.S. 419, 426 (1985).

<sup>68</sup> *Staples v. United States*, 511 U.S. 600, 602 (1994).

<sup>69</sup> *Id.* at 605 (citing 26 U.S.C. § 5861(d) (2018)).

<sup>70</sup> *Id.* at 614-15.

<sup>71</sup> *Id.* at 610-11.

<sup>72</sup> *Id.* (internal quotations omitted).

<sup>73</sup> See *People v. Munoz*, 9 N.Y.2d 51, 59 (1961) (“To apply a statutory presumption of unlawful intent ‘to the possession of a tool of everyday use violates the spirit and intent of enforcement procedure.’” (quoting *People v. Adamkiewicz*, 298 N.Y. 176, 179 (1948))).

either statute. Yet, courts in New York have reached the opposite conclusion to the Supreme Court's, finding that the prosecution is *not* required to prove the defendant's knowledge that the knife he or she possesses fits the definition of a gravity knife.<sup>74</sup> The Supreme Court required proof beyond a reasonable doubt that a defendant knew that his *gun* fit the statutory definition of a *machine gun*, but New York courts do not require proof of a defendant's knowledge that the *knife* he or she possesses fits the statutory definition of a gravity knife.

Most recently, New York's highest court, the Court of Appeals, ruled in *People v. Parrilla* that the prosecution does not have to prove that the defendant knew that the knife he possessed was in fact a gravity knife.<sup>75</sup> The Court of Appeals' decision consisted of very little meaningful explanation. The Court based its decision on "the plain language of that subdivision";<sup>76</sup> a series of lower court decisions that have held similarly;<sup>77</sup> and the Court's precedents regarding firearms and the irrelevance of defendants' knowledge of operability.<sup>78</sup> Without more, simply reading "the plain language of that subdivision" does not shine any light on the legislature's intentions, and both the Penal Law and American jurisprudence in general favor the imposition of mental culpability where no mens rea is specified.<sup>79</sup> Further, analogizing to its precedents on firearms is inapposite because firearm operability is not part of the New York Penal Law's definition of "firearm."<sup>80</sup> Hence, it should not matter whether a person knew that a firearm was operable or not. As long as the person knows it is a pistol or revolver, a shotgun having one or more barrels less than eighteen inches in length, or any other device that falls under the definition, it would make sense not to require additional knowledge of operability. With gravity knives, however, the state should have to prove a defendant's knowledge that the knife opens with the application of centrifugal force, since "centrifugal force" is part of the definition of "gravity knife."

Speaking of "centrifugal force," efforts to defend against gravity knife charges by defining centrifugal force through expert testimony have also been largely unsuccessful. One appellate court upheld a trial court's refusal to allow a physics professor to offer testimony regarding the meanings of relevant physics concepts, including centrifugal force, finding that

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<sup>74</sup> See, e.g., *People v. Neal*, 79 A.D.3d 523, 524 (1st Dep't 2010); *People v. Berrier*, 223 A.D.2d 456 (1st Dep't 1996).

<sup>75</sup> *People v. Parrilla*, 27 N.Y.3d 400, 405 (2016).

<sup>76</sup> *Id.* at 404.

<sup>77</sup> *Id.* at 405.

<sup>78</sup> *Id.*

<sup>79</sup> See *Liparota v. United States*, 471 U.S. 419, 425-26 (1985); N.Y. PENAL LAW § 15.15(2) (McKinney 2018).

<sup>80</sup> PENAL § 265.00(3).

the testimony would “likely have confused the jury” and would have defined centrifugal force “inconsistently with the statutory definition of a gravity knife.”<sup>81</sup> This is a rather odd conclusion to reach, considering that “centrifugal force” was never defined by the legislature. Other appellate courts have reached similar conclusions,<sup>82</sup> although one appellate court did find that it was error for the trial court to preclude a defense expert from providing “explanatory testimony as to the manner of operation of the knife in question.”<sup>83</sup> These precedents show the difficulty in even being *allowed* to mount a defense to this particular element; whether or not such a defense would then succeed is an entirely different discussion.

In sum, under current New York law, it is not a requirement that a person know that the knife he or she possesses is a gravity knife. If a New Yorker possesses a knife which can be opened with the flick of a wrist—irrespective of whether that New Yorker knows that the knife can be opened in that manner, and regardless of whether or not it could be opened that way from the beginning, as in the case of John Copeland—that New Yorker is guilty of misdemeanor weapons possession.

## 2. Constitutional Challenges to New York’s Gravity Knife Law.

Because the manner in which New York’s gravity knife law is applied is fundamentally unfair, it has been challenged in the federal courts. In 2011, a lawsuit was filed, with John Copeland and Pedro Perez included among the plaintiffs, asserting that the law is void for vagueness.<sup>84</sup> A void for vagueness challenge will succeed if the statute either “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits[,]” or “authorizes or even encourages arbitrary and discriminatory enforcement.”<sup>85</sup> The second prong is more important and requires “minimum guidelines to govern law enforcement” for the law to be constitutional.<sup>86</sup>

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<sup>81</sup> *People v. Herbin*, 86 A.D.3d 446, 447 (1st Dep’t 2011).

<sup>82</sup> *See People v. Cabrera*, 135 A.D.3d 412, 413 (1st Dep’t 2016) (“The court properly exercised its discretion in precluding defendant’s accident reconstruction expert from testifying about the laws of motion and different kinds of forces that operate on objects, offered to assist the jury in determining whether the officer’s flicking of the wrist constituted the application of either gravity or centrifugal force.”); *People v. Smith*, 125 A.D.3d 897, 898-99 (2d Dep’t 2015) (“The trial court’s exercise of its discretion in limiting the testimony of a proposed expert on the subject of the manufacture, purpose, and availability of the type of knife which the defendant possessed did not limit his ability to present a defense”).

<sup>83</sup> *People v. Polonsky*, 45 Misc.3d 35 (2014).

<sup>84</sup> *See Plaintiff’s Opening Trial Brief*, *supra* note 53.

<sup>85</sup> *Hill v. Colorado*, 530 U.S. 730, 732 (2000).

<sup>86</sup> *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

The plaintiffs argued that New York's gravity knife law banned a particular type of knife, one that had "no bias toward closure."<sup>87</sup> This type of knife had a blade that was kept inside the handle by a lock which, when released, allowed the blade to slide out of the knife.<sup>88</sup> The plaintiffs further argued that the "Wrist Flick Test," which was distinguishable from the gentle flip of the wrist done with knives that also open on force of gravity,<sup>89</sup> is an inapposite test for classifying gravity knives. They argued that the Wrist-Flick test allows for: a) different units of the same model knife to be permitted and prohibited;<sup>90</sup> b) the same knife to be deemed both legal and illegal, depending on who performs the test;<sup>91</sup> c) the same knife to be deemed illegal even if the knife does not always open with the flick of a wrist;<sup>92</sup> and d) the same knife to be deemed legal at one point and then, after usage over time or other factors, to be deemed illegal.<sup>93</sup> As a result, there was no test that the plaintiffs could employ on a folding knife that would give them notice that the knife was indeed an illegal knife, because the knife could be deemed illegal regardless of whether or not they could open it with the flick of a wrist.<sup>94</sup>

Plaintiffs also cited to *United States v. Irizarry*,<sup>95</sup> which held that the officer in the case lacked both reasonable suspicion to frisk the defendant upon seeing the clip of a folding knife, and probable cause to arrest him for possession of a gravity knife.<sup>96</sup> The *Irizarry* court recognized that the knife the defendant was carrying was widely and lawfully sold.<sup>97</sup> The court further concluded, despite the officer's ability to eventually open the knife using the Wrist-Flick test,<sup>98</sup> that the knife was not a gravity knife and was not designed to be opened through the use of centrifugal force.<sup>99</sup> The court opined that a contrary ruling "would transform thousands of honest mechanics into criminals, subject to arrest at the whim of any police officer."<sup>100</sup> While the *Irizarry* court was not tasked with analyzing a void-for-vagueness challenge, this language suggests that the court

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<sup>87</sup> Plaintiff's Opening Trial Brief, *supra* note 53, at 2.

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

<sup>89</sup> *See id.* at 8-9, n.1.

<sup>90</sup> *Id.* at 3.

<sup>91</sup> *Id.* at 45-46.

<sup>92</sup> *Id.* at 47-48.

<sup>93</sup> Plaintiff's Opening Trial Brief, *supra* note 53, at 49.

<sup>94</sup> *Id.* at 46.

<sup>95</sup> *See id.* at 1 (citing *United States v. Irizarry*, 509 F. Supp. 2d 198 (E.D.N.Y. 2007)).

<sup>96</sup> *Irizarry*, 509 F. Supp. 2d at 209.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 204, 210.

<sup>99</sup> *Id.* at 210.

<sup>100</sup> *Id.* at 199.

thought that treating common folding knives like gravity knives encouraged arbitrary enforcement of the law.

Nonetheless, in 2013, the trial court dismissed the lawsuit, alleging that the plaintiffs did not have standing to bring the suit because they failed to present a “concrete and particularized” and “actual or imminent” injury.<sup>101</sup> That the plaintiffs refused to purchase and carry folding knives for fear of being prosecuted was disregarded by the court, which deemed the injury “completely hypothetical and ‘highly speculative.’”<sup>102</sup> Because the court concluded that none of the plaintiffs had standing, it did not reach the merits of the plaintiffs’ claims.<sup>103</sup>

In 2015, the U.S. Court of Appeals for the Second Circuit vacated the trial court’s decision with respect to Plaintiffs Copeland, Perez, and Native Leather, Inc.<sup>104</sup> The Second Circuit found that those three plaintiffs suffered an actual injury because they wished to sell and/or possess folding knives, but refrained from doing so for fear of criminal prosecution.<sup>105</sup> The Second Circuit heeded the Supreme Court’s instruction that the imminence requirement for standing “does not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.”<sup>106</sup> Given that the Manhattan District Attorney’s office prosecuted each of the plaintiffs for gravity knife possession, the Second Circuit found that the plaintiffs’ articulated injury “is hardly conjectural or hypothetical . . .”<sup>107</sup> Thus, the case was remanded back to the Southern District of New York to decide the claim on the merits as to those three plaintiffs.<sup>108</sup>

In January 2017, the trial court once again decided in favor of the defendants, this time finding that the statute was not unconstitutionally void for vagueness either facially or as-applied.<sup>109</sup> As for the first prong, the trial court concluded that the plaintiffs had adequate notice that their conduct was prohibited by law based on the statutory language of the text and three judicial decisions that were all issued *after* the defendants were

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<sup>101</sup> *Knife Rights, Inc. v. Vance*, No. 11 Civ. 3918(KBF), 2013 WL 5434610, at \*3-4 (S.D.N.Y. Sept. 25, 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

<sup>102</sup> *Id.* at 4 (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013)).

<sup>103</sup> *Id.* at 5.

<sup>104</sup> *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 379 (2d Cir. 2015).

<sup>105</sup> *Id.* at 384-385.

<sup>106</sup> *Id.* at 384 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007)) (internal quotations omitted).

<sup>107</sup> *Knife Rights, Inc.*, 802 F.3d at 385.

<sup>108</sup> *Id.* at 390.

<sup>109</sup> *Copeland v. Vance*, 230 F. Supp. 3d 232 (S.D.N.Y. 2017).

arrested and their cases were resolved.<sup>110</sup> For largely the same reasons, the court found that the statute provided sufficiently clear standards of enforcement.<sup>111</sup> The trial court largely disregarded the opinions of the plaintiffs' knife experts, describing their opinions as attempts to reinterpret the law.<sup>112</sup> The trial court also fully credited the defendants' factual allegations, particularly where those allegations conflicted with the plaintiffs' allegations.<sup>113</sup> The court even went as far as to infer that Plaintiff Pedro Perez had some knowledge that the knife he possessed was an illegal knife because he accepted an Adjournment in Contemplation of Dismissal ("A.C.D.") and agreed to perform seven days of community service.<sup>114</sup> Of course, such an inference is illogical, because an A.C.D. in New York is not a conviction of any kind,<sup>115</sup> but is rather an avenue for a case to be dismissed.<sup>116</sup> That Perez agreed to complete community service *as part of the A.C.D.*,<sup>117</sup> rather than risk going to trial and losing, does not change the fact that this case was disposed of in a manner that: a) did not lead to him pleading guilty or admitting wrongdoing, and b) ultimately resulted in a dismissal.

The trial court also dismissed the "hypotheticals" raised by the plaintiffs, noting that none of them applied to any of the plaintiffs,<sup>118</sup> even though some of them clearly did. For example, one of these "hypotheticals" was a situation where "someone buys a knife, tests such knife inside the store and the knife fails the Wrist-Flick test, but then exits the store moments later where an officer is able to successfully perform the Wrist-Flick test to the same knife."<sup>119</sup> This "hypothetical" captures what happened to John Copeland, except even more grotesque since he had two different officers test the knife after leaving the store, both of whom were unable to open the knife. Then, *a year later*, a different officer was able to successfully perform the Wrist-Flick test to the same knife. John Copeland was unable to open his knife through the Wrist-Flick test, so the trial court's assertion that there was "no evidence that any of the plaintiffs

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<sup>110</sup> *Id.* at 249.

<sup>111</sup> *Id.* at 251.

<sup>112</sup> *Id.* at 240-241.

<sup>113</sup> *See, e.g., id.* at 246 ("In his trial declaration, Perez states that the officers who arrested him could not open Perez's knife using the Wrist-Flick test but inexplicably charged him with possession of a gravity knife because it was 'theoretically' possible to do so. The Court has no basis to credit this statement over the sworn statement of Lieutenant Luke, who was present on the scene at the time of the arrest.") (citation omitted).

<sup>114</sup> *Id.*

<sup>115</sup> N.Y. CRIM. PROC. § 170.55(8) (McKinney 2018).

<sup>116</sup> *Id.* § 170.55(2).

