

Unbridled Prosecutorial Discretion and Standardless Death Penalty Policies: The Unconstitutionality of the Washington Capital Punishment Statutory Scheme

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I. INTRODUCTION

The statutory scheme for capital punishment in Washington State¹ vests local county prosecuting attorneys with the power to seek the execution of murderers in certain circumstances. But nothing requires prosecutors to seek capital punishment. The choice is theirs and theirs alone. No judge may compel a prosecutor to seek death. Alternatively, no judge may prevent a prosecutor who wishes to seek the death penalty from doing so. And given the demise of the grand jury, there is no check at all against overzealous prosecutorial decisions to seek death. While a jury may ultimately refuse to authorize capital punishment, the prosecutor alone has the power to trigger the process of forcing defendants to run the gauntlet of a death penalty trial.

This awesome power granted to Washington county prosecutors is not only unchecked by any other institution, it is unguided by any set of meaningful standards. Prosecutors are authorized—but not required—to seek death in cases of aggravated first degree murder where there is “reason to believe that there are not sufficient mitigating circumstances to merit leniency.”² But the legislature has not said what constitutes a miti-

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1. If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

WASH. REV. CODE § 10.95.040(1) (1981).

2. *Id.*

gating circumstance, nor how many such circumstances are "sufficient" for leniency, nor whether some mitigating circumstances are more meritorious than others. Every county prosecutor in the state is left to decide these issues based upon his or her own moral philosophy and conscientious principles.

Perhaps no other legislative mandate delegates so much power, in a manner so unchecked and unguided by standards or definitions, than this legislative decision to anoint county prosecutors as individual guardians of the moral conscience of our local communities. The legislature has given prosecutors unfettered power to request executions, or not to request executions, as they alone see fit.

This Article advances six reasons why Washington's statutory scheme for capital punishment should be deemed unconstitutional. As set forth below, the current death penalty statutes violate the separation of powers doctrine, the grand jury indictment clause of the fifth amendment, the equal protection clauses of the fourteenth amendment and article I, section 12 of the Washington State Constitution, the vagueness doctrine of the due process clause, and the doctrine of unlawful delegation of legislative power. Finally, it promotes an unequal administration of capital punishment in further violation of the guarantee of equal protection of the law.

II. SEPARATION OF POWERS

The Washington Supreme Court has repeatedly recognized that "[t]he separation of powers doctrine is a fundamental principle of the American political system."³ It has not hesitated to rigorously enforce the separation of powers doctrine where one branch of government has intruded upon the province of another.⁴ The supreme court has traced the history of the doc-

3. *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wash. 2d 443, 453, 635 P.2d 730, 736 (1981). Article I, § 32 of the Washington State Constitution provides: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."

4. The legislative, executive, and judicial functions have been carefully separated and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts.

trine back to the eighteenth century, noting that the interrelated concepts of separation of powers, checks and balances, and inherent judicial power, "are major constituents of our governmental framework."⁶ The philosophers of the Enlightenment era, John Locke, Henry St. John, Viscount Bolingbroke, and Baron de Montesquieu "were influential proponents of their individual versions of the doctrine."⁶ By 1776, the separation of powers doctrine "was being advanced as the only coherent constitutional theory upon which an alternative to colonial forms of government could be based."⁷

While the doctrine is perhaps best known in its national context, "[t]he constitutions of several states, inheritors of the federal constitutional legacy, also embody the principle."⁸ The Washington Supreme Court has twice recognized that under some circumstances, in order to preserve judicial independence and the continued vitality of the separation of powers doctrine, courts may, upon clear and cogent proof of a need for additional financial resources, compel the legislature to authorize the expenditure of public funds necessary for the operation of the judicial system.⁹ "Separation of powers . . . dictates that the judiciary be able to insure its own survival when insufficient

Kassler, 96 Wash. 2d at 453, 635 P.2d at 736 (quoting *In re Bruen*, 102 Wash. 472, 478, 172 P. 1132, 1154 (1918)).

5. *In re Juvenile Director*, 87 Wash. 2d 232, 238, 552 P.2d 163, 167 (1976).

6. *Id.* at 238, 552 P.2d at 167.

7. *Id.* at 239, 552 P.2d at 167-68.

8. *Id.* at 240, 552 P.2d at 168.

The doctrine of separation of powers is not confined to the federal constitution. As noted by Justice William O. Douglas in *The Anatomy of Liberty, The Rights of Man Without Force* (1963), at page 54:

Six of the original states explicitly affirmed the doctrine of the separation of powers. Today the theory is formally announced in about forty state constitutions. The other states make no such formal declaration; nor does the Constitution of the United States. Yet the same result is reached because these other states' constitutions, as the federal constitution, create three departments of government, vesting the executive power in one, the legislative power in another, and the judicial power in a third.

Washington is among those states which recognize the separation of powers theory in its constitution by vesting the "judicial power of the state" in a separate branch of government. Const. art. 4 § 1. . . . We have recognized and applied the doctrine of separation of powers in *Besselman v. Moses Lake*, 46 Wn.2d 279, 280 P.2d 689 (1955), and *Tacoma v. O'Brien*, 85 Wash. 2d 266, 534 P.2d 114 (1975).

Zylstra v. Piva, 85 Wash. 2d 743, 754, 539 P.2d 823, 829 (1975).

9. *In re Juvenile Director*, 87 Wash. 2d at 245-52, 552 P.2d at 170-75.

funds are provided by the other branches."¹⁰ The court has forbidden the legislature to make adjudicatory decisions on legal issues such as what constitutes "economic impossibility."¹¹

Applying the separation of powers doctrine, the court recently held unconstitutional a statute which purported to allow escrow agents to prepare documents for real estate transactions as an encroachment on the judicial function of regulating the practice of law.¹² Most importantly, the court held unconstitutional a statute which granted prosecuting attorneys the power to veto a deferred prosecution as an encroachment upon the judicial function of sentencing.¹³

A legislative scheme which grants the prosecutor a veto power over the applicability of the death penalty violates the doctrine of separation of powers by unconstitutionally usurping the judicial sentencing function. The current statutory scheme provides that upon conviction of aggravated first degree murder, a special sentencing proceeding to consider the imposition of the death penalty "shall be held *if* a notice of special sentencing proceeding was filed and served as provided by RCW [Revised Code of Washington] 10.95.040."¹⁴ The legislature has thus made the act of the prosecutor in filing the notice a mandatory prerequisite for any death penalty proceeding. Without the filing of such a notice, the court is powerless to consider imposing a sentence of death.

This legislative scheme is similar to the scheme struck down as unconstitutional in *State v. Cascade District Court*.¹⁵ In *Cascade*, the court examined RCW 10.05,¹⁶ which provides for deferred prosecution in courts of limited jurisdiction where the accused's criminal conduct is caused by alcohol, drug, or mental problems for which the defendant is in need of treatment. A defendant who wishes to obtain a deferred prosecution treatment program must file a petition at the time of arraignment.¹⁷ RCW 10.05.030 then purports to grant the prosecuting attorney

10. *Id.* at 245, 552 P.2d at 170-71.

11. *O'Brien*, 85 Wash. 2d at 272, 534 P.2d at 117. See also *Plummer v. Gaines*, 70 Wash. 2d 53, 58, 422 P.2d 17, 21 (1966) (defining what constitutes a "general election").

12. *Kassler*, 96 Wash. 2d at 453, 635 P.2d at 736.

13. *State v. Cascade Dist. Ct.*, 94 Wash. 2d 772, 779-82, 621 P.2d 115, 118-21 (1981).

14. WASH. REV. CODE § 10.95.050 (1981) (emphasis added).

15. 94 Wash. 2d 772, 621 P.2d 115 (1981).

16. WASH. REV. CODE § 10.05.020 (1981).

17. *Id.* § 10.05.010.

the power to veto any further action on the petition.¹⁸ According to the legislative scheme, if the prosecutor agrees to a diagnostic referral and evaluation, the defendant may subsequently submit a proposed treatment plan to the court for the court's approval.¹⁹

In *Cascade*, the prosecution conceded that "the decision to defer prosecution following an evaluation and written report is *entirely a judicial function*."²⁰ But the state contended that the decision whether to continue arraignment and refer the accused for a diagnostic evaluation was not a judicial function. The supreme court's inquiry thus focused on whether the decision to refer for evaluation was "essentially judicial or prosecutorial, and if wholly or partially judicial, whether the prosecution may exercise a 'veto' over the court's decision."²¹

After reviewing various statements of legislative purpose, the *Cascade* court concluded "that the decision to refer an accused for a diagnostic evaluation is essentially a *sentencing alternative* and therefore at least partially a judicial act."²² The court emphasized that the decision to approve the sentencing alternative of a deferred prosecution "involves an examination of the circumstances of the particular case, weighing of the allegations, hearing argument contrary to the petition, and resolving the disputes between the parties. *These are fundamentally judicial acts*."²³

The state argued that vesting the court with the authority to initiate consideration of a deferred prosecution invaded the charging function traditionally reserved to the prosecuting attorney. Recognizing that a deferred prosecution was a sentencing (or "dispositional") alternative, the court rejected the state's argument, noting that "[t]his contention overlooks the fact that the court's disposition of the petition *follows* the prosecutor's decision to charge; once the accused has been charged and is

18. "The arraigning judge upon consideration of the petition *and with the concurrence of the prosecuting attorney* may continue the arraignment and refer such person for a diagnostic investigation and evaluation to an approved alcohol treatment facility. . . ." *Id.* § 10.05.030 (emphasis added).

19. *Id.* §§ 10.05.040-.060.

20. 94 Wash. 2d at 776, 621 P.2d at 118 (emphasis in original deleted) (emphasis added).

21. *Id.* at 775, 621 P.2d at 117.

22. *Id.* at 777, 621 P.2d at 118 (emphasis in original).

23. *Id.* at 777-78, 621 P.2d at 118-19 (emphasis added).

before the court, the charging function ceases."²⁴

Having concluded that consideration of a deferred prosecution petition was essentially a judicial function, the *Cascade* court then observed that by making the concurrence of the prosecutor a prerequisite for approval of the petition, "the statute permits a prosecutor to wholly arbitrarily veto a judicial disposition."²⁵ By granting the executive branch of government a complete veto over the exercise of a judicial function, the statute was deemed to violate the separation of powers doctrine.²⁶

The statute at issue here, RCW 10.95.040,²⁷ is fatally flawed in the same manner as the statute struck down in *Cascade*. It too grants the prosecutor an arbitrary veto power over the availability of a sentencing alternative. Like the filing of the petition for a deferred prosecution, the filing of notice of a special sentencing proceeding "follows the prosecutor's decision to charge."²⁸ Once one accused of aggravated first degree murder "has been charged and brought before the court, the charging function ceases."²⁹

In *Cascade*, the veto power conferred upon the prosecution permitted the state to prevent judicial consideration of a lenient sentencing alternative which defendants would generally prefer to other, harsher alternatives. The veto power under the present death penalty statute permits the state to prevent judicial consideration of the most severe sentencing alternative—death—which defendants nearly always would prefer to avoid. But the principle of separation of powers is violated in both cases.

Several decisions of the California Supreme Court also hold that statutes authorizing a prosecutor to preclude a sentencing alternative by withholding his consent violate the separation of powers doctrine of the California State Constitution.³⁰ In *People v. Tenorio*,³¹ the court held that a statute denying the trial judge the discretion to dismiss certain charges under the Health and

24. *Id.* at 778, 621 P.2d at 119 (emphasis in original).

25. *Id.* at 781, 621 P.2d at 120.

26. "Since the statute permits the prosecutor to arbitrarily 'veto' a discretionary decision of the courts, we strike as unconstitutional that portion of RCW 10.05.030 which requires the prosecutor's consent." *Id.*

27. WASH. REV. CODE § 10.95.040 (1981). See also *infra* note 1.

28. *Cascade*, 94 Wash. 2d at 778, 621 P.2d at 119 (emphasis in original).

29. *Id.*

30. CAL. CONST. art. III, § 1.

31. 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970).

Safety Code, except on motion of the prosecuting attorney, constituted an invasion of the separation of powers provision of the state constitution. The *Tenorio* court stated: "When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature."³²

In *Esteybar v. Municipal Court*,³³ the court struck down a statute requiring the prosecutor's consent before a magistrate could determine that an offense be tried as a misdemeanor on the ground that it violated the separation of powers doctrine.³⁴ The court held that since the magistrate's decision followed the decision to prosecute, the act was judicial in nature and did not interfere with the charging process.³⁵

Finally, in *People v. Superior Court*,³⁶ the California Supreme Court held that once the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility.³⁷ The court invalidated a statute which gave the district attorney the power to veto a decision of the trial judge to order a defendant charged with a narcotics offense to be diverted into a pretrial treatment program. In *Cascade*, the Washington Supreme Court cited with approval both *People v. Superior Court*, and *Esteybar v. Municipal Court*.³⁸

In *People ex rel. Carey v. Cousins*,³⁹ the Illinois Supreme Court considered an identical attack on section 9-1(d) of the Criminal Code of 1961.⁴⁰ The defendant claimed that the statute violated the separation of powers provision of article II, section 1 of the Constitution of Illinois. Section 9-1(d) provides in part:

*Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c).*⁴¹

32. *Id.* at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252.

33. 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971).

34. "Since a prosecutor may not be vested with authority to foreclose the exercise of a judicial power, we have concluded that requiring his consent . . . violates the doctrine of separation of powers." *Id.* at 122, 485 P.2d at 1141, 95 Cal. Rptr. at 525.

35. *Id.* at 127, 485 P.2d at 1145, 95 Cal. Rptr. at 529.

36. 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974).

37. *Id.* at 66, 520 P.2d at 410, 113 Cal. Rptr. at 26 (emphasis omitted).

38. 94 Wash. 2d at 778, 621 P.2d at 119.

39. 77 Ill. 2d 531, 397 N.E.2d 809 (1979), *cert. denied*, 445 U.S. 953 (1980).

40. ILL. REV. STAT. ch. 38, § 9-1(d) (1979).

41. *Id.* (emphasis added).

Like RCW 10.95.040, the Illinois statute confers upon the prosecutor the sole power to initiate the death sentence proceedings.

By a margin of four to three, the Illinois Supreme Court rejected the argument that the statute violated the separation of powers doctrine.⁴² But the majority's rationale was premised upon the assumption that the statute did not authorize prosecutorial participation in the sentencing process.⁴³ Both the *Cousins* majority and the minority justices agreed that sentencing was a judicial function upon which the prosecution could not encroach. But they disagreed as to whether the prosecutor's sole power to initiate consideration of a death sentence constituted participation in the sentencing process.⁴⁴

The *Cousins* majority accepted the very same argument that the Washington Supreme Court unanimously rejected in *Cascade*.⁴⁵ The *Cousins* majority held that simply because a prosecutorial decision not to request capital punishment effectively precluded imposition of a death sentence, that did not mean that the prosecution was participating in the sentencing process.⁴⁶ But the very same theory that "prosecutorial preclusion" of a sentencing alternative as an encroachment on the judicial function of sentencing was *accepted* in *Cascade*.⁴⁷ Thus, while the Illinois Supreme Court majority may assert that there is no support in its prior decisions⁴⁸ "to support that theory,"

42. *Cousins*, 77 Ill. 2d at 535-36, 397 N.E.2d at 812.

43. *Id.* at 540-43, 397 N.E.2d at 813-14.

44. *Id.* at 544-45, 397 N.E.2d at 816.

45. *See Cascade*, 94 Wash. 2d at 781, 621 P.2d at 120.

46. The prosecutor of course does not himself impose the death sentence, nor can he require that it be imposed, for the judge or sentencing jury may conclude that the statutory conditions specified for the imposition of the death penalty have not been met. The present argument focuses rather on the fact that no death sentence may be imposed at all without a sentencing proceeding, and that such a proceeding cannot take place unless it is requested by the prosecutor, in which case it becomes mandatory. If the prosecutor fails to request a sentencing hearing, *he thus has precluded the imposition of a death sentence, and in that sense, it is argued, he has participated in the sentencing process.* We find no authority in the decisions of this court to support that theory. . . .

Cousins, 77 Ill. 2d at 535-36, 397 N.E.2d at 812 (emphasis added).

47. 94 Wash. 2d at 780, 621 P.2d at 120.

48. The dissenter in *Cousins* observed that the majority conveniently ignored cases where the Illinois Supreme Court had declared unconstitutional the participation of the executive branch in the sentencing function. 77 Ill. 2d at 547-48, 397 N.E.2d at 817 (Ryan, J., dissenting). *See People v. Montana*, 380 Ill. 596, 44 N.E.2d 569 (1942) (grant of authority to the Division of Correction to change the maximum or minimum sentence unconstitutionally vested judicial power in an administrative body); *People ex rel. Mar-*

the Washington Supreme Court has unanimously accepted the theory that "prosecutorial preclusion" of a sentencing alternative is unconstitutional.

The Washington Legislature has provided that death is one form of punishment available for persons convicted of first degree aggravated murder. Once the legislature has prescribed the punishment for a particular offense, it cannot condition the imposition of a particular sentence upon the prior approval of the prosecutor.⁴⁹ As noted by the dissenters in *Cousins*:

[T]he judicial function of imposing the death sentence cannot be carried out unless the State's Attorney permits a sentencing hearing to be conducted. If the legislature can so condition the performance of this judicial function, it could also provide that, "where requested by the State, the court shall conduct a hearing to determine whether or not a defendant may be sentenced to probation." Such an undesirable restriction could conceivably be imposed by the legislature in response to the indignation expressed by the media at an unpopular decision of a court in granting probation in a particular case. The possibility of such curtailment of the court's powers could severely hamper the performance of the judicial function in a manner mandated by article VI, section 1, of our constitution.⁵⁰

tin v. Mallery, 195 Ill. 582, 63 N.E. 508 (1902) (legislature could not confer upon executive branch the authority to send to penitentiary persons whom courts had committed to a reformatory). See also Note, *The Prosecutor's Discretionary Power to Initiate the Death Sentencing Hearing*, DE PAUL L. REV. 1097, 1102-06 (1980) [hereinafter cited as *Death Sentencing*]. But see *People v. Randolph*, 13 Ill. 2d 552, 150 N.E.2d 603, cert. denied, 358 U.S. 852 (1958). The majority relied upon three prior decisions where it had upheld a statute which granted the prosecutor the authority to decide whether to transfer a juvenile case to adult court. *Cousins*, 77 Ill. 2d at 536, 397 N.E.2d at 812; see *People v. Sprinkle*, 56 Ill.2d 257, 307 N.E.2d 161, cert. denied, 417 U.S. 935 (1974), overruled, *People v. Rahn*, 59 Ill. 2d 302, 319 N.E.2d 787 (1974) (as stated in *People v. Pedrosa*, 36 Ill. App. 3d 207, 343 N.E.2d 649 (1976)); *People v. Bombacino*, 52 Ill. 2d 17, 280 N.E.2d 697, cert. denied, 409 U.S. 914 (1972); *People v. Handley*, 51 Ill. 2d 229, 282 N.E.2d 131, cert. denied, 409 U.S. 914 (1972), overruled, *People v. Rahn*, 59 Ill. 2d 302, 319 N.E.2d 787 (1974) (as stated in *People v. Pedrosa*, 36 Ill. App. 3d 207, 343 N.E.2d 649 (1976)). The majority reasoned that by giving the prosecutor the power to transfer a juvenile case to adult court, the legislature had granted him the same power "to increase the severity of the sanction which might be visited upon the defendant" that § 9-1(d) conferred with respect to the death penalty. *Cousins*, 77 Ill. 2d at 536, 397 N.E.2d at 812. But the juvenile transfer statute, unlike § 9-1(d), did not confer the ultimate authority on the prosecutor, for if the juvenile court judge objected to the prosecutor's decision the issue was referred to the chief judge of the circuit court for his decision. See *People v. Rahn*, 59 Ill.2d 302, 304-05, 319 N.E.2d 787, 789 (1974). See also *Death Sentencing*, supra note 48, at 1097, 1103, nn. 38-39.

49. See *Cascade*, 94 Wash. 2d at 778, 621 P.2d at 119.

50. *Cousins*, 77 Ill. 2d at 549-50, 397 N.E. 2d at 818 (Ryan, J., dissenting).

In a recent decision by Division One of the Washington Court of Appeals, Judge Ringold complained: "For too long Washington courts have unquestioningly accepted the power of the Legislature to eliminate the power of the judiciary in the area of sentencing. We have yet to measure this assumed legislative right against the unusually broad judicial power granted by article 4, section 6 of our constitution. . . ."⁵¹ A separation of powers attack upon RCW 10.95 may soon provide an appropriate test case in which to resolve this issue.

RCW 10.95.040 grants Washington prosecutors an absolute veto power over the imposition of the sentence of death, thus depriving judges of a sentencing alternative and thereby violating the doctrine of the separation of powers and the rule laid down by the *Cascade* court. For these reasons, the special sentencing proceeding required by the present legislative scheme for the death penalty is unconstitutional.

III. THE ABSENCE OF A GRAND JURY CHECK AGAINST OVERZEALOUS PROSECUTORS SEEKING DEATH VIOLATES THE FIFTH AMENDMENT

The fifth amendment to the United States Constitution provides in part:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, while in actual service in time of war or public danger.⁵²

Notwithstanding the clear language of the fifth amendment, most states do not employ grand juries, even in capital cases, except on extremely rare occasions. In Washington State, the grand jury cannot even be considered an endangered species. It became extinct many years ago. Capital crimes, like all other felonies, are prosecuted by information.

The constitutionality of the practice of using informations in capital criminal trials in state courts was upheld nearly 100 years ago. The United States Supreme Court decided in

51. *State v. Hall*, 35 Wash. App. 302, 309-10, 666 P.2d 930, 934 (1983) (Ringold, J., concurring). Judge Ringold concluded that the probation statutes at issue in *Hall* encroached upon the judicial power to determine an appropriate sentence for a defendant in a felony case. *Id.* (footnote omitted).

52. U.S. CONST. amend. V.

*Hurtado v. California*⁵³ that the grand jury indictment clause was not applicable to the states, and only served to require the federal government to abide by its terms. The *Hurtado* Court held that the due process clause of the fourteenth amendment did not incorporate any of the constitutional provisions contained in the Bill of Rights.⁵⁴ The continued vitality of this century old decision is, however, highly questionable.⁵⁵

*Twining v. New Jersey*⁵⁶ demonstrates that twenty-four years after *Hurtado*, the Court still adhered to its nonincorporation theory. The *Twining* Court held that the fifth amendment privilege against self-incrimination was not binding upon states through the operation of the fourteenth amendment.⁵⁷ The

53. 110 U.S. 516 (1884).

54. *Id.* at 535.

55. The *Hurtado* view of the due process clause was premised upon the Court's heavy reliance on the "recognized canon of interpretation" that a court must not assume that any portion of a law is superfluous. *Id.* at 534. The Court noted that the fourteenth amendment due process clause was identical to the fifth amendment due process clause. The fifth amendment, in turn, contains several specific provisions regarding grand jury indictments, double jeopardy, and the privilege against self-incrimination. U.S. CONST. Amend V. In addition to these specific provisions, the fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law" *Id.* According to the *Hurtado* Court, if the phrase "due process of law" were to include the specific constitutional guarantees which preceded it in the text of the fifth amendment, then the fifth amendment due process clause would be a useless and redundant appendage to the rest of the amendment. 110 U.S. at 535. Since the framers were quite capable of writing explicit and specific guarantees for procedures such as grand jury indictments, the phrase "due process of law" must, according to the *Hurtado* Court, encompass some other type of constitutional protection. *Id.* at 536.

The natural and obvious inference [arising from application of the canon that no portion of the fifth amendment is superfluous] is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declaration to that effect.

Id. at 534-35.

Under the *Hurtado* theory of due process, as long as a state acted consistently with respect to all criminal defendants, it would not contravene the requirements of due process. A state could deny jury trials to all defendants, use informations in all cases, routinely permit successive prosecutions for the same offense, and refuse to provide anyone with a lawyer. But if the state refrained from "partial" treatment, and adhered to "general" practices of criminal procedure applicable to all, no due process violation would occur.