<sup>117</sup> *See id.* § 170.55(5).

<sup>118</sup> *Copeland*, 230 F. Supp. 3d at 250.

<sup>119</sup> *Id.* at 249.

tried but were unable to open their knives by application of the Wrist Flick Test” was plainly wrong.<sup>120</sup>

While certainly not bound by *United States v. Irizarry*, the court saw it fit to distinguish the facts of that case from the instant matter in a footnote, stating that in *Irizarry*, the arresting officer could not “readily open” the defendant’s knife by application of the Wrist-Flick test and required “three strenuous attempts” to do so.<sup>121</sup> Such a distinction is irrelevant, however, because courts have found that knives that open with the Wrist-Flick test are gravity knives even if it takes multiple attempts to open the knives in that way.<sup>122</sup> The court further stated that the knife at issue in *Irizarry* “was designed and sold as a folding knife, when the test is *functional* and not design based.”<sup>123</sup> Such an interpretation, however, demonstrates a disregard of the legislative history of the law as well as the history of gravity knives in general. The design of the knife was what caused its detractors to dub it the successor to switchblade knives after switchblade knives were banned.

All in all, the trial court’s decision does no justice to the issue. The fact remains that both the plaintiffs and New Yorkers generally have no way of knowing which folding knives may constitute gravity knives and which ones do not. One factor that has made this difficult to discern is that legitimate business establishments located in both New York City and in New York State continue to sell these knives with impunity. Further, as in the case of John Copeland, a knife that was legal today may later be deemed illegal due to alleged usage over time. Additionally, a knife that is legal in one moment may be deemed illegal the next moment, because it could not be opened via the Wrist-Flick test by one person, but is then opened via the test by somebody else. It is remarkable that a device can be transformed from a legal instrument into an illegal weapon without meddling with it, changing the law, possessing it under circumstances evincing unlawful intent, or anything that could make it reasonable to render it illegal under certain conditions. The reality that an object can be

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<sup>120</sup> *Id.* at 250 & 250 n.25 (acknowledging that attempts to open Copeland’s blade was unsuccessful the year prior to when he was arrested, the Court attempted to distinguish Copeland’s situation from the hypothetical by noting that the difference between the unsuccessful and successful application of the test was due to usage over time. In any event, it was expressly averred that John Copeland was never able to open his knife via the Wrist-Flick test).

<sup>121</sup> *Id.* at 239 n.10 (citing to *United States v. Irizarry*, 509 F. Supp. 2d 198, 204, 210 (E.D.N.Y. 2007)).

<sup>122</sup> *See, e.g.*, *People v. Cabrera*, 135 A.D.3d 412, 413 (1st Dep’t 2016); *People v. Smith*, 309 A.D.2d 608 (1st Dep’t 2003); *People v. Octavio*, 34 Misc. 3d 790, 793 (N.Y. Crim. Ct. 2011).

<sup>123</sup> *Copeland*, 230 F. Supp. 3d at 239 n.10 (internal quotations omitted).

legal today and contraband tomorrow is unprecedented in New York's legal history.

Second Amendment challenges to New York Penal Law section 265.01(1) have also proved futile. Second Amendment challenges to this statute were rekindled by a 2016 Supreme Court decision that vacated a state court judgment for disregarding its Second Amendment jurisprudence in deciding that stun guns were not constitutionally protected.<sup>124</sup> While the Court did not expressly afford stun guns Second Amendment protection, many defense attorneys, including the author, used this case as a springboard to launch constitutional challenges to New York Penal Law section 265.01(1). These challenges have been denied without exception.<sup>125</sup>

### 3. Dismissals on Grounds Other Than Merit

With potential defenses crippled and constitutional challenges rejected, how else can a defendant seek a dismissal of a gravity knife charge against him? One potential avenue is to file a motion to dismiss in furtherance of justice pursuant to Criminal Procedure Law sections 170.40(1) and 210.40(1).<sup>126</sup> These motions are commonly called "Clayton motions," likely named after the case that first articulated factors the court should consider when deciding these motions.<sup>127</sup> Section 170.40(1) deals with criminal court accusatory instruments,<sup>128</sup> while section 210.40(1) concerns indictments.<sup>129</sup> These statutes allow for dismissal based upon "the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice."<sup>130</sup> Both statutes contain the same ten enumerated factors which courts are to consider when deciding whether to grant a *Clayton* motion.<sup>131</sup> The power to dismiss here is a power that is supposed to be "exercised sparingly" and only in that "rare" and "unusual" case when it "cries

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<sup>124</sup> *Caetano v. Massachusetts*, 136 S. Ct.1027 (2016).

<sup>125</sup> *See, e.g., People v. Sosa-Lopez*, 54 Misc. 3d 545 (N.Y. Crim. Ct. 2016); *People v. Buchholz*, 53 Misc.3d 563 (N.Y. Crim. Ct. 2016).

<sup>126</sup> N.Y. CRIM. PROC. LAW §§ 170.40(1), 210.40 (McKinney 2018).

<sup>127</sup> *People v. Clayton*, 41 A.D.2d 204, 208 (2d Dep't 1973).

<sup>128</sup> N.Y. CRIM. PROC. § 170.40(1).

<sup>129</sup> *Id.* § 210.40(1).

<sup>130</sup> N.Y. CRIM. PROC. §§ 170.40(1), 210.40(1).

<sup>131</sup> Those ten factors are: a) the seriousness and circumstances of the offense; b) the extent of harm caused by the offense; c) evidence of guilt, whether admissible or inadmissible at trial; d) the history, condition and character of the defendant; e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant; f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense; g) the impact of a dismissal on the safety or welfare of the community; h) the

out for fundamental justice beyond the confines of conventional considerations.”<sup>132</sup> Motions to dismiss in furtherance of justice are rarely granted.

In this context, a clear obstacle to a dismissal is that the circumstances are not necessarily rare or unusual. In fact, it is quite the contrary: scores of people in New York City are arrested and prosecuted for possessing a gravity knife. Prosecutors have also argued that if the law is as unfair as accused persons say, then the law should be changed through the legislative process. Indeed, one trial court judge in the Bronx denied a Clayton motion, opining that the defense’s ‘perceived unfairness’ of the law should be remedied through the legislative process and had no place before the court.<sup>133</sup>

Nonetheless, a few judges have taken initiative and dismissed gravity knife cases in the interests of justice. In November 2010, the Honorable Ronald Zweibel dismissed a felony indictment in Manhattan where the client was charged with gravity knife possession. Judge Zweibel noted that it “appears to be an absurd result to this Court” that business establishments are not prosecuted for selling weapons, yet unsuspecting New Yorkers are.<sup>134</sup> Judge Zweibel further opined that “the law cannot define as criminals tens of thousands of people who are required to carry such tools in order to earn a living.”<sup>135</sup> In July 2014, the Honorable Troy Webber also dismissed a felony gravity knife case in the Bronx, in which he detailed the unfairness of the law and the efforts made to change it.<sup>136</sup> The recognition by these two judges of the injustice perpetrated by this law is commendable. Nonetheless, getting a Clayton motion granted only solves the problem for a specific individual; a wholesale solution is needed to adequately address the problem.

#### D. *Arbitrary & Racist Enforcement*

People in New York City are prosecuted for possessing knives they bought in legitimate business establishments. That the business establishments which sell these knives go largely unpunished and are not pursued by prosecutors makes the situation even more egregious. The knife Errol Gerber was arrested for carrying was—and is—sold at a Wal-Mart store

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impact of a dismissal upon the confidence of the public in the criminal justice system; i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose. N.Y. CRIM. PROC. § 210.40(1)(a)–(j); *see also Clayton*, 41 A.D.2d at 208.

<sup>132</sup> *People v. Insignares*, 109 A.D.2d 221, 234 (1st Dep’t 1985).

<sup>133</sup> *People v. Francis*, No. 2016BX054585 (N.Y. Crim. Ct. May 19, 2017).

<sup>134</sup> *People v. Castro*, No. 4820/09 (N.Y. Sup. Ct. Nov. 24, 2010).

<sup>135</sup> *Id.*

<sup>136</sup> *People v. Trowells*, No. 3015/2013 (N.Y. Sup. Ct. July 11, 2014).

in Valley Stream, New York. This author has represented clients in gravity knife cases who purchased their knives from business establishments ranging from nationally recognized outfits such as AutoZone and Home Depot, to mom and pop stores located throughout the city.

At one point, the Manhattan District Attorney's office briefly went after retailers in the borough after its investigators purchased forty-three "illegal" knives.<sup>137</sup> However, those retailers entered into agreements to remove those knives from their stores, forfeit the profits, and finance a public education campaign regarding those knives.<sup>138</sup> In exchange, the District Attorney's office agreed to drop the charges.<sup>139</sup> The unfairness of this treatment should be apparent. Businesses simply had to dispose of illegal knives to avoid prosecution. No such option exists for most New Yorkers. Even so, this is the most any prosecutor's office has done to hold business establishments accountable for possessing "gravity knives."<sup>140</sup> No other borough has instituted anything to stop the sale of these knives to unsuspecting New Yorkers who are then prosecuted for their possession.<sup>141</sup>

Allowing establishments to go unpunished for gravity knife possession while prosecuting New Yorkers who buy them might seem like a violation of the Fourteenth Amendment's Equal Protection Clause. Errol Gerber mounted an Equal Protection challenge in his case. The challenge was summarily denied at the trial level, but he filed an appeal of that decision. Prevailing on such a claim is difficult, however, because a finding of an Equal Protection violation requires, at a minimum, a showing that the government actor *intended* to discriminate—showing disparate impact is not enough.<sup>142</sup> With respect to a claim for selective enforcement of law, there must be a showing that the selection "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>143</sup> In the Second Circuit, an additional, preliminary requirement has been imposed for selective enforcement to be established:

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<sup>137</sup> John Eligon, *14 Stores Accused of Selling Illegal Knives*, N.Y. TIMES (June 17, 2010), <https://perma.cc/U5KH-QEFR>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Jon Campbell, *Did Authorities in New York City Lose More Than 1,300 Confiscated Knives?*, VILLAGE VOICE (May 21, 2015), <https://perma.cc/YF7V-Q6B8>.

<sup>141</sup> *Id.*

<sup>142</sup> See generally *Washington v. Davis*, 426 U.S. 229 (1976) (holding that for a government discriminatory act to be unconstitutional, it must contain both a discriminatory purpose and impact); see also *Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944).

<sup>143</sup> *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

there must also be a showing that the parties being compared are “similarly situated in all material respects.”<sup>144</sup> The burden of proof is on the person challenging the constitutionality of the action in question, and it is a heavy burden.<sup>145</sup> This standard makes it difficult to prove selective enforcement in the gravity knife context because most courts are unlikely to find ordinary persons to be similarly situated to business establishments and corporations.

Indeed, in the singular case where a selective enforcement challenge was brought regarding gravity knife prosecutions, the court found that the plaintiffs failed to establish either that the parties are similarly situated or that there was deliberate discrimination.<sup>146</sup> As to the first requirement, the court found that the plaintiffs failed to demonstrate that they were “similarly situated in all material respects when compared to retail and corporate entities that sell or manufacture knives.”<sup>147</sup> As to the second requirement, the court found that there were no allegations showing intent to unlawfully or improperly discriminate.<sup>148</sup>

New York City’s aggressive prosecution has had adverse implications for city residents. For starters, never to be overlooked is the fact that a disproportionate number of those prosecuted for violating New York’s gravity law, like with just about everything else in the United States, are Black and Brown people. Black and Latino people do not make up 84% of New York City, but they make up 84% of the people prosecuted for gravity knife offenses.<sup>149</sup> Additionally, people prosecuted for gravity knife possession “endure the humiliation of detention, miss days of work, suffer suspensions, and refrain from applying for work because of pending cases.”<sup>150</sup> Gravity knife prosecutions can also have adverse immigration consequences, especially under the current presidential administration.<sup>151</sup> Then of course, there is always the risk of jail-time that comes

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<sup>144</sup> *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (2d Cir. 1992).

<sup>145</sup> *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

<sup>146</sup> *Clay v. City of New York*, No. 14 Cv. 9171 (RMB), 2016 WL 5115497, at \*6 (S.D.N.Y. Sept. 9, 2016).

<sup>147</sup> *Id.* (citation and internal quotations omitted).

<sup>148</sup> *Id.*

<sup>149</sup> Stephen Rex Brown, *Racial Bias Seen in N.Y. State Law on Gravity Knives*, N.Y. DAILY NEWS (June 12, 2017, 9:59 PM), <https://perma.cc/9LQA-4N53>.

<sup>150</sup> Memorandum from Dan Quart, Assemblymember, N.Y. State Assembly, to Denise Gagnon, Legislative Sec’y, Exec. Chamber (Sept. 14, 2016) [hereinafter Memorandum from Dan Quart] (on file with author).

<sup>151</sup> Jon Campbell, *Trump’s Immigration Crackdown Sharpens Needs to Cut Bogus ‘Gravity Knife’ Law*, *Pol Says*, VILLAGE VOICE (May 26, 2017), <https://perma.cc/JW2H-LDF5>.

with misdemeanor offenses, and if the person has a prior criminal conviction, they could be charged with a felony and wind up facing upstate prison time.