56. 211 U.S. 78 (1908), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

57. *Id.* at 114.

Court observed that it had already held that neither the jury trial provision nor the confrontation clause of the sixth amendment was binding upon the states through the fourteenth amendment.⁵⁸ Although the *Twining* Court rejected the incorporation argument advanced by the defendants,⁵⁹ for the first time the Court conceded, in dicta, that some incorporation of the Bill of Rights through the due process clause might be warranted.

[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.⁶⁰

The *Twining* Court conceded that the concept of due process of law was elusive. The Court said it "preferred that its full meaning be gradually ascertained . . . in the course of the decision of cases as they arise."⁶¹ Returning to the concept of due process as a doctrine "intended to secure the individual from the arbitrary exercise of the powers of government . . .",⁶² the Court concluded that the self-incrimination privilege "came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision."⁶³

The *Twining* Court did, however, introduce a new historical element into due process analysis, by focusing on

how the right was rated during the time when the meaning of due process was in a formative state and before it was incorpo-

58. *Id.* at 111; see also *Maxwell v. Dow*, 176 U.S. 581 (1900), *overruled*, *Duncan v. Louisiana*, 391 U.S. 145 (1968); *West v. Louisiana*, 194 U.S. 258 (1904), *overruled*, *Pointer v. Texas*, 380 U.S. 400 (1965).

59. *Twining*, 211 U.S. at 98. The *Twining* defendants argued:

[T]he safeguards of personal rights which are enumerated in the first eight articles of Amendment to the Federal Constitution, sometimes called the Federal Bill of Rights, though they were by those Amendments originally secured only against National action, are among the privilege and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against State action.

Id.

60. *Id.* at 99 (emphasis added) (citation omitted).

61. *Id.* at 100.

62. *Id.* at 101.

63. *Id.* at 106.

rated in American Constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there would be no due process without it?⁶⁴

This focus on historical analysis marked a significant departure from earlier cases. In *Hurtado*, the lone dissenter, Justice Harlan, had relied upon a similar historical analysis in arguing that the absence of a grand jury indictment in a capital case was a denial of due process.

[I]t is a fact of momentous interest in this discussion, that, when the Fourteenth Amendment was submitted and adopted, the Bill of Rights and the constitutions of twenty-seven states expressly forbade criminal prosecutions, by information, for capital cases; while in the remaining ten states, they were impliedly forbidden by a general clause declaring that no person should be deprived of life otherwise than by "the judgment of his peers or the law of the land" or "without due process of law." It may be safely affirmed that, when that Amendment was adopted, a criminal prosecution by information, for a crime involving life, was not permitted in any one of the states composing the union.⁶⁵

Although the majority turned a deaf ear towards Harlan's historical analysis in *Hurtado*, the *Twining* Court employed the very same type of historical analysis to support the conclusion that "due process" did not encompass the self-incrimination privilege.⁶⁶ After examining the "popularity" of the self-incrimination privilege among the states, the *Twining* Court concluded,

64. *Id.* at 107.

65. 110 U.S. at 557 (Harlan, J., dissenting).

66. [T]he history of the incorporation of the privilege in an amendment to the National Constitution is full of significance in this connection. Five states, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut, ratified the Constitution without proposing amendments. Massachusetts then followed with a ratification, accompanied by a recommendation of nine amendments, none of which referred to the privilege; Maryland with a ratification without proposing; South Carolina with a ratification accompanied by a recommendation of four amendments, none of which referred to the privilege, and New Hampshire with a ratification accompanied by a recommendation of twelve amendments, none of which referred to the privilege. The nine States requisite to put the Constitution in operation ratified it without a suggestion of incorporating this privilege. . . .

. . . Thus it appears that four only of the thirteen original States insisted upon incorporating the privilege in the Constitution. . . .

Twining, 211 U.S. at 108-09.

in accord with *Hurtado*, that the due process clause of the fourteenth amendment "does not control mere forms of procedure in state courts or regulate practice therein."⁶⁷ The *Twining* Court held that the states were free to ignore the fifth amendment privilege against self-incrimination.

Nearly thirty years later, in *Palko v. Connecticut*,⁶⁸ the Court rejected the argument that the due process clause made the fifth amendment double jeopardy clause binding upon the states. But the *Palko* Court was forced to concede that the era of complete nonincorporation was over. Although the Court had held that the fourth, fifth and sixth amendments did not apply to state criminal prosecutions, it was forced to concede that the due process clause had been held to require the states to abide by the first amendment guarantees of freedom of speech, freedom of the press, free exercise of religion, and the right of peaceable assembly.⁶⁹ The *Palko* Court admitted that in the context of the first amendment and in other situations, "immunities that are valid against the federal government by force of the specific pledges of particular amendments have been found to be *implicit in the concept of ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states."⁷⁰

To dispel the notion that the Court's prior due process cases comprised merely "a hasty catalogue" of "cases on the one side and the other" of a wavering line of division, the *Palko* Court asserted the following "rationalizing principle." Using as examples the sixth amendment right to a jury trial and the fifth amendment right to a grand jury, the *Palko* Court stated in dicta:

The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, *they are not of the very essence of a scheme of ordered liberty*. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Few would be so narrow or provincial as to maintain that a fair and enlight-*

67. *Id.* at 112.

68. 302 U.S. 319 (1937).

69. *Id.* at 324. See, e.g., *DeJonge v. Oregon*, 299 U.S. 353, 364 (1936) (freedom of assembly); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1935) (freedom of the press); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (freedom of the press); *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245 (1934) (freedom of religion); *Gitlow v. New York*, 268 U.S. 652 (1924) (freedom of speech).

70. 302 U.S. at 324-25 (emphasis added) (footnote omitted).

ened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. This too might be lost, and justice still be done.⁷¹

Using this new test of "selective incorporation" of those portions of the Bill of Rights that are implicit in the concept of ordered liberty, the *Palko* Court concluded that the double jeopardy provision of the fifth amendment was not binding upon the State of Connecticut.⁷²

Under the *Palko* test, if a court could imagine a system in which a defendant's trial was not so unfair as to shock the conscience of the court, then the constitutional right under scrutiny was not so essential as to be "implicit in the concept of ordered liberty."⁷³ Thus, in *Adamson v. California*,⁷⁴ the Court again rejected the argument that the fifth amendment self-incrimination privilege was binding upon the states, and reaffirmed its earlier holding in *Twining*.⁷⁵

Two key developments did occur during the selective incorporation era. First, there was the erosion of the *Hurtado* theory that due process did not include any of the specific guarantees of the Bill of Rights. In *Powell v. Alabama*,⁷⁶ the Court held that the sixth amendment right to counsel in criminal cases was binding upon the states by reason of the due process clause, at least in capital cases where the defendant was on trial for his life.⁷⁷ The *Hurtado* Court had held that since no portion of the constitution should be rendered superfluous, the meaning of the due process clause must necessarily be entirely distinct and divorced from the specific guarantees contained elsewhere in the Bill of Rights.⁷⁸ The *Powell* Court confronted this argument head-on and rejected it:

The sixth amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defense." In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult

71. *Id.* at 325 (citations omitted) (emphasis added).

72. *Id.* at 325.

73. *Id.* at 324-25.

74. 332 U.S. 46 (1942).

75. See *supra* text accompanying notes 56-62.

76. 287 U.S. 45 (1932).

77. *Id.* at 66.

78. 110 U.S. at 534.

to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause.⁷⁹

Recognizing that despite *Hurtado* several cases had held that the specific guarantees of the first amendment apply to the states, the *Powell* Court held:

[N]otwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions. The rule is an aid to construction, and in some instances may be conclusive; but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution.⁸⁰

The second development of the *Palko* era was the *focus on capital punishment* as a key factor in assessing whether a defendant had received due process of law. In *Powell*, the defendants were tried for murder and sentenced to death, following a trial at which they had not been represented by counsel.⁸¹ The Court held that execution of such a death sentence "would be little short of judicial murder, [and] it cannot be doubted would be a gross violation of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide."⁸²

In the absence of a death sentence, though, the Court was unwilling to lay down any per se rule requiring that defendants be represented by counsel. In *Betts v. Brady*,⁸³ the Court held that the selective incorporation doctrine required that the sixth amendment right to counsel bind the states only in some selected cases. The "selective application" of the sixth amendment was to hinge upon the particular facts of the case before

79. 287 U.S. at 66.

80. *Id.* at 67 (citations omitted).

81. *Id.* at 49-50.

82. *Id.* at 72.

83. 316 U.S. 455 (1942).

the Court.⁸⁴

The *Betts* Court held that due process was not violated in a case where the defendant had been convicted of robbery and sentenced to eight years in prison.⁸⁵ But the *Powell* Court held that due process was violated where the convicted defendants were sentenced to death.⁸⁶ *Death* thus emerged as a critical factor in assessing the bounds of due process.

Beginning in 1961 with *Mapp v. Ohio*,⁸⁷ and ending with *Benton v. Maryland*,⁸⁸ the Supreme Court, over the span of eight years, thoroughly repudiated the *Palko* doctrine. Every case decided during those years "incorporated" the Bill of Rights provision at issue and held it binding upon the states.⁸⁹

84. Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Id. at 462.

85. *Id.* at 472-73.

86. 287 U.S. at 71.

87. 367 U.S. 643 (1961).

88. 395 U.S. 784 (1969).

89. The Court's record of overruling prior decisions during this era is truly astonishing. In rapid succession, the Supreme Court held that the fourteenth amendment due process clause obligated the states to abide by the fourth amendment's prohibition against unreasonable search and seizure, *Mapp v. Ohio*, 367 U.S. 643 (1961); the eighth amendment's prohibition against cruel and unusual punishment, *Robinson v. California*, 370 U.S. 660 (1962); the sixth amendment's right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)); the fifth amendment's guarantee of the privilege against self-incrimination, *Adamson v. California*, 332 U.S. 46 (1947), and *Malloy v. Hogan*, 378 U.S. 1 (1964) (overruling *Twining v. New Jersey*, 211 U.S. 78 (1908)); the sixth amendment's right to a speedy trial, *Klopfer v. North Carolina*, 386 U.S. 213 (1967); the sixth amendment's right to confrontation, *Pointer v. Texas*, 380 U.S. 400 (1965) (overruling *West v. Louisiana*, 194 U.S. 258 (1903)); the sixth amendment's right to compulsory process, *Washington v. Texas*, 388 U.S. 14 (1967)); the sixth amendment's right to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (overruling *Maxwell v. Dow*, 176 U.S. 581 (1900)); and the fifth amendment's prohibition against double jeopardy, *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)).

These decisions specifically abandoned the *Palko* doctrine of "selective incorporation." In *Benton*, the Court specifically overruled *Palko* and announced a new principle of due process analysis:

Palko represented an approach to basic constitutional rights which this court's recent decisions have rejected. It was cut of the same cloth as *Betts v. Brady*, 316 U.S. 455 (1942), the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was "shocking to the universal sense of justice." *Id.* at 462. It relied upon *Twining v. New Jersey*, 211 U.S. 78 (1908), which held that the right against compulsory self-incrimination was not an element of Fourteenth

In abandoning *Palko*, the Supreme Court implicitly adopted the theory of total incorporation of the Bill of Rights by the fourteenth amendment due process clause. In *Gideon v. Wainwright*,⁹⁰ Justice Black, writing for a unanimous Court, criticized the *Betts* decision for refusing to acknowledge "that those guarantees of the Bill of Rights which are fundamentally safeguards of liberty immune from federal abridgement are *equally protected against State invasion by the Due Process Clause of the Fourteenth Amendment.*"⁹¹

Reiterating the principle explained and applied in *Powell v. Alabama*, the *Gideon* Court explicitly stated that "despite sweeping language to the contrary in *Hurtado v. California*, the Fourteenth Amendment 'embraced' those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' even though they had been 'specifically dealt with in another part of the federal Constitution.'"⁹²

The concept that the guarantees contained in the Bill of Rights protect the individual only against the federal government has been abandoned. There is only one set of constitutional rules to play by. As the *Benton* Court observed, "[i]n an increasing number of cases, the Court 'has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights. . . .'"⁹³

The Supreme Court has recognized its own willingness to overrule past precedent in this area. In *Malloy v. Hogan*,⁹⁴ the Court commented that it had "not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was

Amendment due process. *Betts* was overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Twining*, by *Malloy v. Hogan*, 378 U.S. 1 (1964). Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," *Duncan v. Louisiana*, *supra* at 149, the same constitutional standards apply against both the State and Federal Governments. *Palko's* roots had thus been cut away years ago.