Manhattan District Attorney Cyrus Vance Jr. has been particularly invidious in this regard, using his discretion to prosecute misdemeanor possession offenses as felonies far more than the other four boroughs.<sup>152</sup> The statute that allows him to do that is New York Penal Law section 265.02(1), Criminal Possession of Weapon in the Third Degree. A person can be prosecuted for this offense, which is a Class D felony, if they commit the crime of Penal Law section 265.01(1)—e.g., if they are in possession of a so-called gravity knife—and they have been previously convicted of *any* crime.<sup>153</sup> Neither the statute, nor any case places a time-bar on the age of a conviction.<sup>154</sup> Therefore, if a person has *ever* been convicted of a crime and is then found with any of the enumerated weapons contained in New York Penal Law section 265.01(1), they can be charged with a felony and face prison time. Nor is the requirement of a “previous conviction” limited to prior crimes committed in New York. Thus, if a person arrested for gravity knife possession was previously convicted of an offense outside of New York that would qualify as a crime in New York, that person could be charged with felony weapons possession under Penal Law section 265.02(1).<sup>155</sup>

How do people wind up getting arrested for carrying so-called gravity knives? Sometimes knives are recovered pursuant to a search incident to lawful arrest, i.e., the officer searches a person he or she has placed under arrest and finds a knife. Other times, a person is found with a knife under circumstances evincing an intention to commit a crime with that knife. Most often, however, arrests for gravity knife possession result from street encounters between police officers and citizens, particularly after a stop-and-frisk.<sup>156</sup> This often happens because many folding knives come with a clip, so people who carry these knives will clip them to a belt or pants pocket, making said knives visible to the police. Blacks and Latinos are disproportionately arrested and prosecuted for gravity knife offenses because Blacks and Latinos are disproportionately stopped and

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<sup>152</sup> Stephen Rex Brown, *Manhattan DA Harsher in Prosecuting Gravity Knife Crimes Than Other NYC District Attorneys: Study*, N.Y. DAILY NEWS (June 12, 2017, 11:59 PM), <https://perma.cc/LTN7-GXGC>.

<sup>153</sup> N.Y. PENAL LAW § 265.02(1) (McKinney 2018).

<sup>154</sup> *Id.*; *People v. Kittell*, 135 A.D.2d 1021, 1023 (3d Dep’t. 1987) (“Since a misdemeanor constitutes a ‘crime’ . . . and the Legislature did not impose a limit as to the remoteness of the prior conviction which could be used pursuant to this statute, the admission of this evidence was proper.” (citing PENAL § 10.00(6))).

<sup>155</sup> *See People v. Kulakov*, 278 A.D.2d 519, 521 (3d Dep’t. 2000).

<sup>156</sup> *Campbell*, *supra* note 21.

frisked by police.<sup>157</sup> New York search and seizure law makes it easy for police officers to lawfully seize these knives where seizure of contraband would otherwise not be allowed. In *Terry v. Ohio*, the Supreme Court sanctioned the use of stop-and-frisk as a permissible intrusion by law enforcement, and laid out the standard to govern these police-citizen encounters.<sup>158</sup> During a *Terry* stop, an officer can stop and frisk a person if they have: a) reasonable articulable suspicion that criminal activity was afoot; and b) reasonable articulable suspicion that the person was armed and dangerous.<sup>159</sup> New York has a unique, four-tiered system governing street encounters between police officers and private citizens. Each level of intrusion requires a different amount of suspicion, and the rules vary as to what law enforcement is and is not allowed to do.<sup>160</sup>

A *Level One* stop, known as a *request for information*, is allowed where there is “some objective credible reason for that interference not necessarily indicative of criminality.”<sup>161</sup> Under this level, a private citizen has a right to refuse to answer questions, to walk or even run away, and the police are not allowed to pursue or physically detain that citizen.<sup>162</sup> A *Level Two* stop, called the *common-law right of inquiry*, is permissible where there is a founded suspicion of criminal activity afoot.<sup>163</sup> Under this level, an officer can ask accusatory questions with a focus on potential criminality, e.g., “Can I search your person or bag?”<sup>164</sup> or “Do you have a weapon?”<sup>165</sup> However, the officer cannot forcibly detain the person.<sup>166</sup> A *Level Three* stop is the equivalent of a *stop-and-frisk* under *Terry*: an officer may forcibly detain a person for questioning where they have reasonable suspicion that the person committed, is committing, or is about to commit a crime; and an officer may frisk a person for weapons when the officer has reasonable suspicion that he “is in danger of physical injury by virtue of the detainee being armed.”<sup>167</sup> Finally, a *Level Four* encounter is an arrest. An officer must have probable cause that the person committed a crime, or some other offense in his or her presence.<sup>168</sup> This four-

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<sup>157</sup> See *Stop and Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <https://perma.cc/9RQE-VAFN>.

<sup>158</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>159</sup> *Id.* at 30-31.

<sup>160</sup> See *People v. De Bour*, 40 N.Y.2d 210, 223 (1976).

<sup>161</sup> *Id.*

<sup>162</sup> *People v. Howard*, 50 N.Y.2d 583, 586 (1980).

<sup>163</sup> *De Bour*, 40 N.Y.2d at 223.

<sup>164</sup> *People v. Hollman*, 79 N.Y.2d 181, 191-92 (1992).

<sup>165</sup> *People v. Garcia*, 20 N.Y.3d 317, 324 (2012).

<sup>166</sup> *De Bour*, 40 N.Y.2d at 223.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

tiered system applies to both street encounters with pedestrians and car encounters with motorists and passengers.<sup>169</sup>

A frequently emphasized point of law within this context is that conduct equally compatible with guilt or innocence, and conduct susceptible of innocuous explanation, do not give rise to reasonable suspicion allowing for forcible detention of a suspect.<sup>170</sup> Yet, this rule gets tossed out the window—or, at a minimum, *compromised*—when it comes to the seizure of gravity knives. A person who has a device clipped to his pants with a part of it protruding could be carrying carrying an illegal knife, a legal knife, or some other device. There is no way for an officer to know whether or not the device is an illegal knife until that officer seizes the device, recognizes it as a knife, tests that knife and determines it to be a gravity knife. Because of the high risk of arbitrary enforcement, a person with a knife clipped to their pants should not give an officer reasonable suspicion so permitting forcible detention. This conduct is far too susceptible to “an innocent as well as a culpable interpretation.”<sup>171</sup>

Yet, in a 2011 decision, the New York Court of Appeals found that an officer had reasonable suspicion to conduct a stop-and-frisk where the officer saw a knife clipped to the defendant’s pants, and referenced his

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<sup>169</sup> *Garcia*, 20 N.Y.2d at 324.

<sup>170</sup> Based on this premise, the Court of Appeals has invalidated searches and seizures for lack of reasonable suspicion where: a) a male defendant carrying a woman’s vanity case in a burglary-prone area ignored questions from a police officer in an unmarked car and ran off when the officer exited his vehicle to talk to him further, *People v. Howard*, 50 N.Y.2d 583 (1980); b) passengers in a car stopped for a defective brake light “were a little furtive,” “looking behind,” “stiffened up,” and “acted nervous” when the officer approached, *Garcia*, 20 N.Y.3d 317; c) police received an anonymous phone tip of a dispute involving a person with a gun, the police arrived at the location and found no dispute, just a defendant who matched the description given by the anonymous caller, *People v. Moore*, 6 N.Y.3d 496 (2006); d) a defendant walking toward an intersection with a brown opaque paper bag made a quick turn away from an officer after he and the officer made eye contact, *People v. Carrasquillo*, 54 N.Y.2d 248 (1981); e) a defendant, standing with a group of men congregated in a “known narcotics location” with an identifiable bulge in his jacket pocket, walked away upon police arrival in a marked vehicle and ran off when an officer called to him and asked him to approach, *People v. Sobotker*, 43 N.Y.2d 559 (1978)); and f) defendants, driving in a high-crime neighborhood where several burglaries had taken place, slowed down to about five-miles an hour looking in one bar, and then glancing into a second bar. *Id.*

New York’s lower appellate courts have also struck down searches and seizures on this principle. See *People v. Ties*, 132 A.D.3d 558 (1st Dep’t 2015); *People v. Laviscount*, 116 A.D.3d 976 (2d Dep’t. 2014); *People v. Kennebrew*, 106 A.D.3d 1107 (2d Dep’t 2013); *People v. Cady*, 103 A.D.3d 1155 (4th Dep’t 2013); *In re Darryl C.*, 98 A.D.3d 69 (1st Dep’t 2012); *People v. Morrow*, 97 A.D.3d 991 (3d Dep’t 2012); *People v. Riddick*, 70 A.D.3d 1421 (4th Dep’t 2010); *People v. Solano*, 46 A.D.3d 1223 (3d Dep’t 2007); *People v. Hill*, 262 A.D.2d 870 (3d Dep’t 1999); *People v. Powell*, 246 A.D.2d 366 (1st Dep’t 1998); *People v. Moore*, 176 A.D.2d 297 (3d Dep’t 1991).

<sup>171</sup> *People v. Brannon*, 16 N.Y.3d 596, 602 (2011).

training and experience in concluding that gravity knives are commonly carried that way.<sup>172</sup> The court articulated the applicable rule:

Typically, one cannot tell if a knife is a gravity knife until the knife is opened. Reasonable suspicion, however, does not require absolute certainty that the knife the individual is carrying is a gravity knife. Rather, the issue is whether, under the circumstances, the officer possessed specific and articulable facts from which he or she inferred that the defendant was carrying a gravity knife.<sup>173</sup>

Other than the knife being clipped to Defendant Jose Fernandez's right-front pants pocket, no other facts existed that would give the police cause for even a *Level One* stop.<sup>174</sup> Fernandez did not behave suspiciously, look nervous, or run away from police. He was not evasive, gave no inconsistent answers to police inquiries, and did nothing bizarre, strange, or out of the ordinary. Even the State, in both of their appellate briefs, did not set forth any facts regarding Fernandez, aside from him walking down the street and having a knife clipped to his front pants pocket.<sup>175</sup> When examining the facts, reasonable suspicion existed here *only* because of the clipped knife.

Even more outrageous is the reality that if the police have a lawful encounter with a person and see a knife clipped to their person, or protruding from a pocket, the police need not even articulate facts to support a belief that the knife was illegal. In 2012, the Court of Appeals held:

Where a knife (even if not necessarily an illegal one) becomes plainly visible to a police officer in the course of an authorized common-law inquiry due to the suspect's own movement and no intrusive conduct on the officer's part, the officer is permitted to seize it, so long as the ensuing intrusion is 'minimal' and 'consonant with the respect and privacy of the individual'.<sup>176</sup>

The court distinguished its decisions in 2011,<sup>177</sup> noting that the officer here "was already engaged in a lawful encounter with defendant prior to spotting the knife, and thus was not required to have a reasonable

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Brief for Defendant-Appellant, *People v. Brannon*, 16 N.Y.3d 596 (2011) (No. 2011-0078), 2010 WL 6817491, at \*9-11; Brief for Defendant-Appellant, *People v. Fernandez*, 60 A.D.3d 549 (1st Dep't 2009) (No. 153), 2008 WL 8188862, at \*4-8.

<sup>175</sup> Brief for Respondent, *People v. Brannon*, 16 N.Y.3d 596 (2011) (No. 2011-0078), 2010 WL 6817492, at \*3, \*5-8; Brief for Respondent, *People v. Fernandez*, 60 A.D.3d 549 (1st Dep't 2009) (No. 153), 2009 WL 7267107, at \*4-5.

<sup>176</sup> *People v. Miranda*, 19 N.Y.3d 912, 914 (2012).

<sup>177</sup> *Brannon*, 16 N.Y.3d at 602.

suspicion that the knife he observed was a gravity knife before he took it.”<sup>178</sup> Since this decision, courts have found that police can remove knives—legal or otherwise—that they can see from persons during *any* encounter, insofar as the encounter is deemed lawful.<sup>179</sup>

The Court of Appeals’ decisions essentially allow a police officer to forcibly detain a person if the officer observes the person with a folding knife clipped to their clothing. In addition, if the knife opens as a result of the Wrist-Flick test, the officer is allowed to arrest that person. That officer can then appear in court for the suppression hearing (an evidentiary hearing held before trial to determine whether evidence was seized unlawfully and should consequently be excluded from use at trial) and give boilerplate testimony about their “training and experience” in detecting gravity knives based on how the knives look and are typically carried. The suppression court will be bound by the Court of Appeal’s ruling and be constrained to uphold the search and seizure. Further, if a lawful encounter—like a legitimate traffic stop—is underway, and the officer observes a knife, the police can retrieve the knife and make an arrest, and no testimony describing the knife will be necessary at the suppression hearing. Thus, it is not only next to impossible to mount a defense against New York’s gravity knife law, but it is also increasingly difficult to challenge the constitutionality of the police action that leads to recovery of the knife.

As applied, New York’s gravity knife law is unclear and antiquated. People who buy these knives from legitimate business establishments do not know that their knives can be classified as illegal weapons, nor do they realize that a knife considered to be a legal folding knife may later on be determined to be an illegal gravity knife. Various constitutional challenges to the law have been unavailing. The Court of Appeals’ rulings have made it more difficult to both defend against the charges and challenge the police action that leads to arrests. New Yorkers, and particularly Black and Brown New Yorkers, have consequently become involved with the judicial system, sometimes after years of openly possessing the knife in question. Further, those who have been previously convicted of a crime run the risk of facing felony time for misdemeanor charges, especially in Manhattan. Meanwhile, the business establishments which sell these knives go largely unpunished and unprosecuted. New York’s gravity

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<sup>178</sup> *People v. Alkabeeli*, 48 Misc.3d 681, 686 (N.Y. Crim. Ct. 2015) (citing *Miranda*, 19 N.Y.3d at 914.).

<sup>179</sup> *See* *People v. Randall*, 143 A.D.3d 411 (1st Dep’t 2016); *People v. O’Donnell*, 122 A.D.3d 475 (1st Dep’t 2014); *In re Gregory N.*, 108 A.D.3d 553 (2d Dep’t 2013); *People v. Terrance*, 101 A.D.3d 624, 625 (1st Dep’t 2012) (“Defendant’s conduct, viewed in its entirety, gave the officer a reasonable basis to fear for his safety, even though the officer did not articulate any fear for his safety at the suppression hearing”); *Alkabeeli*, 48 Misc.3d 681.

knife law is unfair in application, and the law must either be applied more equitably, or it must be changed.