Benton, 395 U.S. at 794-95.

90. 372 U.S. 335 (1963).

91. *Id.* at 341 (emphasis added).

92. *Id.* at 341 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (citation omitted)).

93. *Benton*, 395 U.S. at 794 (quoting *Malloy*, 378 U.S. at 10-11).

94. 378 U.S. 1 (1964).

contemplated by its framers when they added the Amendment to our constitutional scheme."⁹⁵

It has now been nearly one hundred years since *Hurtado v. California* was decided. Both the *Hurtado* nonincorporation and the *Palko* selective incorporation doctrines were repudiated long ago. The United States Supreme Court has not had occasion to reexamine the holding of *Hurtado* since deciding *Gaines v. Washington*,⁹⁶ forty-five years ago. More recently, however, the Supreme Court has hinted strongly that the change in due process analysis will necessitate overruling *Hurtado* when the issue is next presented to the Court. In *Gosa v. Mayden*,⁹⁷ the Court put the handwriting on the wall with the following pointed observation: "The Court, of course, has not yet held the indictment requirement of the Fifth Amendment to be binding upon the states."⁹⁸

The current test of due process incorporation stresses the significance of specific inclusion of the right in the Bill of Rights and the historical roots of the right. In *Duncan v. Louisiana*,⁹⁹ the Court neatly summed up the difference between the abandoned *Palko* doctrine and the current focus on whether the right at issue is "fundamental to the American scheme of justice." In *Palko*, the Court opined that since it was possible to imagine a "fair and enlightened" judicial system which did not honor the right to trial by jury, it was clear that a jury trial was not central to "the essence of a scheme of ordered liberty."¹⁰⁰ The *Duncan* Court replaced such imagination exercises with a framework of historical analysis:

[R]ecent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered

95. *Id.* at 5. See also *Pointer*, 380 U.S. at 406.

96. 277 U.S. 81, 86 (1928).

97. 413 U.S. 665 (1973).

98. *Id.* at 668 n.1 (emphasis added).

99. 391 U.S. at 149.

100. 302 U.S. at 325.

liberty.¹⁰¹

The issue is no longer whether a constitutional provision is "necessarily fundamental to fairness in every criminal system that might be imagined but [whether it] is fundamental in the context of the criminal processes maintained by the American states."¹⁰²

To answer this question, the more recent cases focus on two things. First, is the right specifically enumerated in the Bill of Rights? If the answer is yes, that in itself gives rise to a presumption that the right is "fundamental to the American scheme of justice." In *Gideon*, the Court stated: "[T]his court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States."¹⁰³ And in *Washington v. Texas*,¹⁰⁴ the Court said: "[W]e have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law."¹⁰⁵ In *Klopper v. North Carolina*,¹⁰⁶ the Court held that the speedy trial guarantee of the sixth amendment applied to the states: "That this right was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the states, *as well as by its prominent position in the Sixth Amendment.*"¹⁰⁷

The other clear focus of recent due process decisions has been upon the historical lineage of the right at issue. In *Benton*, the Court observed that the prohibition against double jeopardy "became established in the common law of England long before this nation's independence" and "was carved into the jurisprudence of this country through the medium of Blackstone. . . ."¹⁰⁸ The double jeopardy clause of the fifth amendment was a fundamental right because it was "*deeply ingrained* in at the least the Anglo-American system of jurisprudence" and it traced its origins "*from the very beginning*" of our Anglo-

101. 391 U.S. at 149 n.14.

102. *Id.*

103. 372 U.S. at 341.

104. 388 U.S. 14 (1966).

105. *Id.* at 18; *accord, Benton*, 395 U.S. at 794.

106. 386 U.S. 213 (1966).

107. *Id.* at 225-26 (emphasis added).

108. 395 U.S. at 795.

American constitutional tradition.¹⁰⁹ The guarantee of a speedy trial was held binding upon the state since that right "has its roots at the very foundation of our English law heritage" since it first appeared in the Magna Carta in 1215.¹¹⁰ The rights of confrontation and cross-examination "have ancient roots."¹¹¹ The long pedigree of the right to trial by jury was traced in *Duncan v. Louisiana* from the Magna Carta through the British Declaration and Bill of Rights of 1689, the Continental Congress of 1774, and the Declaration of Independence.¹¹²

Employing the due process doctrine of *Benton, Duncan, and Malloy*, the central issue with respect to the Washington death penalty is whether the fifth amendment indictment guarantee in capital and infamous cases is fundamental to the American political system. Answering this question requires an examination of the history of the grand jury, culminating in the inclusion of the grand jury indictment clause in the text of the fifth amendment.

The English institution of the grand jury is more than eight centuries old. While the English use of the grand jury can easily be traced to the Assize of Clarendon of 1166, scholars have traced the development of the grand jury even further. It is generally accepted that the grand jury developed from the use of the "inquisitio" procedure used by the continental Carolingian kings.¹¹³

109. *Id.* at 796 (emphasis added).

110. *Klopper*, 386 U.S. at 223.

111. *Pointer*, 380 U.S. at 404.

112. 391 U.S. 145 (1968).

113. The Frankish kings used the inquisition to summon subjects before the king to supply him with information on various subjects touching the administration of government, including the detection of crime. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 312 (7th ed. 1956). The Normans, who conquered the Franks, adopted the procedure and brought it with them to England following the victory of William the Conqueror in 1066. *Id.*; 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 141 (2d ed. 1959).

In the Assize of 1166, King Henry II set down the first law governing the investigation of criminal matters by juries. The law required that twelve men from the local village "hundred" where the crime allegedly occurred, and four men from each township in the county, should be assembled and placed under oath, "to tell the truth; if in their hundred or their township there be any man who is accused or generally suspected of being a robber or murderer or thief, or any man who is a receiver of robbers, murderers or thieves, since our lord the king was king." 1 W. HOLDSWORTH, *supra*, at 77; 1 F. POLLOCK & F. MAITLAND, *supra*, at 152. Ten years later the king added the crimes of forgery and arson to the list of crimes which could be investigated by the grand jury. 1 F. POLLOCK & F. MAITLAND, *supra*, at 152; Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 111 (1931). See also Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1106 (1955).

The precursor of the modern criminal grand jury was not exclusively reserved for criminal proceedings. It was a mechanism for ensuring local community participation in the operation of government.

[T]he grand jury concept . . . was an outgrowth, as were the civil jury and the criminal petty [sic] jury concepts, of the early Frankish legal custom of calling together a body of neighbors to give upon oath a true answer to some question. These bodies of neighbors came to be entrusted with more and more power. It is difficult to classify these early juries because they often performed all of the functions which at a later date became the separate functions of civil juries, grand juries and criminal petit juries.¹¹⁴

At first the grand jury performed both the tasks of accusation and determining guilt. In 1351-52, Parliament enacted a statute which provided that one who sat on the accusing jury (an "indictor") could not sit on the jury which determined the truth of the charge, if the accused raised an objection.¹¹⁵

[T]he accusing jury came both to accuse those suspected of crime and to determine the guilt or innocence of those it accused. Acting in the latter capacity, it performed the functions of the modern criminal petit jury. . . . [T]he criminal petit jury was preceded in historical development by the accusing or grand jury, and evolved from it. . . . Gradually . . . the grand jury and the petty [sic] jury became separated. . . .¹¹⁶

The alternative method of initiating a prosecution by information developed later, as an invention of English kings who wished to circumvent the grand jury. The information seems to have made its first appearance in the reign of Edward I (1272-1307) as a means of putting a man on trial even though no indictment had been obtained. Public hostility towards this practice soon brought about a restriction of the use of informations to misdemeanor cases only. The Act of 11 Henry VII, c. 3 passed in 1494 excluded "treason, murder *and felony*" from being prosecuted by information.¹¹⁷

The English prohibition against the use of informations in felony cases became an established part of the constitutional law

114. Morse, *supra* note 113, at 107.

115. Morse, *supra* note 113, at 114.

116. *Id.*

117. *Id.* at 119 (emphasis added).

of England. As stated by Blackstone: "[T]hese informations (of every kind) are confined by the constitutional law to mere misdemeanors only. . . ." ¹¹⁸

The framers of the federal Constitution followed the English constitutional practice by providing that the fifth amendment requirement of a grand jury indictment applied to any "capital or otherwise infamous crime."¹¹⁹ Infamous crimes were subsequently equated with felonies, and referred to all crimes punishable by imprisonment at hard labor in a prison or penitentiary.¹²⁰

The limitation on the use of informations to misdemeanors was historically linked to the fact that all felonies were punishable by death at common law. Under English common law, a felony conviction of any kind meant the imposition of a sentence of death.¹²¹ Thus, the practical effect of restricting information prosecutions to misdemeanor cases was to prevent putting a man's life in jeopardy solely on the basis of an information signed by an officer of the King. Blackstone explicitly recognized the connection between the death sentence and the requirement of a grand jury indictment.

[I]nformations . . . are confined by the *constitutional law* to mere misdemeanors only; for, *whenever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it.*¹²²

The majority justices in *Hurtado* seem to have simply misunderstood this critical point, arguing that:

if an indictment or presentment by a grand jury is essential to due process of law in all cases of imprisonment for crime, it applies not only to felonies but to misdemeanors and petty offences, and the conclusion would be inevitable that informations as a substitute for indictments would be illegal in all cases.¹²³

However, in his dissent, Justice Harlan accurately observed

118. 4 W. BLACKSTONE, COMMENTARIES § 310 (Lewis ed. 1898).

119. U.S. CONST. amend. V.

120. See *United States v. Moreland*, 258 U.S. 433 (1922) (misdemeanor); *Ex parte Wilson*, 114 U.S. 417 (1885) (felony).

121. See W. LAFAVE, HANDBOOK ON CRIMINAL LAW 546 n.4 (1972).

122. 4 W. BLACKSTONE, *supra* note 118, § 310 (emphasis added).

123. 110 U.S. at 524.

that neither English constitutional law nor the text of the fifth amendment required any such result.¹²⁴ The fifth amendment expressly limited the grand jury indictment requirement to "capital and infamous crimes."¹²⁵ Harlan quoted Blackstone at length to drive home his point that a *death sentence* could only result following *both* an indictment of a grand jury and a finding of guilt by a petit jury:

Blackstone, after observing that the English law has "wisely placed this strong and *two-fold barrier*, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown," says: "The founders of the English law have, with excellent forecast, contrived that no man shall be called to answer the King for any *capital crime*, unless upon the peremptory accusation of twelve or more of his fellow-subjects, the grand jury. . . ."¹²⁶

The *Hurtado* majority did not quarrel with Justice Harlan's assessment that the grand jury was historically associated with capital crimes. The majority simply rejected the premise that English constitutional history was relevant to the constitutional due process question before it. The majority rejected the argument because acceptance of the relevance of history would have tied the concept of due process down to one model and prevented the states from experimenting with their own forms of

124. *Id.* at 547 (Harlan, J., dissenting)(emphasis added).

125. *Id.* (quoting U.S. CONST. amend. V).

126. *Id.* at 544. Justice Harlan protested that since "human life is involved" he was compelled to dissent:

Erskine, in his speech delivered in 1784, in defence of the Dean of St. Asaph, said, in the presence of the judges of the Kings Bench: "If a man were to commit a *capital* offence in the face of all the judges of England, their united authority could not put him upon his trial; they could file no complaint against him *The grand jury alone could arraign him*, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it. If it be said that this exclusive power of the grand jury does not extend to lesser misdemeanors, which may be prosecuted by information, I answer, that for that reason it becomes doubly necessary to preserve the power of the other jury which is left."