### III. ATTEMPTS TO CHANGE NEW YORK'S GRAVITY KNIFE LAW

The conclusion that New York's gravity knife law is unfair is widely shared by defense associations, civil rights organizations, and knife advocacy groups.<sup>180</sup> This part will examine the supporters and opponents of gravity knife law reform, and the motives behind their respective positions.

#### A. Supporters of Gravity Knife Law Reform

Eventually, calls for change reached the New York legislature, and bills were introduced into both houses. In 2016, Assemblyman Dan Quart introduced a bill into the State assembly,<sup>181</sup> and Senator Diane Savino introduced a similar bill into the senate.<sup>182</sup> The Assembly bill sought to amend the definition of gravity knives to exclude knives “with a bias toward closure” that “requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure and open the knife.”<sup>183</sup> The Senate bill read the same.<sup>184</sup> Previous attempts to amend the law failed in the Senate.<sup>185</sup> That year, however, the bill passed in the Assembly by a vote of 117-12, and passed in the Senate by a vote of 61-1.<sup>186</sup> Clearly, the New York legislature recognized the problems posed by the current application of the law and felt it necessary to change the law.

Several organizations and groups weighed in during the process and voiced support for the new legislation. The Legal Aid Society, the oldest and largest provider of public defense in the nation, has played a significant role in lobbying for gravity knife law reform.<sup>187</sup> Two attorneys in particular, Martin LaFalce and Hara Robrish, both of the Criminal Defense Practice in Manhattan, worked tirelessly to get the law changed. William Gibney, director of Legal Aid's Special Litigation Unit, wrote an amicus brief for the void-for-vagueness challenge brought by John

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<sup>180</sup> Jon Campbell, *Everyone but de Blasio Wants to Get Rid of Stupid Pocket Knife Laws*, VILLAGE VOICE (Sept. 21, 2016), <https://perma.cc/A9FV-YA6D>.

<sup>181</sup> Assemb. B. 9042A, 240th Sess. (N.Y. 2016).

<sup>182</sup> S.B. 6483A, 240th Sess. (N.Y. 2016).

<sup>183</sup> Assemb. B. 9042A, 240th Sess. (N.Y. 2016).

<sup>184</sup> S.B. 6483A, 240th Sess. (N.Y. 2016).

<sup>185</sup> Jon Campbell, *Once Again, Albany Republicans Stall Out the Clock on Gravity Knife Bill*, VILLAGE VOICE (June 29, 2015), <https://perma.cc/VXE6-6R3X>.

<sup>186</sup> *NY Governor Vetoes Knife Rights' Knife Law Reform Bill!*, KNIFE RIGHTS (Dec. 31, 2016), <https://perma.cc/5R9H-2NS9>.

<sup>187</sup> *New York's Outdated Knife Law*, Editorial, N.Y. TIMES (May 31, 2016), <https://perma.cc/A33A-XYH3>.

Copeland, Pedro Perez, and Native Leather, Inc.; the trial court, however, declined to read the brief.<sup>188</sup>

The Legal Aid Society addressed a memorandum in support of the bill to the Senate, which laid out the history of the traditional gravity knife and the impact that the police department's "tortured interpretation of the gravity knife statute" has had on law-abiding, gainfully employed New Yorkers.<sup>189</sup> Particularly, the memo provided useful statistics gleaned from reviewing a six-month sample of complaints from Legal Aid cases in Manhattan Criminal Court. The memo pointed out that 69% of arrests for violations of Penal Law section 265.01(1) were gravity knife arrests.<sup>190</sup> Of that sample, less than 2% (4 out of 254 complaints) involved allegations of possession under circumstances evincing unlawful intent against another.<sup>191</sup> During this same time period, the Manhattan District Attorney's Office prosecuted sixty-five Legal Aid clients for violating Penal Law section 265.02(1), the statute allowing for felony prosecution of gravity knife possession; this was more than four times the number of those charged in the other four boroughs combined.<sup>192</sup>

In September 2016, Assemblyman Dan Quart wrote a memorandum to Denise Gagnon, the Legislative Secretary in the Executive Chamber, in support of the bill.<sup>193</sup> The memo noted that enforcement of New York's gravity knife law "varies widely throughout the state," and that outside of New York City, there are very few gravity knife cases because prosecutors do not "strain the statute to prohibit possession of common folding knives."<sup>194</sup> The overwhelming majority of gravity knife prosecutions take place within the five boroughs, with Manhattan ranking the highest. The memorandum also identified and rebutted the arguments of the main opponents to his bill.<sup>195</sup>

The same month, the National Association for the Advancement of Colored People's Legal Defense and Educational Fund ("NAACP LDF") wrote a letter to Governor Cuomo urging him to sign the bill into law.<sup>196</sup> The letter articulated many of the same concerns as other supporters, but

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<sup>188</sup> See *Copeland v. Vance*, 230 F. Supp. 3d 232, 236-37 n.2 (S.D.N.Y. 2017).

<sup>189</sup> Memorandum from Legal Aid Soc'y to N.Y. State Senate 2 (June 7, 2016) [hereinafter Memorandum from Legal Aid Soc'y] (on file with author).

<sup>190</sup> *Id.* at 3.

<sup>191</sup> *Id.* at n.4.

<sup>192</sup> *Id.* at 3-4.

<sup>193</sup> Memorandum from Dan Quart, *supra* note 150.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Letter from Sherrilyn Ifill, President & Dir.-Counsel, NAACP Legal Def. Fund, to Andrew Cuomo, Governor, State of N.Y. (Sept. 19, 2016), <https://perma.cc/P8V5-J4NG> (urging the Governor to sign the New York State Assembly Gravity Knife and Switchblade Reform Bill S.6483A/A.9042A).

placed particular focus on the racial disparities resulting from the law's application. The letter noted that, within the pool of gravity knife arrests resulting from stop and frisk, "86% of those arrested were Black or Latino. Only 11% were white. When the police stopped a white suspect with a knife, he had a 35% chance of being arrested. If the suspect is Black or Latino, that number jumps to 56%."<sup>197</sup>

The following month, the New York Civil Liberties Union ("NYCLU") wrote a letter to Governor Andrew Cuomo imploring him to sign the bill into law.<sup>198</sup> The NYCLU raised many of the same concerns that Legal Aid raised in its memo to the Senate, chiefly that: 1) the gravity knives of old are distinct from the pocketknives and utility knives that are criminalized under the statute;<sup>199</sup> 2) police officers have become adept at opening knives that were not designed to open via gravity or centrifugal force with the use of the Wrist-Flick test;<sup>200</sup> 3) tens of thousands of law abiding, gainfully employed New Yorkers have been prosecuted under the flawed interpretation of New York's gravity knife law, with people of color being disproportionately targeted;<sup>201</sup> and 4) possession of the knife is a strict liability offense.<sup>202</sup>

Other supporters include the Office of Court Administration ("OCA"), the agency that runs the courts in New York;<sup>203</sup> Brooklyn Defender Services, a public defense organization concentrated in Brooklyn;<sup>204</sup> the New York Times Editorial Board, which ran an op-ed calling for the bill to be passed;<sup>205</sup> Think Progress, a progressive news organization that criticized the current knife law in a September 2015 article;<sup>206</sup> and even conservative organizations such as the National Rifle Association (NRA),<sup>207</sup> and Knife Rights, Inc.<sup>208</sup> The Village Voice ran a series of

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<sup>197</sup> *Id.* at 3.

<sup>198</sup> Letter from Robert Perry, Legislative Director, N.Y. Civil Liberties Union to Andrew Cuomo, Governor, State of N.Y. (Oct. 11, 2016), <https://perma.cc/3ZA2-EUWS> (recommending approval of the Bill).

<sup>199</sup> *Id.* at 1.

<sup>200</sup> *Id.* at 1-2.

<sup>201</sup> *Id.* at 2.

<sup>202</sup> *Id.*

<sup>203</sup> Jon Campbell, *NY Assembly Passes Bill to End Over-Prosecution of 'Gravity Knives'*, VILLAGE VOICE (June 11, 2015), <https://perma.cc/TE9H-9VSN>.

<sup>204</sup> See Memorandum from Brooklyn Def. Servs. (Apr. 6, 2016) [hereinafter BDS Memorandum], <https://perma.cc/N7S8-QKNM>.

<sup>205</sup> *New York's Outdated Knife Law*, *supra* note 187.

<sup>206</sup> Ian Millhiser, *New York Cops Are Jailing Handymen for Carrying this Common Pocketknife*, THINK PROGRESS (Sept. 24, 2015, 4:04 PM), <https://perma.cc/Q3WT-E4BK>.

<sup>207</sup> Jon Campbell, *Gravity Knife Reform Appears Blocked by GOP in State Senate*, VILLAGE VOICE (June 15, 2017), <https://perma.cc/Y2DH-U5EK>.

<sup>208</sup> *NY Governor Vetoes Knife Rights' Knife Law Reform Bill!*, *supra* note 186.

extensive articles documenting the injustice caused by the law's application, highlighting some of the personal stories of people impacted by the law; following the attempts to change the law, as well as its supporters and opponents; uncovering the motives behind the NYPD's distorted interpretation of the law, i.e., fulfilling quotas, easy arrests, and opportunities for promotion; and advocating for changing the law for the same reasons enunciated by other supporters.<sup>209</sup> Articles supportive of gravity knife law reform also appeared in publications such as *Business Insider*,<sup>210</sup> *The Wall Street Journal*,<sup>211</sup> and *Gothamist*.<sup>212</sup>

Despite this overwhelming and bi-partisan support, Governor Cuomo vetoed the bill on December 31, 2016, citing the bill's vagueness and potential for confusion, among other things.<sup>213</sup> Later that year, a new bill was introduced to amend New York's gravity knife law, amending the language to criminalize knives that open "solely" by the force of gravity, removing the term "application of centrifugal force" from the law.<sup>214</sup> This new bill passed by an even wider margin of 136-1 in the Assembly, and a unanimous 62-0 in the Senate, once again indicating a clear understanding by the legislature of a need to enact reform.<sup>215</sup> Yet, on October 24, 2017, Governor Cuomo vetoed the new bill, claiming that the law would essentially legalize all folding knives.<sup>216</sup>

### *B. Opponents of Gravity Knife Law Reform*

The opposition to reforming New York's gravity knife law consisted mostly of law enforcement and prosecutors. The District Attorneys Association of the State of New York wrote Governor Cuomo a letter calling

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<sup>209</sup> See Archive for *Gravity Knives NYC*, VILLAGE VOICE, <https://perma.cc/8YG4-29PE>.

<sup>210</sup> Michelle Mark, *An 'Unbelievably Stupid' New York Law About Knives Could Be Changed Very Soon*, BUS. INSIDER (Apr. 1, 2016, 3:04 PM), <https://perma.cc/P9AU-FCQQ>.

<sup>211</sup> Corinne Ramey, *Knife Ban Spurs Legal Fight Over Arrests in New York City*, WALL STREET J. (June 2, 2016, 8:51 PM), <https://perma.cc/2E3K-L96V>.

<sup>212</sup> Nathan Tempey, *New York May Stop Locking Up Thousands of People A Year for Possessing Pocketknives*, GOTHAMIST (June 15, 2016, 4:25 PM), <https://perma.cc/7EX2-7E6B>.

<sup>213</sup> Memorandum from the Andrew Cuomo, Governor, State of N.Y. to the N.Y. State Assembly (Dec. 31, 2016) [hereinafter Governor's 2016 Veto Memorandum], <https://perma.cc/BS7R-4749> (disapproving of the Bill).

<sup>214</sup> S.B. 4769A, 241st Sess. (N.Y. 2017); Assemb. B. 5667A, 241st Sess. (N.Y. 2017).

<sup>215</sup> *Knife Rights' New York Gravity Knife Law Reform Bill Passes*, AMMOLAND (June 22, 2017), <https://perma.cc/84UH-YWMB>.

<sup>216</sup> Memorandum from the Andrew Cuomo, Governor, State of N.Y. to the N.Y. State Assembly (Oct. 23, 2017) [hereinafter Governor's 2017 Veto Memorandum], <https://perma.cc/BS7R-4749> (disapproving of the Bill).

on him to veto the legislation in June 2016.<sup>217</sup> William Bratton, then the commissioner of the NYPD, also pushed for a veto in a *New York Daily News* op-ed.<sup>218</sup> New York City Mayor Bill de Blasio and Manhattan District Attorney Cyrus Vance, Jr., actively campaigned against the law, and other mayors throughout New York were purportedly opposed to the bill as well.<sup>219</sup> The District Attorneys for Queens, Brooklyn, and the Bronx were also opposed to the legislation.<sup>220</sup> The gist of their opposition boiled down to the same types of appeals to emotion and fear that have always been effective in either sanctioning bad law or stifling reform: that the change would legalize dangerous weapons at a time when knife stabbings were purportedly on the rise, and that such a change would empower criminals and endanger public safety.<sup>221</sup> An analysis of these claims shows that they lack merit.

The first problem with this argument is the lack of proof of causality between so-called gravity knives and increases in crime. Despite opponents' claims of uptick in knife crimes, no opponent had ever provided a number as to how many of those stabbings were done with so-called gravity knives. For example, Governor Cuomo highlighted in his veto memo for the first bill that there were 4,000 stabbings and slashings in 2015, and that half of homicides committed in Manhattan in the first half of 2016 were committed with knives.<sup>222</sup> This is information the governor received from Mayor de Blasio and the NYPD.<sup>223</sup> Yet, there was no breakdown illustrating how many of these stabbings, slashings, and homicides involved gravity knives, or even illegal knives in general. State Senator Martin Golden, the only holdout in the 2016 Senate vote, complained about how gangs such as MS-13 used gravity knives in the commission of horrific crimes, but when pressed for data to back up his claims, he responded, "you have to get them . . . . I can't, I don't have them with me."<sup>224</sup>

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<sup>217</sup> Letter from Thomas P. Zugibe, President, Dist. Attorney's Ass'n of the State of N.Y., to Andrew Cuomo, Governor, State of N.Y. (June 27, 2016), <https://perma.cc/8G47-PXRA> (requesting that the Governor veto the Bill).