Id. at 539, 543-44 (emphasis added).

In Wooddeson's lectures on the Laws of England (Lect. 38), it is said that "informations *cannot be brought in capital cases*, nor for misprison of treason." Bacon, in his Abridgment, lays it down:

But though, as my Lord Hale observes, in *all* criminal causes the most regular and safe way, and most consonant to the statute of Magna Charta, &c., is by presentment or indictment of twelve sworn men, yet he admits that, for crimes *inferior to capital ones*, the proceedings may be by information.

Id. at 545 (emphasis added).

criminal procedure. But the *Hurtado* majority's view of the relevance of history has not prevailed. History is now the central focus of the modern due process incorporation doctrine. The proof of the fundamental nature of a Bill of Rights guarantee now lies in the assessment of its historical importance in the Anglo-American system of justice.¹²⁷

Ironically enough, the Supreme Court has already recognized that the historical argument in favor of incorporating the indictment clause was far *stronger* than the argument in favor of incorporating the self-incrimination privilege. In the earlier era of nonincorporation the *Twining* Court stated:

Due process of law, guaranteed by the Fourteenth Amendment, does not require the state to adopt a particular form of procedure. . . . Indeed, the reasoning for including indictment by grand jury and trial by petit jury in that conception . . . was historically and in principle much stronger [than the argument in favor of including the privilege against self-incrimination].¹²⁸

Yet *Twining* was subsequently overruled in *Malloy v. Hogan*.¹²⁹ If the historical argument in favor of incorporating the grand jury indictment clause is "much stronger" than the argument for incorporating the privilege against self-incrimination, then a fortiori the argument in favor of overruling *Hurtado* is "much stronger" than the arguments which prompted the *Malloy* Court to overrule *Twining*.

It need not be decided whether the due process clause of the fourteenth amendment requires grand jury indictments in all felony cases. When the case is a capital case, it need only be decided whether due process is violated where a man is put on trial for his life without first obtaining the community judgment of an indicting grand jury. As stated by the elder Justice Harlan:

It is difficult . . . to perceive anything in the system of *prosecuting human beings for their lives*, by information, which suggests that the State which adopts it has entered upon an era of progress and improvement in the law of criminal procedure. Even the statute of H.7, c. 3, allowing informations, and "under which Empson and Dudley, and an arbitrary star chamber, fashioned the proceedings of the law into a thousand tyrannical forms," expressly declared that *it should not extend*

127. See *supra* note 88 and accompanying text.

128. 211 U.S. at 112.

129. 378 U.S. 1, 6-9 (1964).

"to treason, murder or felony, or to any other offence wherefor any person should lose life or member."¹³⁰

Putting aside the historical arguments, one might well ask what purpose is to be served by resurrecting the corpse of the grand jury from the legal graveyard and requiring its use in all capital criminal trials. The United States Supreme Court has recognized the "high place" accorded the grand jury in our system of criminal justice, as the body of citizens which stands between the prosecutor and the accused.¹³¹ It is precisely because no one stands between Washington prosecutors and defendants in capital cases that use of a grand jury should be constitutionally required in these circumstances.

In *Costello v. United States*,¹³² the Court opined that the English institution of the grand jury was brought to America by the colonists, included in the Constitution by the framers, and that there was "every reason to believe" it was "intended to operate like its English progenitor" by permitting a body of citizens to prevent a prosecutor from bringing unfounded, excessive or unjust accusations against their fellow citizen.

Grand jurors were selected from the body of the people and their work was not hampered by rigid procedures or evidentiary rules. . . . Despite its broad power to institute criminal proceedings *the grand jury grew in popular favor with the years. It acquired an independence in England from control by the Crown of judges.* Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows *the high place it held as an instrument of justice.*¹³³

Similarly, in *Wood v. Georgia*,¹³⁴ the Court declared:

Historically this body has been regarded as the primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.¹³⁵

130. *Hurtado*, 110 U.S. at 553-54 (Harlan, J., dissenting) (emphasis added).

131. *Costello v. United States*, 350 U.S. 359, 362 (1956).

132. 350 U.S. 359 (1956).

133. *Id.* at 362 (emphasis added).

134. 370 U.S. 375 (1962).

135. *Id.* at 390; *accord*, *Hale v. Henkel*, 201 U.S. 43, 59 (1905).

By charging defendants by information in capital cases, Washington prosecutors prevent any community input into the decision to place a defendant on trial for his life. The use of an information in a capital case completely removes lay citizens from the decision to seek the ultimate criminal sanction of capital punishment. It is precisely this kind of decision to which the fifth amendment grand jury indictment clause most clearly applies. As reflected in Blackstone's Commentaries, the Anglo-American system of criminal justice has historically adhered to the proposition that community participation is necessary at *two independent stages* of the proceeding.¹³⁶ The trial jury serves this "critical function" at the guilt determination stage by "introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the state" in imposing a particular punishment.¹³⁷ The trial jury in a capital case "can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."¹³⁸

The United States Supreme Court has stated:

Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"¹³⁹

The grand jury serves the same purpose of injecting community values and judgment into the criminal proceeding at the earlier accusatorial stage. In *Duncan v. Louisiana*, the Court quoted Blackstone's Commentaries with approval, stating: "Our law has therefore wisely placed this strong and *twofold barrier*, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown."¹⁴⁰ "The institution of the grand jury is deeply rooted in American history. In England, the grand jury served for centuries . . . as a protector of citizens against arbitrary and oppressive governmental action."¹⁴¹

136. 4 W. BLACKSTONE, *supra* note 118, at § 349.

137. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

138. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

139. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (quoting *Witherspoon*, 391 U.S. at 519 n.15 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

140. 391 U.S. at 151 (emphasis added).

141. *United States v. Calandra*, 414 U.S. 338, 342-43 (1974).

The elimination of any role for "grand jurors . . . selected from the body of the people"¹⁴² by the prosecution in a capital case is in violation of the grand jury indictment clause of the fifth amendment. The principle that no man can be forced to stand trial in a capital case unless there has *first* been a determination, by lay citizens, that the accusation is true and reasonable, is "fundamental to the American scheme of criminal justice."¹⁴³ For these reasons, Washington State is bound by the due process clause of the fourteenth amendment to abide by the requirement of the fifth amendment that, "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a grand jury. . . ." The systematic failure of Washington prosecutors to obtain indictments in capital cases, and their reliance upon the statutory procedure of filing a notice of intent to seek the death penalty, violates the plain terms of the indictment clause of the fifth amendment. A procedure which permits death penalty trials to be triggered by a prosecutorial decision to file a piece of paper cannot pass constitutional muster.

IV. THE TWO SIDES OF THE SEPARATION OF POWERS COIN

As noted by Blackstone, the institutions of both the jury and the grand jury were part of the English system of a "twofold barrier" placed between the people and the crown, as a means "for preserving the admirable balance of our constitution."¹⁴⁴ For fear that the executive power "might be dangerous and destructive to that very constitution, if exerted without check or control,"¹⁴⁵ English constitutional law wisely required "that no man be called to answer to the King for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury. . . ."¹⁴⁶ Indeed, Blackstone cautioned that any attempt to avoid the use of grand juries, through the use of informations, must be consistently opposed as "inroads upon this sacred bulwark of the nation . . . fundamentally opposite to the spirit of our constitution," and, if permitted, "the precedent may gradually increase and spread to the utter disuse

142. *Costello v. United States*, 350 U.S. 359, 362 (1956).

143. *Duncan*, 391 U.S. at 149.

144. *Id.* at 151.

145. *Id.*

146. 4 W. BLACKSTONE, *supra* note 118, § 349-350.

of juries in questions of the most momentous concern."¹⁴⁷

As previously discussed in section I, RCW 10.95.040 violates the separation of powers doctrine by granting the prosecutor an absolute veto over the availability of capital punishment as a sentencing alternative. His power to prevent the imposition of capital punishment is unchecked in this regard. The opposite side of the coin is that the prosecutor's power to put the defendant on trial for his life is also unchecked where the state initiates the prosecution by information.

The use of the information avoids the necessity of confronting the grand jury. Instead, the court certifies the existence of probable cause to believe the crime of aggravated first degree murder has been committed. Although the state must obtain a magistrate's concurrence as to probable cause for aggravated first degree murder, there is no requirement that the court must review the prosecutor's notice of intent to seek the death penalty.

The filing of a death penalty notice, under RCW 10.95.040, is effected when the prosecuting attorney has "reason to believe that there are no sufficient mitigating circumstances to merit leniency."¹⁴⁸ There is no mechanism whereby the court reviews this prosecutorial determination. The prosecutor does not file, along with the notice of a special sentencing proceeding, any supporting affidavit setting forth the facts to justify his determination that there is an absence of mitigating circumstances and that leniency is therefore not merited.

Thus, there is no authority and no mechanism for disputing the conclusion of the prosecutor that the jury should consider the imposition of capital punishment. If the notice of special sentencing proceeding is filed, then the court *must* put the issue to the jury for its consideration.

Assuming, arguendo, that the death penalty is not per se unconstitutional in all cases, then the statutory framework of RCW 10.95 operates on the assumption that some cases of first degree aggravated murder warrant capital punishment and other cases do not. All power to remove death penalty consideration in a given case is given to the prosecuting attorney. On the other hand, all power to compel judicial consideration of capital punishment is given to the prosecuting attorney. The simple act of

147. *Id.*

148. WASH. REV. CODE § 10.95.040(1) (1981).

filing a piece of paper, which need not contain any statement of the facts in support of the prosecutor's conclusion, is sufficient to force the court to put this issue to the jury. No matter how mentally ill the defendant, no matter how young, no matter how much he operated under duress or coercion, and no matter how strong other mitigating circumstances may be, once the prosecution triggers death penalty deliberations, neither judge nor grand jury may voice an objection to the procedure.

A statutory scheme such as this one, which vests such complete power in the prosecuting attorney, when coupled with the failure to seek the judgment of lay grand jurors who might pass upon the state's conclusion that capital punishment is warranted, constitutes an egregious violation of the principle of separation of powers, and must therefore be held unconstitutional on its face.

V. UNFETTERED PROSECUTORIAL DISCRETION

It is inconsistent with the requirements of fundamental fairness for the legislature to authorize prosecutors to choose between different levels of potential punishment for defendants who have all committed the same criminal act. While judges may tailor sentences to individual defendants, prosecutors may not. The Washington Supreme Court has observed that the principles of equal protection guaranteed by the fourteenth amendment to the federal Constitution, and by article I, section 12 of the Washington State Constitution, require that prosecutorial discretion in bringing criminal charges against defendants must be exercised in accordance with certain minimal standards of fair play. The equal protection principle at issue here is most frequently referred to as the *Zornes* doctrine. But prior to the decision in *State v. Zornes*,¹⁴⁹ the Washington Supreme Court had approved of this constitutional doctrine in two earlier cases.

First, in *Walder v. Belnap*,¹⁵⁰ the court, in dicta, recognized the principle that if two fully operational statutes are in existence contemporaneously, and if they offer the prosecuting authorities the option to prosecute for (1) a misdemeanor or (2) a felony, despite the identity of the criminal act covered by both statutes, then there is a violation of the defendant's constitu-

149. 78 Wash. 2d 9, 475 P.2d 109 (1970).

150. 51 Wash. 2d 99, 316 P.2d 119 (1957).

tional right to equal protection.¹⁵¹

In *Olsen v. Delmore*,¹⁵² the court held that where one statute purports to grant a prosecutor the option of charging either a misdemeanor or a felony for commission of the same crime, a constitutional violation has occurred.

A statute which prescribes different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution. Such a statute must therefore be violative of Art. I, Section 12, of the constitution of this state, relating to privileges and immunities, since this provision of the State Constitution is substantially identical with the equal protection clause of the Fourteenth Amendment.¹⁵³

In *Olsen*, the court invalidated RCW 9.41.160 (prohibiting carrying a concealed weapon without a license) as unconstitutionally abridging the equal protection clause and article I, section 12 of the Washington State Constitution.¹⁵⁴ The court found that the legislature had attempted to "authorize prosecuting officials to charge violations of the Uniform Firearms Act as a gross misdemeanor or a felony."¹⁵⁵ In *Walder*, the court found there was no constitutional defect because it concluded that the later of the two statutes had impliedly repealed the inconsistent provisions of the earlier statute.¹⁵⁶ Thus, *Walder* and *Olsen* indicate that equal protection violations can be effected either when one statute alone, or two statutes together, purportedly authorize the prosecutor to seek different punishments for the same offense.

The magnitude of disparity between the differential punishments has no bearing upon the application of the equal protection principle. The *Zornes* doctrine was first articulated in cases where the legislature had authorized differential punishment as either a felony or a misdemeanor. In *Walder*, the court considered the felony statute prohibiting taking a motor vehicle without permission, together with the misdemeanor statute making it unlawful to cause injury to property by riding or driving away

151. *Id.* at 101, 316 P.2d at 120.

152. 48 Wash. 2d 545, 295 P.2d 324 (1956).

153. *Id.* at 550, 295 P.2d at 327 (citations omitted).

154. *Id.* at 551, 295 P.2d at 327.

155. *Id.* at 550, 295 P.2d at 327.

156. *Walder*, 51 Wash. 2d at 101, 316 P.2d at 120.

in a vehicle without the authority of the owner. In *Zornes*, the issue was framed in terms of the potential joint operation of the misdemeanor statute outlawing the possession of dangerous drugs and a felony statute prohibiting the possession of narcotic drugs. The *Zornes* court restated the holding of *Olsen v. Delmore*:

[T]hat an act which prescribes different punishments for the same act and thereby purports to authorize the prosecutor to charge one person with a felony and another with a misdemeanor for the same act committed under the same circumstances, denies the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the constitution of this state.¹⁵⁷

But the *Zornes* principle applies whenever the legislature purports to authorize the prosecution to seek different degrees of punishment for the same criminal act, even when both punishments are classified as misdemeanors or when both are classified as felonies.¹⁵⁸

In a case decided in the same term as *Zornes*, the supreme court clarified *Olsen* by recognizing that the prohibition against permitting prosecutors to choose between different maximum levels of potential punishment for the same act applied equally to cases where the differential punishments both fell within the same legislative classification as felonies.¹⁵⁹ In *State v. Ensminger*,¹⁶⁰ the court noted that if charged under RCW 9.47.060 for receiving "a bet or wager upon the result of a contest or trial of speed or endurance between horses," the defendants were potentially subject to felony punishment by confinement in a penitentiary for one to five years, but if charged under RCW 9.47.140 for "race track gambling," the defendants would only be subject to potential felony punishment by incarceration for one

157. 78 Wash. 2d at 21, 475 P.2d at 117.

158. Generally speaking, the law with respect to the punishment to be inflicted for a crime must operate equally on every citizen or inhabitant of the state, and a statute is void as a denial of the equal protection of the laws which prescribes *different punishments or different degrees of punishment* for the same acts committed under the same circumstances by persons in like situations.

Id. at 24, 475 P.2d at 119 (quoting 16A C.J.S. *Constitutional Law* § 564 (1956)) (footnotes omitted) (emphasis added).

159. *State v. Ensminger*, 77 Wash. 2d 535, 463 P.2d 612 (1970).

160. 77 Wash. 2d 535, 463 P.2d 612 (1970).

to three years.¹⁶¹ Despite the fact that both crimes were felonies, the *Olsen* rule still prohibited differential degrees of punishment for the same offense if the choice between the two were left to the prosecution. The *Ensminger* court explained that "no person shall be subjected, for the same offense, to any greater or different punishment from that to which others may be subjected; hence, statutes that provide different degrees of punishment for different persons for the same act are unconstitutional."¹⁶²

Similarly, in *State v. Martell*,¹⁶³ the court of appeals agreed with the defendant that the statutory definitions of criminal trespass in the first degree and criminal trespass in the second degree offered the prosecutor an unconstitutional option to charge the defendant for either a gross misdemeanor or a simple misdemeanor for commission of the same criminal act. The *Martell* court applied the *Zornes* doctrine.¹⁶⁴

On one occasion, a defendant raised an equal protection *Zornes* attack against the (subsequently invalidated) death penalty provisions of former RCW 9A.32.045(7).¹⁶⁵ In *State v. Green*,¹⁶⁶ the defendant noted that under RCW 9A.32.045(7) the crime of aggravated murder in the first degree was defined as murder in the first degree committed in the course of the crime of rape or kidnapping.¹⁶⁷ But first degree felony murder, defined in RCW 9A.32.030(1)(c)(2) and (5)¹⁶⁸ encompassed the same act. First degree felony murder carried a maximum penalty of life imprisonment, whereas first degree aggravated murder carried a mandatory sentence of death. The defendant alleged this differential punishment scheme violated *Zornes* by granting the prosecutor a charging option which allowed the prosecutor to deter-

161. *Id.* at 536, 463 P.2d at 614.

162. *Id.* (emphasis added).

163. 22 Wash. App. 415, 591 P.2d 789 (1979).

164. Equal protection of the law under the Fourteenth Amendment to the United States Constitution and article 1, section 12 of the Washington State Constitution is denied by the existence of two separate criminal statutes which declare identical acts to be criminal, but penalize more severely under one than under the other.

In viewing the two statutes pertaining to criminal trespass, it is evident that each prescribes different punishment for the same act, namely entering or remaining unlawfully in a building.

22 Wash. App. at 417-18, 591 P.2d at 790.

165. *State v. Green*, 91 Wash. 2d 431, 438, 588 P.2d 1370, 1374 (1979). See WASH. REV. CODE § 9A.32.045(7), repealed by 1981 Wash. Laws ch. 138, § 24.

166. 91 Wash. 2d 431, 588 P.2d 1370 (1979).

167. *Id.* at 438, 588 P.2d at 1374.

168. *Id.* at 439, 588 P.2d at 1374.

mine the maximum possible sentence. The supreme court recognized the applicability of the *Zornes* principle,¹⁶⁹ yet found the *Zornes* problem was not presented, because the enactment of the aggravated murder statute, by voter initiative, constituted a modification of the preexisting felony murder statute.¹⁷⁰ The *Green* court concluded that the aggravated murder statute removed from the prosecutor the option of charging first degree felony-murder in cases where the aggravated murder statute fit the facts and circumstances of the crime; thus the prosecutor had no discretion to choose between the two statutes.¹⁷¹

The *Zornes* doctrine applies where different punishments are authorized for the same criminal offense. In deciding whether an equal protection violation exists, the reviewing court must decide if the two maximum punishments authorized apply to the same criminal act. The test of whether the same act is being punished differently is whether the elements of the offenses prohibited are identical. "It is a denial of equal protection of law if the prosecutor has discretion to seek varying degrees of punishment by proof of *identical criminal elements*."¹⁷²

In a number of cases the courts have held that although two statutes punish identical offenses, there is no equal protection violation because: (1) the more recently enacted statute effected a repeal of the earlier statute;¹⁷³ or, (2) because one statute is more specific than the other statute, and therefore the general rule dictating that specific statutes govern over general statutes deprives the prosecutor of any option to choose between the two statutes.¹⁷⁴

169. "It is a fundamental principle of constitutional law that no person shall be subjected for the same offense to any greater or differing punishment from that to which others may be subjected." *Id.* at 438, 588 P.2d at 1374.

170. *Id.* at 439-40, 588 P.2d at 1375.

171. *Id.*

172. *Ensminger*, 77 Wash. 2d at 536, 463 P.2d at 614 (emphasis added). *Accord*, *State v. Cann*, 92 Wash. 2d 193, 196, 595 P.2d 912, 915 (1979).

173. *See, e.g.*, *State v. Zornes*, 78 Wash. 2d 9, 475 P.2d 109 (1970); *State v. Ensminger*, 77 Wash. 2d 535, 463 P.2d 612 (1970); *Walder v. Belnap*, 51 Wash. 2d 99, 316 P.2d 119 (1957).

174. *See State v. Cann*, 92 Wash. 2d 193, 595 P.2d 912 (1970) ("special law [WASH. REV. CODE § 9A.88.080, prohibiting the knowing advancement of prostitution] applies to the subject matter contemplated by it to the exclusion of the general [law, WASH. REV. CODE § 9A.28.030, prohibiting criminal solicitation]"); *see also State v. Green*, 91 Wash. 2d 431, 588 P.2d 370 (1979) ("overlay" death penalty statute removes prosecutor's option to charge first degree felony murder where circumstances show first degree aggravated murder was committed).

In a number of Washington cases courts have not applied the *Zornes* doctrine where the two crimes involved have different criminal elements.¹⁷⁶ But it is clear that RCW 10.95.030 authorizes two levels of punishment for the *same crime* of aggravated murder in the first degree. That statute lists the alternative sentences available for commission of the crime:

RCW 10.95.030 *Sentences for Aggravated First Degree Murder.* (1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole . . . (2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050 the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.¹⁷⁶

There can be no contention, in an aggravated first degree murder case, that there are two different crimes with different elements. There is only one criminal statute to examine. That statute, RCW 10.95.020,¹⁷⁷ is entitled "Aggravated First Degree Murder Defined." The decision whether to kill a defendant convicted of aggravated first degree murder depends upon the outcome of a special sentencing proceeding governed by RCW 10.95.040—.060.¹⁷⁸ If the prosecutor determines that he wishes to seek the death penalty, and if he files the notice of the special *sentencing* proceeding as specified in RCW 10.95.040, then all persons convicted of aggravated first degree murder will be sentenced by the jury. At a special sentencing proceeding, the jury is to be asked, "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances

175. "[The *Zornes* rule] applies only when the statutes described identical crimes: the equal protection guarantees are not contravened if the statutes require proof of different elements in order to convict for each offense." *State v. Burley*, 23 Wash. App. 881, 883, 598 P.2d 428, 430 (1979) (first and second degree manslaughter are different crimes; the former requires proof of reckless conduct and the latter crime does not). *See also State v. Reid*, 66 Wash. 2d 243, 401 P.2d 988 (1965) (different elements for unlawful possession of narcotic drugs and unlawful use of narcotic drugs); *State v. Richard*, 27 Wash. App. 703, 621 P.2d 165 (1980) (different elements for possession of a stolen firearm under WASH. REV. CODE § 9A.56.160(1)(e) and third degree theft of firearms under WASH. REV. CODE §§ 9A.56.020, .050); *State v. Eckman*, 9 Wash. App. 905, 515 P.2d 837 (1973) (second degree assault and resisting arrest have different elements).

176. WASH. REV. CODE § 10.95.030 (1981).

177. *Id.* § 10.95.020.

178. *Id.* §§ 10.95.040-.060.

to merit leniency?"¹⁷⁹

The absence of mitigating factors is not an element of aggravated first degree murder. Nowhere in RCW 10.95.020 does it list the absence of mitigating circumstances as an element of the offense.

RCW 10.95.040 purports to give the prosecutor guidance in determining whether to seek the death penalty. It instructs the prosecutor to seek capital punishment when he has "reason to believe that there are not sufficient mitigating circumstances to merit leniency."¹⁸⁰ But unlike the predecessor death penalty statute,¹⁸¹ the prosecutor's notice of intent to seek the death penalty no longer requires that the prosecutor notify the defendant that he "intends to *prove*" the appropriateness of the death sentence in the special sentencing proceeding.

The jury is similarly told to consider whether it is convinced, beyond a reasonable doubt, that there are no mitigating circumstances meriting leniency.¹⁸² But the jury is *not* instructed that the prosecution bears the burden of proving the absence of mitigating circumstances. And under the state supreme court's recent decision in *State v. Bartholomew*,¹⁸³ it is clear that the prosecution does *not* bear the burden of proving the absence of mitigating factors.

Under *Bartholomew*, the prosecution is forbidden, except in rebuttal, to present any evidence at the special sentencing proceeding "other than the defendant's criminal record."¹⁸⁴ The *Bartholomew* court held:

The constitutional requirement of a channeled jury discretion demands that, if the defendant produces no mitigating evidence, the prosecution should be *limited to the factors proved at the guilt phase together with the defendant's criminal record*.¹⁸⁵

179. *Id.* § 10.95.060(4).