<sup>218</sup> William J. Bratton, Opinion, *A Perilous Push to Legalize More Knives: Commissioner Bill Bratton Urges Gov. Cuomo to Veto a Bill Permitting Gravity Knives*, N.Y. DAILY NEWS (June 25, 2016, 5:00 AM), <https://perma.cc/SQN5-TAD3>.

<sup>219</sup> Letter from Bill de Blasio, Mayor, City of N.Y., et al. to Andrew Cuomo, Governor, State of N.Y. (Oct. 7, 2016) [hereinafter Letter from Bill de Blasio], <https://perma.cc/5MCJ-PURH>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*; Bratton, *supra* note 219.

<sup>222</sup> Governor's 2016 Veto Memorandum, *supra* note 214.

<sup>223</sup> See Letter from Bill De Blasio, *supra* note 220.

<sup>224</sup> Campbell, *Gravity Knife Reform Appears Blocked by GOP in State Senate*, *supra* note 210.

In his Daily News op-ed, then-police chief William Bratton “dispute[d] the argument of the gravity-knife-rights advocates that it is largely tradespeople and other legitimate knife users who carry these blades and who are being arrested by overzealous police officers.”<sup>225</sup> However, he put forth no statistics, data, or any other kind of evidence to dispute the argument. The police chief also did not address the evidence from the sample of criminal court complaints examined by the Legal Aid Society indicating that only four out of 254 people charged with gravity knife possession were also charged with possessing the knives with intent to use unlawfully against another.<sup>226</sup> Repeated requests to both the NYPD and Cyrus Vance Jr. to provide numbers and statistics have been unsuccessful, which suggests that such evidence does not exist.<sup>227</sup>

The second problem with this argument is that it is just not true. As Assemblyman Dan Quart pointed out in his memo to the Governor, eight other states recently enacted legislation legalizing gravity knives and/or switchblade knives, which is far broader than what he sought to do in New York.<sup>228</sup> Of the eight states, six saw declines in knife crimes, while two saw slight upticks.<sup>229</sup> If *legalizing* gravity and switchblade knives did not lead to surges in knife crimes, certainly *clarifying the definition* of gravity knives to exclude pocketknives, while keeping true gravity and switchblade knives illegal, is unlikely to lead to increased crime. Critics of law reform certainly have not proven otherwise. Not only do opponents of the bill fail to provide data to show that gravity knives are more dangerous than legal knives, but they have yet to give any example of a jurisdiction which passed similar legislation and subsequently faced a significant increase in knife crimes.

Opponents of law reform consistently mischaracterize the gravity knife reform bill as an attempt to legalize gravity knives, either out of sheer ignorance or wilful confusion. The bill has never sought to legalize gravity knives; it has simply sought to clarify the meaning to avoid confusing common folding knives and pocketknives with actual gravity knives. The supporters of gravity knife law reform, unlike the opponents, understand that gravity knives and pocketknives are distinct kinds of knives. Yet, Cyrus Vance Jr. wrote an op-ed entitled, “Keep the Ban on Gravity Knives” and argued that it is “not advisable” to end a ban.<sup>230</sup> Wil-

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<sup>225</sup> Bratton, *supra* note 219.

<sup>226</sup> Memorandum from Legal Aid Soc’y, *supra* note 189.

<sup>227</sup> *Id.*

<sup>228</sup> Memorandum from Dan Quart, *supra* note 150.

<sup>229</sup> *Id.*

<sup>230</sup> Cyrus R. Vance, Jr., Opinion, *Keep the Ban on Gravity Knives*, N.Y. TIMES (June 6, 2016), <https://perma.cc/D3PX-P3FA>.

liam Bratton's op-ed also classified the bill as "legalizing so-called gravity knives"<sup>231</sup> Governor Cuomo stated in his second veto memo that the legislation would "essentially legalize all folding knives."<sup>232</sup> A true gravity knife, however, is not a folding knife. A *folding knife* is a knife with a blade that is folded into the handle; a *gravity knife* is a knife with a blade that is ejected out of the handle by force of gravity and "centrifugal force."

Given the complete lack of evidence submitted by the bill's critics, why are they opposed to reforming a law that is clearly unjust? Of all the opponents of gravity knife law reform, four players will be examined in depth here: Cyrus Vance, Jr., Manhattan District Attorney; Bill de Blasio, Mayor of New York City; the New York City Police Department; and Andrew Cuomo, Governor of the State of New York. This examination will include an analysis of their positions on issues relating to criminal justice; and will explore what ulterior motives, if any, these players may have in opposing reform.

#### 1. Cyrus Vance, Jr., Manhattan District Attorney

Cyrus Vance, Jr. vigorously opposed the New York legislature's attempts to reform the gravity knife law.<sup>233</sup> He claimed that reforming the law would compromise public safety and endanger New Yorkers at a time when knife crimes are on the rise.<sup>234</sup> Vance provided no real evidence of these claims and, in fact, provided some misinformation.<sup>235</sup> More importantly, the inconsistent manner in which he enforces New York's gravity knife law, as well as the law in general, is suggestive of a dissembler.

Vance ran for the Manhattan District Attorney's office in 2009 on the idea of promoting justice and fairness.<sup>236</sup> However, the prosecutorial practices of the Manhattan District Attorney's office under Vance's reign exemplify the total opposite of fairness. A report by the Vera Institute, released after an extensive study done in partnership with the DA's office (because, apparently, studies are still needed to determine that the criminal judicial system treats Black people and white people differently), showed that race played a role in how people in the system are treated;

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<sup>231</sup> Bratton, *supra* note 221.

<sup>232</sup> Governor's 2017 Veto Memorandum, *supra* note 217.

<sup>233</sup> Vance, Jr., *Keep the Ban on Gravity Knives*, *supra* note 233.

<sup>234</sup> *Id.*

<sup>235</sup> Campbell, *Trump's Immigration Crackdown Sharpens Needs to Cut Bogus 'Gravity Knife' Law*, *Pol Says*, *supra* note 153.

<sup>236</sup> Chip Brown, *Cyrus Vance Jr.'s 'Moneyball' Approach to Crime*, N.Y. TIMES (Dec. 3, 2014), <https://perma.cc/7UHK-NY67>.

Blacks and Latinos are treated worse overall than their white counterparts.<sup>237</sup> Despite this study, racial disparities continue to persist. For example, the DA's office treats Black people more harshly than white people, after similarly situated marijuana arrests.<sup>238</sup> Manhattan is home to less than 20% of New York City's population, but is the source of almost 40% of detainees on Rikers Island, a stunning fact that is partially due to Vance's aggressive prosecution of misdemeanors.<sup>239</sup>

Vance has a record of picking and choosing who he prosecutes, based on the power and prestige of the person and/or organization. For example, Vance declined to prosecute Donald Trump's children Ivanka and Donald Jr. in 2012 despite evidence that both of them committed real estate fraud.<sup>240</sup> Vance went after none of the large financial institutions that played a role in the 2008 financial crisis, choosing instead to prosecute a small, family-owned bank that "boasted one of the lowest default rates in the country."<sup>241</sup> Most infamously, he declined to prosecute Harvey Weinstein in 2015 for sex-related crimes despite having admissions from him that he committed the crime.<sup>242</sup> In both the case with the Trump children and the case with Weinstein, Vance then accepted political contributions from both *after* declining to prosecute their cases.<sup>243</sup> Thus despite his rhetoric, Vance and the Manhattan DA's office are quite deliberately unfair in their prosecutorial practices. They routinely go after poor people and people of color, while leaving affluent white criminal suspects untouched.

The gravity knife issue is another example of Vance's track record. Vance spent several years lobbying against gravity knife reform, both by aggressively opposing any bills in the legislature, and by pressing the

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<sup>237</sup> See generally BESIKI KUTATELADZE ET AL., *VERA INST., RACE AND PROSECUTION IN MANHATTAN* (2014), <https://perma.cc/Y5R9-8TXL>.

<sup>238</sup> Brendan Cheney, *For Non-White New Yorkers, Marijuana Arrests More Often Lead to Conviction*, POLITICO (May 9, 2017, 5:30 AM), <https://perma.cc/PKD6-HJ8D>.

<sup>239</sup> Josie Duffy Rice, Opinion, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), <https://perma.cc/57TC-H3ZP>.

<sup>240</sup> Jesse Eisinger et al., *Ivanka and Donald Trump Jr. Were Close to Being Charged with Felony Fraud*, PROPUBLICA (Oct. 4, 2017, 4:00 AM), <https://perma.cc/723T-RTCD>.

<sup>241</sup> Joe Patrice, *'Small Enough to Jail' Looks at the Only Bank Prosecuted Over the Housing Crisis*, ABOVE THE LAW (Sept. 12, 2017, 1:42 PM), <https://perma.cc/8F7Z-X9W6>; Joe Patrice, *Which Bank Deserves Criminal Prosecution? The Smallest One, Obviously!*, ABOVE THE LAW (Feb. 4, 2013, 4:15 PM), <https://perma.cc/Q6KV-KKSU>.

<sup>242</sup> Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://perma.cc/QA6C-WRNA>; James C. McKinley Jr., *Cy Vance Defends Decision Not to Pursue Case Against Harvey Weinstein*, N.Y. TIMES (Oct. 11, 2017), <https://perma.cc/S33Q-ZFYR>.

<sup>243</sup> Jesse Eisinger et al., *supra* note 243; David Sirota & Jay Cassano, *Harvey Weinstein's Lawyer Gave \$10,000 to Manhattan DA After He Declined to File Sexual Assault Charges*, INT'L BUS. TIMES (Oct. 5, 2017, 6:36 PM), <https://perma.cc/TEG6-RTE5>.

Governor to veto them.<sup>244</sup> Vance was so active in opposing reform that he took out an op-ed in the New York Times to voice his opposition, in part repeating the same talking points about the dangers such a measure would pose for public safety.<sup>245</sup> Yet, he has never prosecuted business establishments which sell the knives he claims to be dangerous.<sup>246</sup> The only time he ever took action against the stores was in 2010, when he and several retailers entered into deferred agreements in which the stores surrendered the “gravity knives” they had in stock, as well as profits made from sales of those knives; and in return, the DA’s office declined to prosecute.<sup>247</sup> Even so, several of the retailers which were party to those agreements have since begun to sell the knives with impunity; the knife education programs that the forfeited profits were supposed to fund never began; and the 1,343 knives seized by the DA’s office are unaccounted for.<sup>248</sup> Most contradictorily, Vance gave Paragon Sports in Manhattan express permission to sell high-end, custom-made knives that, based on the current application of the law, are gravity knives.<sup>249</sup> His actions, therefore, are inconsistent with his purported concern about keeping gravity knives off the streets. It is a contrary notion that he is concerned with gravity knife crimes, yet has taken no meaningful initiative to deal with the sources of these knives.

Why then does Cyrus Vance Jr. oppose gravity knife reform so vehemently even though he has no real concern about these knives? Based on the foregoing, it is likely because the poor and working class, as well as Black and Brown people, have always been and continue to remain easy targets of the judicial system. The government routinely victimizes these populations with impunity, and New York’s gravity knife law is just another tool to allow for more of the same. The Manhattan District Attorney’s office can continue to rack up convictions against vulnerable populations, and it is through the accrual of convictions that the office can acquire and maintain the reputation of being “tough on crime.”

Some would dispute this conclusion and argue that DA Vance is genuinely interested in striking a balance between fair enforcement of the law and public safety, citing the alternative proposals he suggested as proof

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<sup>244</sup> Jon Campbell, *How New York City’s ‘Progressives’ Killed a Critical Criminal Justice Reform*, VILLAGE VOICE (Jan. 5, 2017), <https://perma.cc/QEV5-RSKN>.

<sup>245</sup> Vance, Jr., *Keep the Ban on Gravity Knives*, *supra* note 233.

<sup>246</sup> Memorandum from Dan Quart, *supra* note 150.

<sup>247</sup> Campbell, *Did Authorities in New York City Lose More Than 1,300 Confiscated Knives?*, *supra* note 142.

<sup>248</sup> *Id.*

<sup>249</sup> See Memorandum from Dan Quart, *supra* note 150.

of the same.<sup>250</sup> Assemblyman Quart provided a thorough response to these proposals in his memo to the Governor, showing how they are impractical and unjust.<sup>251</sup> The real hypocrisy, however, is that DA Vance does not even follow his own suggestions. His office prosecutes people for gravity knife possession irrespective of the blade's length, or where it is found; and he prosecutes craftspeople and tradespeople for gravity knife possession even when proof of use in employment is provided, despite his claims to the contrary.<sup>252</sup> For example, the knife possessed by Clayton Baltzer, the bible-college student prosecuted for gravity knife possession, had only a one-inch blade.<sup>253</sup> DA Vance claimed that his office "quickly dismissed cases" where it appears that the accused person uses the knife for employment purposes.<sup>254</sup> This claim is misleading at best and wrong at worst: where defense attorneys provide proof that a knife is used for employment purposes, the Manhattan District Attorney office's best offer is an A.C.D.,<sup>255</sup> which is generally a good disposition, but is not as great as a straight dismissal. Often times, however, the prosecution will offer a plea to a Disorderly Conduct violation, which would require the accused person to admit some guilt and pay, at a minimum, court costs.<sup>256</sup> Outright dismissals on that basis do not happen in Manhattan.

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<sup>250</sup> Specifically, DA Vance suggested the following proposals: 1) defining "gravity knives" as knives having blades in excess of 1.5 inches; 2) exempting from prosecution a person whose knife is "secured in a closed container being used for the purpose of transporting tools, and while using such knife for a legitimate business purpose."; 3) creating a knife licensing agency to allow people to carry gravity knives; 4) defining gravity knives as knives whose blades are "readily released" from the handle or sheath; and 5) creating an affirmative work defense. Memorandum from N.Y. Cty. Dist. Attorney's Office to Senator Diane Savino & Assemblyman Dan Quart (May 19, 2016) [hereinafter Memorandum from Cy Vance] (Addressing, proposed bill S-6483-A) (on file with author).

<sup>251</sup> Memorandum from Dan Quart, *supra* note 150.

<sup>252</sup> Memorandum from Cy Vance, *supra* note 250.

<sup>253</sup> Weiss, *NYPD's Zero Tolerance Stop-and-Frisk Policy Lands Seminary Student in Cell*, *supra* note 40.

<sup>254</sup> Memorandum from Cy Vance, *supra* note 251.

<sup>255</sup> The author polled Legal Aid Society Defense Attorneys from the five boroughs of New York on whether any of the attorneys in their borough's office were successful in getting their client's gravity knife cases dismissed by providing proof of their clients' employment. All five lawyers from Manhattan who responded, stated they were never able to get a case dismissed outright on that basis, but were either offered ACDs, or pleas to Disorderly Conduct. Email from Michelle McGrath, Staff Attorney, Legal Aid Society, to author (Dec. 4, 2017, 10:30 EST) (on file with author); Email from Beverly Vu, Staff Attorney, Legal Aid Society, to author (Dec. 5, 2017, 8:22 EST) (on file with author); Email from Judith Preble, Staff Attorney, Legal Aid Society, to author (Dec. 3, 2017, 18:50 EST) (on file with author); Email from Francis White, Staff Attorney, Legal Aid Society, to author (Dec. 3, 2017, 16:09 EST) (on file with author); Email from Beth Rennekamp, Staff Attorney, Legal Aid Society to author (Dec. 3, 2017, 14:24 EST) (on file with author).

<sup>256</sup> See textual footnote accompanying *supra* note 255.

The fact that Vance enforces the law unevenly “undermines his authority to suggest alternatives to reform.”<sup>257</sup> That he makes no effort to employ his own suggestions makes his position even more hypocritical on this issue. It also calls into question his motives for aggressively opposing reform: is it really about balancing public safety and fair enforcement, or is it about getting easy convictions against powerless New Yorkers? His record on this issue and others suggests the latter.

## 2. Bill de Blasio, Mayor of the City of New York

Mayor de Blasio has also been a fierce critic of gravity knife law reform.<sup>258</sup> He has trumpeted the same talking points about knife crimes being on the rise and the supposed threats to public safety that reform will pose.<sup>259</sup> However, there is no indication or evidence that Mayor de Blasio put pressure on DA Vance or any District Attorney office in New York City to prosecute the business establishments which sell these knives. Nor is there any indication that he has taken DA Vance to task for allowing Paragon Sports to sell knives that are “gravity knives” by both his and DA Vance’s interpretation of the law. His silence suggests that his opposition to gravity knife reform is rooted elsewhere. De Blasio came into office calling for policing reform,<sup>260</sup> but his position on this issue and on policing generally likely shows that he either never had interest in reform, or has chosen to bow to law enforcement for political expediency.

In evaluating New York City’s political landscape, not to be overlooked is the power of the law enforcement lobby. The law enforcement lobby has a powerful presence nationally, and has played a role in both the shaping of legislation and the enforcement of criminal laws.<sup>261</sup> For example, California legalized medical marijuana in 1996. While law enforcement efforts to repeal the law had been unsuccessful, their efforts did succeed in undermining its application.<sup>262</sup> Police unions “leverage the public’s high regard for law enforcement to impede policy changes,” and

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<sup>257</sup> BDS Memorandum, *supra* note 205.

<sup>258</sup> See Letter from Bill De Blasio, *supra* note 220; Memorandum from Sherif Soliman, Director, State Legal Affairs, City of N.Y. (June 14, 2016) [hereinafter Memorandum from Sherif Soliman] (opposing the reform Bill).

<sup>259</sup> Letter from Bill De Blasio, *supra* note 222; Memorandum from Sherif Soliman, *supra* note 262.

<sup>260</sup> David W. Chen, *De Blasio, Announcing Mayoral Bid, Pledges to Help People City Hall Forgot*, N.Y. TIMES (Jan. 27, 2013), <https://perma.cc/7X2C-Z7GB>; Michael Barbaro & David W. Chen, *De Blasio Is Elected New York City Mayor in Landslide*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/nyregion/de-blasio-is-elected-new-york-city-mayor.html> [perma.cc/Y62X-Y2V6].

<sup>261</sup> Katie Rucke, *The Law Enforcement Lobby’s Heavy Hand in American Policy*, MINT PRESS NEWS (May 29, 2014), <https://perma.cc/YSA9-RD2R>.

<sup>262</sup> *Id.*

have lobbied against sentencing reform, reduction of police militarization, and body cameras.<sup>263</sup> In New York City, the police unions are especially powerful, given the fact that the NYPD is the largest police force in America. They have a powerful influence in the state legislature through financing and control of a large bloc of votes; they have received almost unconditional support from the tabloid press, as there are very few things people seeking or holding public office dread more than a headline portraying them as “soft on crime”; and have an arsenal of other effective tools to promote their agenda, including work slowdowns, mass rallies and public denunciations and criticisms.<sup>264</sup> Individual police officers are generally well protected, seldom prosecuted for misconduct, and are almost never found personally liable for even egregious behavior.<sup>265</sup>

It is within this context that the author examines Bill de Blasio, who is also touted as a progressive politician. Mayor de Blasio learned firsthand of the power of the city police union and law enforcement lobby after a shooter killed two NYPD officers in December 2014. This shooting followed a summer of unarmed killings of Black people by police; in New York City specifically, it followed the killings of Akai Gurley and, most infamously, Eric Garner. After the decision was made to not indict Eric Garner’s killer, Officer Daniel Pantaleo, Mayor de Blasio went on record as having advised his biracial son about being careful in any encounters he might have with the police.<sup>266</sup> Ed Mullins, president of the Sergeants Benevolent Association, called de Blasio’s comments “really hypocritical and moronic.”<sup>267</sup> Patrolmen’s Benevolent Association Patrick J. Lynch claimed that the mayor threw the NYPD “under the bus,” and former mayor Rudolph Giuliani—of all people—called the mayor “racist.”<sup>268</sup> After the death of the two NYPD officers in December 2014, both Patrick Lynch and Ed Mullins claimed that Mayor de Blasio had “blood on his hands” for promoting anti-police sentiments.<sup>269</sup> These

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<sup>263</sup> German Lopez, *Why Police Unions Protect the Worst Cops*, VOX (Dec. 18, 2014, 9:40 AM), <https://perma.cc/TA7V-Y5QT>.

<sup>264</sup> David Firestone, *The Rise of New York’s Police Unions*, GUARDIAN (Jan. 13, 2015, 8:46 AM), <https://perma.cc/UJD3-UNFZ>.

<sup>265</sup> Tana Ganeva & Laura Gottesdiener, *Nine Terrifying Facts About America’s Biggest Police Force*, SALON (Sept. 28, 2012, 1:17 PM), <https://perma.cc/45WE-YA28>; Michael Tracey, *The Police Lobby Has Far Too Much Power in American Politics*, VICE (Dec. 4, 2014, 2:00 PM), <https://perma.cc/27ST-LCWF>.

<sup>266</sup> Erin Durkin, *Bill de Blasio Details Talk with Biracial Son About Interacting with Police*, N.Y. DAILY NEWS (Dec. 8, 2014, 6:35 AM), <https://perma.cc/V8FC-B5QD>.

<sup>267</sup> *Id.*

<sup>268</sup> *See id.*

<sup>269</sup> Rocco Parascandola et al., *NYPD Cops Furious with Bill de Blasio Turn Their Backs on the Mayor as he Enters Hospital Where Officers Died*, N.Y. DAILY NEWS (Dec. 21 2014,

claims were patently ridiculous, but effective nonetheless: the relationship between the mayor and the police reached a nadir at this point, and both his approval ratings and his prospects for reelection took a turn for the worst over the following year.<sup>270</sup> This prompted the mayor to try and mend the rift;<sup>271</sup> and de Blasio has seemingly become one with the police ever since. Given this history, the argument can be made that Bill de Blasio's current and apparently unconditional love of the NYPD stems more from having been broken by the law enforcement lobby, one of the most powerful lobbies in New York City, than from his belief in their practices.

This argument loses weight, however, given the fact that it was de Blasio who brought in William Bratton as the police commissioner during his first term. It is difficult to profess to be an honest advocate for policing reform and then bring in a guy like Bratton, who is very much opposed to meaningful reform. Bratton is as out of touch with reality as he is racist; after the police killing of Eric Garner, he actually told the Associated Press that the NYPD "is not a racist organization – not at all."<sup>272</sup> Interestingly enough, Bratton is aware of the abuses that law enforcement has inflicted on Black people throughout American history;<sup>273</sup> thus, one must wonder at what point in Bratton's reality did racism disappear from the department. Bratton is a strong believer in "broken windows policing," the theory that serious crime can be prevented by going after minor offenses, because it is the commission of minor offenses—not lack of economic opportunity, not inequality and inadequacies in education, not unaddressed mental health issues and psychological traumas—that lead to more serious crime. Broken windows policing is given much credit for why crime has gone down in New York City, despite the complete lack of evidence that broken windows policing caused crime to go down.<sup>274</sup>

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7:52 AM), <https://perma.cc/27EZ-D34Z>; Christopher Robbins, "Blood on Many Hands": Police Unions Blame de Blasio for Death of 2 Cops, *GOTHAMIST* (Dec. 21, 2014, 9:00 AM), <https://perma.cc/J4JM-Q9LR>.

<sup>270</sup> Gregory Krieg, *De Blasio Re-Elected in Victory for New York City Progressives*, CNN (Nov. 7 2017, 11:10 PM), <https://perma.cc/J4LH-HNPQ>; Michael M. Grynbaum et al., *Mayor de Blasio Has Lost Support of White New Yorkers, Poll Finds*, *N.Y. TIMES* (Nov. 17, 2015), <https://perma.cc/3QPK-49SM>.

<sup>271</sup> Matt Flegenheimer & Al Baker, *After Public Acrimony, Quieter Steps by Mayor de Blasio and Police to Mend Rift*, *N.Y. TIMES* (Feb. 17, 2015), <https://perma.cc/E9TG-YXET>.

<sup>272</sup> Patrik Jonsson, *NYC Mayor Bill de Blasio Walks Thin Blue Line in Chokehold Aftermath*, *CHRISTIAN SCI. MONITOR* (Aug. 9, 2014), <https://perma.cc/69MK-V3UZ>.

<sup>273</sup> Christopher Mathias, *Bratton Says Police to Blame for 'Worst Parts' of Black History, But Reform Advocates are Unimpressed*, *HUFFINGTON POST* (Feb. 24, 2015, 6:45 PM), <https://perma.cc/G9PT-DNJY>.

<sup>274</sup> Justin Peters, *Broken Windows Policing Doesn't Work*, *SLATE* (Dec. 3, 2014, 5:33 PM), <https://perma.cc/V3HD-9LBF>.

Moreover, broken windows policing has been racist in both its origin and its application, with the overwhelming majority of people given summonses and prosecuted for minor offenses having been Black or Latino.<sup>275</sup> The NYPD's stop-and-frisk program, which Mayor de Blasio publicly denounced during his first mayoral campaign,<sup>276</sup> was born out of broken windows policing.<sup>277</sup> Thus, bringing in Bratton to serve as police chief calls into serious question whether de Blasio's talk of policing reform was genuine, or just talk.

Mayor de Blasio's policy on crime and policing has consisted of almost full support for the NYPD's practices. He has repeatedly approved of broken windows policing, calling it "effective"<sup>278</sup> and "the right approach."<sup>279</sup> This "right approach" has also been a lucrative approach for the city: in 2013, for example, summonses brought in \$8.7 million in revenue for the city's criminal courts.<sup>280</sup> Bill Bratton sought to have 1,000 cops added to the force; after an initial position that no new cops were needed, the de Blasio administration agreed to add that plus an additional 297.<sup>281</sup> De Blasio has defended the NYPD's aggressive policing of fare-beating, asserting that "it's not an economic issue."<sup>282</sup> For the longest while, he opposed the Right to Know Act, two bills that require police to identify themselves, give out business cards during stops, and obtain consent from people before searching them without probable cause.<sup>283</sup> He has claimed that this legislation will "make it harder for police to do their

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<sup>275</sup> Justin Peters, *Loose Cigarettes Today, Civil Unrest Tomorrow*, SLATE (Dec. 5, 2014, 6:37 PM), <https://perma.cc/JA65-2VZG>.

<sup>276</sup> Eliana Dockterman, *New NYC Mayor Drops Stop-and-Frisk Appeal*, TIME (Jan. 30, 2014), <https://perma.cc/47Y8-NY87>.

<sup>277</sup> Mary Emily O'Hara, *NYPD's 'Broken Windows' Policing is the Same Old Stop and Frisk*, VICE (Aug. 6, 2014, 2:00 PM), <https://perma.cc/4U9F-TQWL>; Shankar Vedantam, et al., *How a Theory of Crime and Policing was Born, and Went Terribly Wrong*, NPR (Nov. 1, 2016, 12:00 AM), <https://perma.cc/GK9C-UZEK>.

<sup>278</sup> Jennifer Fermino & Larry McShane, *De Blasio on City Council Decriminalization Proposal: I Agree with NYPD's Bratton on 'Broken Windows'*, N.Y. DAILY NEWS (Apr. 22, 2015, 8:48 PM), <https://perma.cc/9U4P-4VV9>.

<sup>279</sup> Emma Whitford, *De Blasio Calls Broken Windows 'Right Approach' as Commissioner Bratton Steps Down*, GOTHAMIST (Sep. 16, 2016, 4:38 PM), <https://perma.cc/W2B4-U9BW>.