180. *Id.* § 10.95.040(1).

181. *Id.* § 10.94.010 (1979), *repealed by* Act of May 14, 1981, ch. 138, § 24, 1981 Wash. Laws.

182. *Id.* § 10.95.060(4) (1981).

183. 98 Wash. 2d 173, 654 P.2d 1170 (1982), *vacated*, Washington v. Bartholomew, 103 S. Ct. 3530 (1983), *cert. denied*, 103 S. Ct. 3548 (1983).

184. 98 Wash. 2d at 197, 654 P.2d at 1184.

185. *Id.* (emphasis added). *Bartholomew* was decided on federal constitutional grounds. Following the *Bartholomew* decision the United States Supreme Court held, in *Zant v. Stephens*, 103 S. Ct. 2733 (1983), that federal constitutional law did not prohibit the consideration of nonstatutory aggravating circumstances. *Bartholomew* was remanded to the Washington Supreme Court for reconsideration pursuant to *Zant*. It

It is clear under *Bartholomew* that the state need not prove that the defendant does not deserve to live. The state need not present, and indeed is forbidden from presenting, any evidence that would prove that the defendant did *not* act under the influence of extreme mental disturbance;¹⁸⁶ did *not* kill with the consent of the victim;¹⁸⁷ did *not* act as an accomplice in a relatively minor role to a murder committed by another;¹⁸⁸ did *not* act under duress or domination of another person;¹⁸⁹ did *not* suffer from a mental disease or defect causing him to fail to appreciate the wrongfulness of his act or to conform his conduct to the law;¹⁹⁰ is *not* so young as to merit leniency;¹⁹¹ and *is* likely to pose a danger to others in the future.¹⁹²

Since the prosecution need not prove the absence of any of these mitigating factors in order to obtain a conviction for aggravated murder in the first degree, their absence is not an element of the crime. Although the jury must be convinced beyond a reasonable doubt that there are no mitigating factors, their judgment need not, and in fact, cannot, rest upon evidence presented by the state which affirmatively proves the null hypothesis that such factors do not exist. Even assuming, *arguendo*, that the prosecution does have the burden of affirmatively proving the absence of all mitigating factors beyond a reasonable doubt, the state would not be shouldering the burden of proving an *element* of the crime. The crime would already have been proven in the guilt phase. Assuming the state has the burden of proof on the issue of sentencing, its burden would be precisely that—to prove the appropriateness of the requested *sentence* beyond a reasonable doubt.

The term “element” is used so commonly in criminal law that it has nearly escaped definition by appellate courts. It does, however, have a common definition which focuses on the legal description of the offense, *not* a description of the offender.¹⁹³

remains to be seen whether the Washington Supreme Court will adhere to its prior decision in *Bartholomew* by grounding its decision in state law rather than federal law.

186. WASH. REV. CODE § 10.95.070(2) (1981).

187. *Id.* § 10.95.070(3).

188. *Id.* § 10.95.070(4).

189. *Id.* § 10.95.070(5).

190. *Id.* § 10.95.070(6).

191. *Id.* § 10.95.070(7).

192. *Id.* § 10.95.070(8).

193. In *State v. Hook*, the Supreme Court of Missouri discussed the term “elements of the crime” as follows:

The term "element," as it is commonly referred to in criminal law, refers to specific historical facts relating to alleged events which have transpired. Either they have transpired or they have not. Historical facts do not encompass subjective judgments or evaluations of offenders to determine if they merit leniency. The "constituent facts of the offense" of aggravated first degree murder are listed in RCW 10.95.020.¹⁹⁴ The absence of "mitigating

However, it is believed that the words "elements of the crime" are used in this statute as they are commonly used in the field of criminal law. In this field, when reference is made to the elements of an offense, such reference means *the constituent facts of the offense, the occurrence of which must be alleged and proved by the state in order to sustain a conviction*. All of the elements of an offense taken together describe and define the crime being considered.

433 S.W. 2d 41, 46 (Mo. App. 1969) (emphasis added).

194. A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnaping in the first degree; or

circumstances meriting leniency" is not listed. Nor is it necessary for the state to prove the absence of mitigating circumstances "in order to sustain a conviction."¹⁹⁵

The state already has a conviction at the end of the guilt phase. In violation of the *Zornes* doctrine, RCW 10.95.030 purports to confer upon the prosecutor the option of seeking harsher punishment based solely upon his subjective conclusion that this particular case of aggravated first degree murder, as opposed to other cases, does not warrant leniency. The statute simply directs the prosecutor to seek the death penalty whenever he feels that a failure to seek the death penalty would be unwarranted. Failure to impose capital punishment is unwarranted whenever the prosecutor feels that leniency is unwarranted. The statute allows the prosecutor alone to determine whether the courts will have the possibility of imposing a sentence of death.

The *Zornes* doctrine distinguishes between *judicial* discretion to impose different sentences for the same crime, and *prosecutorial* discretion to subject some, but not all offenders, to the possibility that the court will impose a harsher sentence. The *Zornes* doctrine has no application to judicial sentencing discretion. In *State v. Blanchey*,¹⁹⁶ the court explained that as long as all offenders who commit the same offense are subject to the *same risk* of the same range of possible sentences by the court, there is no equal protection violation.

This distinction between discretion in choosing the degree of the charge and discretion in fixing the sentence may seem pointless and can result in petty disputes over language. However, it results from a meeting of our two goals of treating men equally in the guilt determination process while retaining some flexibility and individualized treatment at the punishment stage.¹⁹⁷

In *Olsen v. Delmore*,¹⁹⁸ the court explained that simply

(e) Arson in the first degree;

(10) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

WASH. REV. CODE § 10.95.020 (1981).

195. *Hook*, 433 S.W.2d at 46.

196. 75 Wash. 2d 926, 454 P.2d 841 (1969).

197. *Id.* at 940, 454 P.2d at 850.

198. 48 Wash. 2d 545, 295 P.2d 324 (1956).

because the legislature vested the court with discretionary power to impose the alternatives of either incarceration in a penitentiary or confinement in a county jail did not violate equal protection.¹⁹⁹ But the statute struck down in *Olsen* contained "a pretty clear indication that the Legislature thereby intended to vest in prosecuting officials the discretion to charge as for either a gross misdemeanor or a felony."²⁰⁰

The judge may constitutionally give different sentences to defendants who commit the same crime without violating the rule of *Zornes*. But the legislature may not empower the prosecutor to place similarly situated people in jeopardy of different degrees of punishment. It is at this point that the *Zornes* doctrine intersects the doctrine of separation of powers.

The consequence of granting the prosecutor a veto over a sentencing alternative is the creation of a system that violates defendants' rights to equal protection of the law. The separation of powers doctrine combats the evil of usurpation of the powers of one branch of government by another. The equal protection guarantee is designed to secure an impartial and evenhanded administration of the law. When evaluated from a separation of powers doctrinal approach, RCW 10.95.030 invades the power of the judiciary by permitting prosecutors to foreclose a sentencing option. When evaluated from an equal protection approach, RCW 10.95.030 deprives a defendant of his right to be treated like other defendants who have committed the same offense, but who have not been subjected to a special sentencing proceeding and the risk of capital punishment.

When the state chooses not to seek the death penalty, the judicial branch of the government may complain that the defendant in the case at bar is as deserving of capital punishment as other past defendants who have been subjected to special sentencing proceedings. The court may legitimately complain: Why not treat this aggravated murder defendant like those others? When the state chooses to seek the death penalty, the defendant may complain that he is as deserving of life imprisonment without parole as other past defendants who have not been subjected to special sentencing proceedings. The defendant may legitimately complain: Why not treat me like those other aggravated

199. *Id.* at 547-48, 295 P.2d at 325-26.

200. *Id.* at 548, 295 P.2d at 326 (emphasis added). See also *State v. Boggs*, 57 Wash. 2d 484, 490, 358 P.2d 124, 128 (1961).

murder defendants?

Both the *Zornes* equal protection doctrine and the separation of powers doctrine are based on the underlying assumption of our criminal justice system that it is the responsibility of the court, not of the prosecution, to individualize criminal sentences to make the sentence fit the offender. The prosecution is responsible for deciding *which crime* fits the defendant's conduct. Once the prosecution determines which crime to charge, then the range of potential sentences is legislatively defined. Within that legislative range of possible sentences, the court chooses the sentence which fits the offender. In this manner, our criminal justice system promotes equality by insisting that all persons who commit the same offense are subject to the same broad range of potential punishments. Yet, simultaneously, the system promotes individualized sentencing by allowing the judiciary to choose a sentence within the legislatively authorized range which fits the particular defendant before the court.

It is because sentencing is an inherently judicial function that the *Zornes* doctrine developed. Adherence to *Zornes* confines prosecutors to their proper role of making charging decisions, but not sentencing decisions. This interplay between equal protection doctrine and separation of powers doctrine is best illustrated by the decision in *In re Schellong*.²⁰¹

In *Schellong*, the juvenile defendant was convicted of ten separate offenses of burglary and theft. At the time of his sentencing, the state relied on nine prior criminal offenses (one felony, seven gross misdemeanors and one misdemeanor) as part of the juvenile's prior juvenile delinquency record. The defendant claimed that the prosecutor's discretion to choose between grouping offenses or counting each offense individually gave the prosecution the power to subject defendants to different potential maximum punishments for commission of identical crimes in violation of *Zornes*.²⁰²

The supreme court recognized that although the prosecutor had no power to directly increase the maximum potential punishment for his offenses, the state could indirectly influence the maximum potential sentence by choosing not to aggregate prior criminal offenses.²⁰³ While acknowledging that this might cause

201. 94 Wash. 2d 314, 616 P.2d 1233 (1980).

202. *Id.* at 319, 616 P.2d at 1236.

203. *Id.*

a *Zornes* equal protection violation if the prosecutor's acts caused a mandatory inflation of the sentence, the court noted that the Juvenile Justice Act contained a "safety valve" permitting the trial judge to override any effect the prosecutor might have on the recommended sentence.²⁰⁴

The death penalty provisions of RCW 10.95 contain no similar "safety valve." There is no "manifest injustice" provision that allows the trial judge to override a prosecutor's decision not to initiate a special sentencing proceeding. The absolute veto power of the prosecution over capital punishment, immune from judicial override, thus gives birth to a denial of equal protection. It produces a legitimate constitutional complaint that the prosecutorial failure to seek capital punishment in other aggravated first degree murder cases, coupled with the decision to seek the death penalty against a particular defendant, constitutes a violation of the equal protection clause of the fourteenth amendment to the United States Constitution, and article I, section 12 of the Washington State Constitution.

VI. VOID FOR VAGUENESS

Even if one assumes, for the sake of argument, that RCW 10.95 does not violate the *Zornes* doctrine because the prosecution is required to prove the additional element of the absence of sufficient mitigating circumstances in order to obtain a death sentence, RCW 10.95 is nevertheless unconstitutionally void for vagueness. Vague statutes violate due process by encouraging

204. The only effect that the prosecutor can have, under the trial court's interpretation of the statute, is that the suggested sentence under the guidelines would vary according to whether the prosecutor charges multiple offenses in groups or all at once. Although this discretion might reach the level of a violation of equal protection if the trial judge were bound to simply follow the guidelines, just as in *Zornes* and *Olsen* the trial judges were bound to sentence according to the applicable statutes, that is not the case here. The Juvenile Justice Act of 1977 contains a safety valve which places discretion in the trial judge and overrides this small amount of discretion that the trial court's interpretation of the statute would place in the prosecutor. The trial judge has the discretion to impose a sentence outside of the standard range if he finds this is necessary to avoid "manifest injustice." RCW 13.40.160(4)(c).

Because the trial judge has a discretion in sentencing that can override any effect that the prosecutor might have on the recommended sentence, this case falls under the rule of State v. Boggs, 57 Wn.2d 484, 358 P.2d 124 (1961). . . . The trial judge should be able to tailor the sentence to the individual criminal. Thus, there was no denial of equal protection.