<sup>280</sup> Sara Ryley et al., *Exclusive: Daily News Analysis Finds Racial Disparities in Summonses for Minor Violations in 'Broken Windows' Policing*, N.Y. DAILY NEWS (Aug. 4, 2014, 2:00 AM), <https://perma.cc/CD9V-KDUH>.

<sup>281</sup> Sally Goldenberg, *De Blasio's Surprising Turnaround on Police Headcount*, POLITICO (June 23, 2015, 10:21 PM), <https://perma.cc/8QHB-EJ89>.

<sup>282</sup> Jillian Jorgensen, *De Blasio Maintains There's 'No Evidence' Fare-Beating Is Crime of Poverty*, N.Y. DAILY NEWS (Feb. 9, 2018, 6:41 PM), <https://perma.cc/W8AJ-98RG>.

<sup>283</sup> See Gloria Pazmino & Conor Skelding, *Council Members Could Push Right to Know, Over Objections from de Blasio*, POLITICO N.Y. (Nov. 1, 2017, 5:20 PM), <https://perma.cc/4H7E-9V3K>. But see *De Blasio Says He'll Sign Police Oversight 'Right to Know' Act*, N.Y. 1 (Dec. 13, 2017, 12:04 AM), <https://perma.cc/Z3W9-DK4M>.

jobs.”<sup>284</sup> City Council Speaker Melissa Mark-Viverito, a longtime de Blasio ally until recently,<sup>285</sup> did her part by not allowing the bills to come to a vote.<sup>286</sup> He only supported these bills after they were watered down following negotiations with the NYPD.<sup>287</sup> Mayor de Blasio was so accommodating for the NYPD that Commissioner Bratton made it a point to praise him, saying that he “has funded us in a phenomenal way . . . what more can a Mayor do? . . . He supports me on the major policy issues. [He] is very supportive . . . very engaged.”<sup>288</sup>

Mayor de Blasio has refused to release disciplinary records for NYPD officers, including that of Eric Garner’s killer, ending a practice the NYPD has had for decades, including under right-winged mayors Michael Bloomberg and Rudy Giuliani.<sup>289</sup> De Blasio claimed that state law is to blame for his inability to do so, yet—despite his claims that he would otherwise be willing to release them—he appealed a judge’s contrary reading of the law and subsequent order to turn over the records,<sup>290</sup> an appeal which was successful.<sup>291</sup> De Blasio vowed to veto a City Council bill to criminalize the use of chokeholds just months after the maneuver was used to kill Eric Garner.<sup>292</sup> De Blasio takes credit for ending the NYPD’s unconstitutional use of stop-and-frisk, but the evidence for this claim is tenuous at best and non-existent at worst: stop-and-frisk numbers had fallen drastically by the time de Blasio got elected.<sup>293</sup> For all his anti-Trump talk about standing up to the president’s immigration policy,<sup>294</sup> de

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<sup>284</sup> Alison Fox, *Right to Know Act Pushed by Council Members, Protesters in Front of City Hall*, A.M. N.Y. (Sept. 22, 2016), <https://perma.cc/88UC-YCTK>.

<sup>285</sup> See Gloria Pazmino, *Mark-Viverito, Speakership Winding Down, Steps out to de Blasio’s Left*, POLITICO (May 11, 2017, 12:42 PM), <https://perma.cc/9EQD-UFM6>.

<sup>286</sup> See *New York City Policing Reform, Derailed*, Editorial, N.Y. TIMES (July 25, 2016), <https://perma.cc/H9FT-JP6P>.

<sup>287</sup> See Jillian Jorgensen, *Mayor de Blasio Slammed for Timing on Controversial Police Reform Bill*, N.Y. DAILY NEWS (Jan. 8, 2018, 8:14 PM), <https://perma.cc/HRD2-J8VH>.

<sup>288</sup> Thomas Tracy, *Despite New Yorkers’ Faltering Approval of Mayor de Blasio, Police Commissioner Bratton is a Huge Fan*, N.Y. DAILY NEWS (Nov. 5, 2015, 9:47 AM), <https://perma.cc/RX9X-GR7A>.

<sup>289</sup> See Jillian Jorgensen, *Cuomo Says Releasing NYPD Records is a ‘Decision for New York City’*, OBSERVER (Sept. 8, 2016, 5:41 PM), <https://perma.cc/E9Q5-WT55>.

<sup>290</sup> Matthew Chayes, *Cuomo to de Blasio: ‘Don’t Scapegoat’ on NYPD Secrecy*, NEWSDAY (Sept. 10, 2016), <https://perma.cc/GRX7-B8LY>.

<sup>291</sup> Robert Lewis, *City Wins Two Cases to Keep Police Disciplinary Records Secret*, WNYC (Mar. 30, 2017) <https://www.wnyc.org/story/city-wins-two-cases-keep-police-discipline-records-secret/>

<sup>292</sup> J. David Goodman, *Mayor de Blasio Vows to Veto Chokehold Bill*, N.Y. TIMES (Jan. 14, 2015) <https://perma.cc/V7MB-8G6H>.

<sup>293</sup> Azi Paybarah et al., *De Blasio on Stop and Frisk: ‘We Changed it Intensely’*, POLITICO (Dec. 8, 2016), <https://perma.cc/NP3D-DDWT>.

<sup>294</sup> Mazin Sidahmed, *Mayor Bill de Blasio vows to defend New Yorkers from Trump presidency*, The Guardian (Nov. 21, 2016) <https://www.theguardian.com/us->

Blasio has done very little to protect non-citizens in New York City; in fact, his continued support of broken windows has endangered the very population he professes to seek to protect from President Donald Trump.<sup>295</sup> In sum, Mayor de Blasio is no friend of advocates for criminal justice reform.

Gravity knife prosecution and reform is a telling example of Mayor de Blasio's pattern of marching along with the NYPD. His office wrote a memorandum to the legislature in June 2016 urging them to disapprove of the legislation, citing two examples—one of them false<sup>296</sup>—in support of his claim that so-called gravity knives are dangerous.<sup>297</sup> He co-authored a similar memorandum to the governor in October 2016. He has continuously trumpeted the NYPD's claims that knife stabbings are on the rise, and has similarly provided no evidence that this uptick in crime was caused by illegal knives. That his position on this issue has put him squarely at odds with just about every criminal justice reform advocate that has taken a public position on this issue is of no moment to the mayor; the NYPD opposes gravity knife reform, so he opposes it as well. De Blasio's motive for opposing gravity knife reform likely stems from a lack of concern due to the very nature of politics: de Blasio bows to the police lobby either willingly, or out of fear that his political career could be ruined. As the city's economic head, however, Mayor de Blasio may also have a financial motive: broken-windows policing, which includes gravity knife arrests, has brought in substantial revenue for the city.<sup>298</sup>

### 3. The New York City Police Department

Why would the NYPD oppose gravity knife reform? According to Bill Bratton, former NYPD commissioner, legalizing gravity knives would compromise public safety and “endanger[] every police officer who makes a street stop or a car stop.”<sup>299</sup> This familiar appeal to fear and increase in crime might seem earnest, but the reality is that the NYPD's opposition has nothing to do with public safety; if it did, the organization

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news/2016/nov/21/bill-de-blasio-defend-new-york-trump-presidency; Nina Agrawal, *It may be Trump's hometown, but it's de Blasio's city – and will be for the next four years*, Los Angeles Times (Nov. 7, 2017), <https://perma.cc/7QPG-EQPF>

<sup>295</sup> See Vincent Barone & Alison Fox, *De Blasio Defends NYPD Fare-Beating Policing Amid Deportation Fears*, A.M. N.Y. (Mar. 2, 2017), <https://perma.cc/5UGX-J3P6>.

<sup>296</sup> Jon Campbell, *Gravity Knife Reform Passes Legislature, Over Objections from de Blasio*, VILLAGE VOICE (June 19, 2016), <https://perma.cc/K5P8-AGCM>.

<sup>297</sup> Memorandum from Sheriff Soliman, *supra* note 258.

<sup>298</sup> Sara Ryley et al., *Exclusive: Daily News Analysis Finds Racial Disparities in Summonses for Minor Violations in 'Broken Windows' Policing*, N.Y. DAILY NEWS (Aug. 4, 2014), <https://perma.cc/HQ4K-APJP>.

<sup>299</sup> Bratton, *A Perilous Push to Legalize More Knives: Commissioner Bill Bratton Urges Gov. Cuomo to Veto a Bill Permitting Gravity Knives*, *supra* note 221.

would go after the retailers and business establishments that sell these knives. They would have also opposed DA Vance's action of expressly authorizing Paragon Sports to sell high-end knives that are, by their interpretation, gravity knives. The logic here is not deep: if the state wanted to stop the spread of something, they would go after the users *and* the suppliers. This happens with illegal drugs, guns, and other contraband: both possession and sale are criminalized; so the fact that this does not happen in the context of gravity knives fatally compromises this premise. The NYPD's motive for opposing gravity knife reform likely boils down to two words: filling quotas.<sup>300</sup>

New York City and New York State banned the use of quotas in 2010,<sup>301</sup> and NYPD top brass has continuously denied the use of quotas. In response to allegations by Officer Edwin Raymond about the department's use of quotas, then-commissioner Bratton said, "bull---- is my response to that."<sup>302</sup> Oftentimes, however, the best evidence against a person is his or her own mouth. The Village Voice recorded some of the comments written by NYPD officers on an online NYPD officer forum called Thee Rant.<sup>303</sup> Some comments included: "discretion has been taken away and it's all about numbers;" "rookies stalking the subways between 5-7pm to catch a construction worker wearing one so they could get a . . . Big CPW [criminal possession of a weapon] arrest;" "[t]here was a time when a cop had discretion and used common sense when enforcing the law. Now we look at the public as a 'number' to use to keep our steady tours and make OT and we wonder why the public hates cops."<sup>304</sup> Several NYPD whistleblowers have come forward and admitted the existence of quotas, and filed a federal class-action lawsuit against the NYPD alleging the same.<sup>305</sup> Other officers have also sued the NYPD for retaliation and

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<sup>300</sup> See Jon Campbell, *A Fervent Cop Supporter Changes His Mind About NYPD After Gravity Knife Arrest*, VILLAGE VOICE (Jan. 29, 2015), <https://perma.cc/8ERL-PGSD>.

<sup>301</sup> But see Camille Augustin, *NYPD Officers Speak On Their Tactics for Fulfilling Arrest Quotas Despite 2010 Ban*, VIBE (Apr. 5, 2016), <https://perma.cc/R9F3-GQCM>; Sarah Wallace, *I-Team: More NYPD Officers Say There's Proof of Quota-Driven Arrests*, NBC N.Y. (Mar. 31, 2016, 12:17 AM), <https://perma.cc/568P-B4RH>.

<sup>302</sup> Ryan Sit et al., *Cops Suing NYPD Say Police Use Quotas, and It's Making the Subways More Dangerous*, N.Y. DAILY NEWS (Mar. 1, 2016), <https://perma.cc/MVB5-FCLX> (statement of William J. Bratton).

<sup>303</sup> Campbell, *How a '50s-Era New York Knife Law Has Landed Thousands in Jail*, *supra* note 22; Campbell, *A Fervent Cop Supporter Changes His Mind About NYPD After Gravity Knife Arrest*, *supra* note 300.

<sup>304</sup> Campbell, *A Fervent Cop Supporter Changes His Mind About NYPD After Gravity Knife Arrest*, *supra* note 301 (statements of police officer on online forum).

<sup>305</sup> See *Raymond v. City of New York*, No. 15-CV-6885-LTS-HBP, 2017 WL 892350 (S.D.N.Y. Mar. 6, 2017); see also Wallace, *supra* note 301.

other claims in response to their objecting to its quota system.<sup>306</sup> Some of those suing officers provided recordings of their supervisors who pushed for certain amounts of summonses to be written, arrests to be made, and/or stop-and-frisks to be performed.<sup>307</sup> Former prosecutors have also admitted to the same; Matt Galluzzo, a former Manhattan A.D.A., explained to the Village Voice how arrests for this offense helps officers meet quotas perhaps more so than arrests for other offenses: “You don’t have to fight the guy, you don’t have to chase him . . . it’s an easy way to make an arrest. And they’re under pressure to make arrests.”<sup>308</sup>

The City recently settled a class action lawsuit, which alleged that police officers wrote over 900,000 bogus summonses to fill quotas, for a massive \$75 million.<sup>309</sup> This settlement followed a court battle that featured apparent evidence destruction on the part of the NYPD.<sup>310</sup> Of course, the NYPD admitted no wrongdoing in the settlement, but nonetheless agreed to instruct their officers about the illegality of quotas.<sup>311</sup> Despite this settlement, people in the neighborhood, like Sharif Stinson, the lead plaintiff in that lawsuit, believe that cops still have quotas.<sup>312</sup> Relevant statistics at the very least suggest that a quota system exists, as traffic ticket volumes start off low during the beginning of a given month, but surge during the middle and the end, despite a lack of a corresponding

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<sup>306</sup> See, e.g., *Schoolcraft v. City of New York*, 81 F. Supp. 3d 295 (S.D.N.Y. 2015); *Matthews v. City of New York*, No. 12 CV 1354(BSJ), 2012 WL 8084831 (S.D.N.Y. April 12, 2012); Christopher Mathias, *NYC To Pay \$280,000 Over Cop Who Exposed City’s Quota System*, HUFFINGTON POST (Dec. 7, 2015), <https://perma.cc/TL2E-9HW4>; *\$600K Settlement for NYPD Officer Who Made Quota Tapes*, NBC N.Y. (Sept. 29, 2015, 10:35 PM), <https://perma.cc/2B9Z-XXQG>.

<sup>307</sup> Wallace, *supra* note 301; John Marzulli, *Hear it: NYPD Cop Recorded Supervisors Complaining He Didn’t Stop Enough Minority Teenagers or Write Enough Summonses*, N.Y. DAILY NEWS (July 13, 2016, 7:21 PM), <https://perma.cc/B96Z-UWMQ>.

<sup>308</sup> Jon Campbell, *Knife Law Reformers Make Last-Minute Push to Stop ‘Most Discriminatory Criminal Justice Practice in New York State’*, VILLAGE VOICE (Nov. 30, 2016), <https://perma.cc/V7TP-QEEW>.

<sup>309</sup> See *Stinson v. City of New York*, 256 F.Supp.3d 283 (S.D.N.Y. 2017); see also Order Granting Preliminary Approval of Proposed Settlement, Approving Proposed Notice Plan, and Appointing Settlement Claims Administrator, *Stinson v. City of New York*, 256 F.Supp.3d 283 (S.D.N.Y. 2017) (No. 10 CV 4228 (RWS)), 2017 WL 1135865; John Annese, *Judge Finalizes \$75M Settlement in Class Action Against NYPD Over Summons Quotas*, N.Y. DAILY NEWS (June 13, 2017, 7:07 AM), <https://perma.cc/3FDB-UU2E>.

<sup>310</sup> Stephen Rex Brown, *Exclusive: NYPD Accused of Destroying Evidence Showing Cops Issued Bogus Summonses to Meet Quota*, N.Y. Daily News (July 6, 2015, 2:30 AM), <https://perma.cc/DJ28-8ESS>.

<sup>311</sup> Annese, *supra* note 310.

<sup>312</sup> Andrew Keshner & Thomas Tracy, *NYPD Chief James O’Neill Pledges Wrath Against Quota-Chasing Cops*, N.Y. DAILY NEWS (May 12, 2017, 7:14 PM), <https://perma.cc/66T5-XQYN>.

increase in either vehicle collisions or crime reports for Vehicle and Traffic Law violations.<sup>313</sup> Promotions within the NYPD are likely still based upon, and performance still measured by, the numbers and the kinds of offenses police officers arrest or summons people for,<sup>314</sup> despite the top brass' claims to the contrary.<sup>315</sup> For police officers, gravity knife arrests are simply an additional means to an end.

#### 4. Andrew Cuomo, Governor of the State of New York

Of the four biggest opponents to gravity knife law reform, Governor Andrew Cuomo presents the most complex picture. Governor Cuomo has presided over a time period in which the state has taken apparent steps towards meaningful criminal justice reform. Cuomo signed into law a bill to raise the age in which people are prosecuted as adults from 16 to 18, joining the rest of America except North Carolina.<sup>316</sup> Cuomo closed down thirteen prisons in 2011 and has vowed to close down more.<sup>317</sup> In August 2017, Cuomo announced an agreement to partner with several legal organizations to expand pro bono resources for state prisoners seeking clemency.<sup>318</sup> He signed an executive order directing state agencies to work towards separating teenage inmates from adults.<sup>319</sup> He also announced an initiative to fund programs to the tune of \$7.5 million to offer college courses to incarcerated persons, with Manhattan District Attorney Cyrus Vance financing these programs.<sup>320</sup> He also signed into law a bill that, for the first time ever, would allow for criminal convictions to be sealed in New York under particular conditions.<sup>321</sup> Cuomo has certainly taken action on the criminal justice front that should be lauded.

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<sup>313</sup> Jonathan Auerbach, *No Urban Legend: Stats Show NYPD Traffic Tickets More Likely at Month's End*, N.Y. DAILY NEWS (Aug. 31, 2017, 5:00 AM), <https://perma.cc/2JBS-M5WR>.

<sup>314</sup> Campbell, *A Fervent Cop Supporter Changes His Mind About NYPD After Gravity Knife Arrest*, *supra* note 301.

<sup>315</sup> Keshner & Tracy, *supra* note 313.

<sup>316</sup> See Jesse McKinley, *'Raise the Age,' Now Law in New York, Is Still a Subject of Debate*, N.Y. TIMES (Apr. 10, 2017), <https://perma.cc/3GD5-K2B7>.

<sup>317</sup> Brian Mann, *Governor Cuomo Says He Will Close More State Prisons*, N. COUNTRY PUB. RADIO (Jan. 11, 2016), <https://perma.cc/KEP6-ZUEF>.

<sup>318</sup> Josefa Velasquez, *New York Expanding Pro Bono Clemency Program*, N.Y.L.J. (Aug. 21, 2017, 4:02PM), <https://perma.cc/4U5S-XZTX>.

<sup>319</sup> *Id.*

<sup>320</sup> Press Release, Manhattan Dist. Attorney's Office, Governor Cuomo and DA Vance Announce Statewide Initiative to Provide College Classes in Prison (Jan. 11, 2016) <https://perma.cc/9YRH-SAY2>; see also LAC Praises "Right Priorities" Criminal Justice Initiative Announced by NY Governor Andrew Cuomo, LEGAL ACTION CTR., <https://perma.cc/T5XV-RYB3>.

<sup>321</sup> *New York Surprises with Broad New Sealing Law*, COLLATERAL CONSEQUENCES RES. CTR. (Apr. 19, 2017), <https://perma.cc/WY94-AV2U>.

When one examines these initiatives and new laws, however, a common theme is evident. Governor Cuomo's focus has been largely on prisoners' rights, as well as issues regarding individuals post-conviction. By the time people are in prison, they have already gone through the judicial process and dealt with the police, the prosecution, and judges. Helping incarcerated persons go to college, or separating incarcerated teenagers from incarcerated adults, or providing services to incarcerated persons seeking clemency, does not impact the NYPD, other police departments, or prosecutor's offices. Closing prisons is unlikely to rub those players the wrong way, especially since: 1) both crime and the number of prisoners have declined statewide;<sup>322</sup> and 2) all of the prisons that were closed were either minimum security or medium security.<sup>323</sup> Thus, this is a relatively safe area for Cuomo to enact "reform," because it allows him to maintain the image of a progressive reformer without having to directly pit himself against law enforcement or prosecutors. Governor Cuomo does not take positions that require him to deal with arbitrary and racist police and prosecutorial behavior; doing so would require him to confront those players, and that could be at the detriment of his political career. In short, Cuomo would much rather deal with the cure than with prevention.

When it comes to the type of reform that changes the status quo for police and prosecutors, Governor Cuomo has been found wanting. Cuomo has talked a lot about reforming New York's laws with regards to bail, speedy trial, and discovery;<sup>324</sup> yet he has taken few meaningful steps to reform these laws.<sup>325</sup> This is particularly problematic since he has repeatedly criticized New York City Mayor Bill de Blasio for his "impotence" with regards to closing Rikers Island,<sup>326</sup> but without significant

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<sup>322</sup> Paul Post, *Closed Prisons in Rural Areas Are a Tough Sell*, N.Y. TIMES (Apr. 10, 2017), <https://perma.cc/BD4W-L8RM>.

<sup>323</sup> *Id.*

<sup>324</sup> Shaun King, *KING: It's Time For New York To Do Right By Kalief Browder's Family And Pass Reasonable Criminal Justice Reforms*, N.Y. DAILY NEWS (Jan. 18, 2017, 12:08PM), <https://perma.cc/BGN8-74VG>; James C. McKinley, Jr., *Cuomo, in Bid to Help Poor, Proposes Ending Cash Bail for Minor Crimes*, N.Y. TIMES (Jan. 2, 2018), <https://perma.cc/Z2VX-8VN6>; Press Release, *Statement from Vera President Nicholas Turner on Governor Cuomo's "New York Promise" Agenda*, VERA INST. OF JUSTICE (Jan. 9, 2017), <https://perma.cc/X94U-HL4B>.

<sup>325</sup> Matthew Hamilton, *Kalief Browder's Brother Pushes Speedy Trial Reform in Albany*, TIMES UNION (Mar. 27, 2017, 4:16 PM), <https://perma.cc/39YN-LPVR>; Glenn E. Martin, *As We Close Rikers, Setting our Sights on Essential State-Level Reforms*, GOTHAM GAZETTE (Oct. 19, 2017), <https://perma.cc/36RM-BEEM>; Julio Pabón, *Gov. Cuomo: NY State Can't Be a "Great State" Unless You Change this Law*, HUFFINGTON POST (Apr. 7, 2017, 12:50 AM), <https://perma.cc/426G-2ZQV>.

<sup>326</sup> Ellen Moynihan & Ginger Adams Otis, *Cuomo Knocks the de Blasio Administration's 'Impotence' for Keeping Rikers Island Open*, N.Y. DAILY NEWS (Mar. 14, 2017, 12:26 AM), <https://perma.cc/BPB8-CPJD>.

bail reform, discovery reform, and speedy trial reform, closing Rikers will be a lot harder and more impractical to do.<sup>327</sup> His bail reform proposals included a “dangerous to the community” factor that does not exist in the current bail statute and runs afoul of the purpose of bail: ensuring the defendant’s return to court.<sup>328</sup> In April 2017, Cuomo enacted a law that supposedly requires videotaping custodial interrogations for certain violent offenses,<sup>329</sup> but this law has almost no teeth: there are several “good cause” provisions that will exempt law enforcement from having to follow the rule,<sup>330</sup> some of which the police could theoretically invoke, even if untrue; and even if none of the “good cause” exemptions are found, suppression of a non-recorded statement solely on the basis that it was not recorded is barred under the law.<sup>331</sup> Further, Cuomo has done just about nothing on issues regarding discriminatory or racist policing.<sup>332</sup>

Cuomo’s opposition to gravity knife law reform makes sense in this context. To pass gravity knife law reform is to change how the law is enforced and prosecuted. Both law enforcement and prosecutors are uniformly against reform, so changing the law would put Cuomo in direct opposition with those forces. His two veto memos had the prints of the NYPD and the Manhattan District Attorney’s Office all over them. In his veto memo, Cuomo claimed that stabbings were on the rise and that there were 4,000 stabbings in 2015, some of the only statistics provided by the NYPD and the mayor’s office on this issue.<sup>333</sup> His “proposed modifications” read much like DA Vance’s proposals that Assemblyman Quart discredited.<sup>334</sup> He talked about how the second bill “would essentially legalize all folding knives,” indicating a continued confusion perpetrated by law enforcement and prosecutors that gravity knives are folding knives that a person can open with a flick of the wrist.<sup>335</sup> And in both veto

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<sup>327</sup> Kenneth Lovett, *Prison Reform Group Demanding Rikers Closure Vows to Hound Cuomo*, N.Y. DAILY NEWS (Sept. 4, 2017, 4:00AM), <https://perma.cc/TQE3-7ZPS>.

<sup>328</sup> David Howard King, *‘Dangerousness’ Aspect of Cuomo’s Bail Plan Troubles Reformers*, GOTHAM GAZETTE (Jan. 22, 2016), <https://perma.cc/BD6E-L8MQ>; Sarina Trangle, *Lawmaker: Cuomo’s Plan to Make Public Safety Risk Part Of Bail Decision Unpopular With Assembly Democrats*, CITY & ST. N.Y. (Feb. 1, 2017), <https://perma.cc/XK9R-L3T3>.

<sup>329</sup> James Ford, *Law Passes in NY Mandating that Police Interrogations Be Recorded on Video*, PIX11 (Apr. 17, 2017, 5:30 PM) <https://perma.cc/TGG4-CSEY>.

<sup>330</sup> N.Y. CRIM. PROC. LAW § 60.45(3)(c) (McKinney 2018).

<sup>331</sup> *Id.* § 60.45(3)(b), (d).

<sup>332</sup> Joseph Goldstein & J. David Goodman, *Criminal Justice Reforms Stall in a Liberal Capital: New York*, N.Y. TIMES (Aug. 21, 2016), <https://www.nytimes.com/2016/08/22/nyregion/criminal-justice-reforms-new-york.html> [perma.cc/BUM9-L345].

<sup>333</sup> Letter from Bill De Blasio, *supra* note 219.

<sup>334</sup> Governor’s 2016 Veto Memorandum, *supra* note 213; Memorandum from Cy Vance, *supra* note 250.

<sup>335</sup> Governor’s 2017 Veto Memorandum, *supra* note 216.

memos, Cuomo has made clear his unwillingness to go along with any initiative that law enforcement opposes.

If the rumors that Governor Cuomo intends to make a run for president in 2020 are correct, Cuomo will likely need the support of the law enforcement lobby to win New York. And where police departments, police unions, and prosecution offices across New York have arrayed themselves against a particular initiative, adopting that initiative can hurt Cuomo's chances. Even if he were not running for president, however, he would likely need law enforcement support to win a third term as governor.<sup>336</sup> That support may be compromised if he passes gravity knife reform legislation.

#### CONCLUSION

Gravity knife prosecution in New York City is a classic example of the existence of law and order with no justice. At the root of it all is a law, a law that prohibits the possession of a particular type of knife. That type of knife has all but disappeared, but the law is now being interpreted in New York City to criminalize a whole class of knives that were never targeted under the statute. New York courts have consistently made prosecuting such offenses easy and defending against such charges difficult. The law is frequently applied in an uneven manner: while business establishments have largely gone unpunished for selling these knives, unsuspecting New Yorkers—most of them Black or Brown—who innocently purchase these knives are arrested, prosecuted, imprisoned and, if they are not citizens, denied citizenship or even deported, for simple possession.

The order, or the sanctioned processes and procedures, for correcting the resulting unfairness have hit a dead end. Constitutional challenges to the law have been continuously rejected. A few successes have come from seeking dismissals in furtherance of justice, but this avenue is limited and only solves the problem on an individual basis. Further, a big argument against such dismissals is that the judiciary is usurping the legislative function by deeming the law unfair. Legislative attempts to change the law have been unsuccessful; the bills first died out in the State Senate, and then were vetoed twice by Governor Cuomo. Thus, in spite of the existence of law and order, the unfair treatment of New Yorkers continues unabated and unaddressed. This reality, simply put, is unjust.

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<sup>336</sup> See Firestone, *supra* note 267; Tracey, *supra* note 268.