Id. at 319-20, 616 P.2d at 1236 (emphasis added).

arbitrary and discriminatory enforcement. In *Papachristou v. City of Jacksonville*,²⁰⁵ the Supreme Court held unconstitutional a municipal vagrancy statute on grounds of vagueness. The Supreme Court emphasized that where "there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages arbitrary and discriminatory enforcement."²⁰⁶

The ordinance, according to one scholar, "had to be invalidated because its vagueness permitted and encouraged arbitrary and discriminatory enforcement. The ordinance was so vague that the arresting officers had hardly any guidance from it."²⁰⁷

The Washington Supreme Court, in *City of Seattle v. Rice*,²⁰⁸ struck down a municipal trespass ordinance which criminalized the act of refusing to leave premises open to the public when given a "lawful order" to leave:

[A] statute or ordinance must be sufficiently specific to ensure that it will not be enforced arbitrarily. A vague statute or ordinance invites unequal enforcement, and gives unfettered discretion to the police and to the Courts. By defining the offense of criminal trespass in terms of obedience to a "lawful" order, the Seattle ordinance creates the possibility of arbitrary enforcement. As we stated in *Bellevue v. Miller*, 85 Wn.2d 539, 545, 536 P.2d 603 (1975):

"Legislation which purports to define illegality by resort to such inherently subjective terms as 'unlawful purpose' . . . permits, indeed requires, an *ad hoc* police determination of criminality. . . . The potential for arbitrary and discriminatory law enforcement under such legislation cannot constitutionally be tolerated."²⁰⁹

Like the standardless statutes in *Papachristou* and *Rice*,²¹⁰ the failure to define the terms "mitigating circumstances" or "merits leniency" renders RCW 10.95 unconstitutionally vague by inviting arbitrary ad hoc prosecutorial determination of when to request capital punishment. The prosecution is directed to seek the death penalty "when there is reason to believe that there are not sufficient mitigating circumstances to merit leni-

205. 405 U.S. 156, 162 (1972).

206. *Id.* at 170.

207. K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE, § 3.9, at 180 (1979).

208. 93 Wash. 2d 728, 612 P.2d 792 (1980).

209. *Id.* at 732, 612 P.2d at 794 (citation omitted)(emphasis added).

210. See *supra* notes 205-09 and accompanying text.

ency.”²¹¹ The statute thus poses four issues for prosecutorial resolution in every case: (1) What constitutes a mitigating circumstance? (2) How strong must the mitigating circumstances be before they are “sufficient” to merit leniency? (3) Do there exist mitigating circumstances in this case which merit leniency? (4) Notwithstanding the existence of mitigating circumstances which, in the prosecutor’s judgment *do* merit leniency, is there nevertheless “a reason to believe” that the mitigating circumstances are not sufficient?

The language of the statute appeals directly to personal, subjective feelings. The decision turns on belief, and not on evidence, proof, or findings. The judgment called for is not directed or guided in any way. What is “sufficient,” “mitigating,” or “meritorious”? The statutory language does not say. But the legislature has provided no other guidelines. Absent guidance, the decision becomes an exercise in unfettered discretion, where every prosecuting attorney in the State of Washington is free to act in accordance with his or her own personal beliefs.

A. *Mitigating Circumstance*

If the prosecutor is to determine that there are not sufficient mitigating circumstances to merit leniency, he must be able to distinguish a mitigating circumstance from other “neutral” circumstances. What is a mitigating circumstance? Is poverty a mitigating circumstance? Is the lack of employment opportunities a mitigating circumstance? Is the fact that the defendant is an immigrant who came to this country with meager employment skills and a poor command of the English language a mitigating circumstance? The Spokane County Prosecuting Attorney may feel in his heart that this is a mitigating circumstance. The King County Prosecuting Attorney may disagree. An Asian-American prosecuting attorney may feel that a teenage immigrant to this country from Hong Kong has a claim of mitigating circumstances but an Anglo-American prosecuting attorney who has no personal experience with the social impact of immigration may disagree.

Is it a mitigating circumstance that the accused has, notwithstanding this commission of an aggravated murder, acquired a reputation of being unusually generous and charitable to other

211. WASH. REV. CODE § 10.95.040(1) (1981).

members of the community? Is it a mitigating circumstance that the defendant has worked to single-handedly support his family of five brothers and sisters and his parents?

The statute provides no definition of the term "mitigating circumstance." The closest the statute comes to a discussion of mitigating circumstances is contained in RCW 10.95.070.²¹² This section does not speak of mitigating circumstances as such, but instead permits jury consideration of "any relevant factors." The factors listed do not all militate in favor of leniency. The last relevant factor concerns the question of "whether there is a likelihood that the defendant will pose a danger to others in the future." Presumably an affirmative answer to this question militates against leniency. Although some of the factors listed in RCW 10.95.070 could be taken as mitigating circumstances, neither the prosecuting attorney nor the jury is told why these factors qualify as mitigating factors. Since the list is expressly stated to be only illustrative, the statute conveys that there are other relevant factors, yet no legislative directive tells how to determine if these other relevant factors qualify as "mitigating circumstances."

If the underlying truth is that *anything* may be a mitigating circumstance, then RCW 10.95 is completely standardless, and the statute fails to " 'guide' and 'regularize' the discretion of the sentencing jury and [to] make the process of sentencing to death 'rationally reviewable.' "²¹³ In *Gregg v. Georgia*,²¹⁴ the defendant argued that the statutory definitions of some of the aggravation factors under Georgia law "were vague and therefore susceptible of widely differing interpretations creating a substantial risk that the death penalty would be arbitrarily inflicted."²¹⁵ The U.S. Supreme Court initially rejected this argument, based on the assumption that the Georgia Supreme Court could, through judicial interpretation, narrow the scope of vague statutory definitions. But in *Godfrey v. Georgia*,²¹⁶ the Court said:

[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this

212. *Id.* § 10.95.070.

213. *Bartholomew*, 98 Wash. 2d at 192, 654 P.2d at 1182.

214. 428 U.S. 153 (1976).

215. *Id.* at 202.

216. 446 U.S. 420 (1980).

regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance" and that "make rationally reviewable the process for imposing a sentence of death."²¹⁷

In the case of Washington's death penalty statute, the constitutional defect concerns the failure to define "mitigating circumstances." In *Godfrey*, the defect was the failure to constitutionally "tailor" the vague definition of an aggravating circumstance.²¹⁸ In both cases, however, the evil to be prevented is the same: standardless sentencing discretion must be eliminated. The Washington statute fails to channel both the prosecutor's discretion to request the death penalty and the jury's discretion to grant his request, by failing to supply "clear and objective standards" which provide the "specific and detailed guidance" mandated by *Godfrey*.²¹⁹

In *People ex rel. Rice v. Cunningham*,²²⁰ the Illinois Supreme Court examined the Illinois death penalty statute

217. *Id.* at 428 (quoting *Bartholomew*, 98 Wash. 2d at 189, 654 P.2d at 1180) (emphasis added).

218. 446 U.S. at 428-29.

219. *Id.* at 428. In *Zant v. Stephens*, 103 S. Ct. 2733, 2741-44 (1983), a majority of the Supreme Court concluded that aggravating circumstances serve simply to define the threshold which distinguishes cases of murder where capital punishment is unavailable from those where a death sentence is available. As long as the aggravating factors are defined with sufficient clarity, the *Zant* Court concluded it was not necessary that the jury be instructed that it should weigh aggravating circumstances against mitigating circumstances in order to satisfy the eighth amendment requirement that a death penalty scheme must adequately channel the discretion of the sentencing body.

The *Zant* dissenters noted that the majority was effectively abandoning its prior decision in *Gregg v. Georgia*, 428 U.S. 153, at 198 (1976), where it was held that capital punishment discretion was "to be exercised by clear and objective standards." Justice Marshall, dissenting, observed:

Under today's decision all the State has to do is require the jury to make some threshold finding. Once that finding is made, the jurors can be left completely at large, with nothing to guide them but their whims and prejudices. They need not even consider any statutory aggravating circumstances that they have found to be applicable. Their sentencing decision is to be the product of their discretion and of nothing else.

103 S. Ct. at 2760 (Marshall, J., dissenting).

While the *Zant* majority has determined that the absence of channeled discretion, after making a threshold finding, does not violate the eighth amendment, that determination does not dictate the answer to the question of whether or not a state may fail to adequately define an element of a statutory offense, in violation of the vagueness doctrine under the fourteenth amendment due process clause.

220. 61 Ill. 2d 353, 336 N.E.2d 1 (1973).

which directed a panel of three judges to decide whether "there are compelling reasons for mercy"²²¹ such that the death sentence should not be imposed. The *Cunningham* court concluded:

[T]he provision is defective because it does not contain standards or guidelines to be considered in determining whether there are "compelling reasons for mercy" and the imposing of a sentence other than a sentence of death.²²²

The two phrases "compelling reasons for mercy" and "sufficient mitigating circumstances meriting leniency" are equally vacuous. Both are equally unconstitutionally vague.

B. *Sufficient to Merit Leniency*

Are some mitigating circumstances more meritorious than others, or do all mitigating circumstances contribute equally to the "leniency" calculation? Is the youth of a defendant a more powerful reason for leniency than a defendant's lack of a significant history of prior criminal activity? Does the existence of a lengthy juvenile history of prior criminal activity "negate" the mitigating force of a defendant's relative youth so as to make leniency unwarranted? The statutes do not answer these questions. Assuming that all mitigating circumstances are equally meritorious, how many mitigating circumstances are required before leniency is merited? Is one enough? Will the jury infer from the use of the plural (in the phrase "mitigating circumstances") that at least two mitigating circumstances are required? Does it depend upon how many aggravating factors were proved at stage one? If three aggravating factors are proved, must the jury be able to articulate at least three mitigating circumstances to counterbalance them?

The statute provides no guidance whatsoever as to how much mitigation is required before leniency is merited. The statutory term "sufficient" is left undefined and every prosecutor and juror is free to follow his or her own personal feelings. One jury may find it "sufficient" that a defendant is twenty-three years old, notwithstanding the fact that he raped and murdered a dozen kindergarteners. For the same crime another jury might find it insufficient to merit leniency that the twenty-three year old defendant had a history of schizophrenia, no prior criminal

221. *Id.* at 361-62, 336 N.E.2d at 6.

222. *Id.*

record, an I.Q. of sixty-five, and that he committed the crime under the direction of an older defendant with ten prior felony convictions.

The statute's failure to define "sufficiency" is hardly an insurmountable legislative barrier. Many states simply require that the jury be convinced that there are *no* mitigating circumstances present. The Washington death penalty statute provides that the presence of just one aggravating factor is sufficient for the imposition of capital punishment. The statute could easily quantify the number of mitigating circumstances necessary to merit leniency, but it fails to do so.

C. *The Prosecutor's "Reason to Believe"*

The prosecutorial decision to request death is also intertwined with an additional thread of unfettered discretion. The prosecution is directed to request a death sentence whenever the prosecutor has "reason to believe" that there are not sufficient mitigating circumstances (as defined by the prosecutor). In contrast to the question put to the jury, requiring them to find—in the plural—mitigating circumstances, the prosecution need only have *one* "reason to believe" that capital punishment is appropriate. Thus, notwithstanding the presence of five or ten identifiable mitigating circumstances, if the prosecutor believes that in cases of multiple homicides no number of mitigating circumstances can be sufficient for leniency, then that one "reason" is sufficient to put the question of capital punishment before the jury.

Nor does the statute require the prosecutor to record that reason, or to articulate in any manner his justification for requesting capital punishment. No affidavit must be filed with the court which specifies the state's reason.

The failure to require the prosecutor to articulate the basis of his "reason to believe" that capital punishment is warranted constitutes a violation of procedural due process which further aggravates the statute's unconstitutional vagueness. The U.S. Supreme Court has consistently held that the fundamental requirements of procedural due process guarantee citizens the right to an explanation when governmental officials take action that adversely affects them. One scholar has noted that this right "has often been valued less for its own sake than as a device for the protection of substantive rights or entitle-

ments.”²²³ In *Wolff v. McDonnell*,²²⁴ the Supreme Court required that a denial of parole be accompanied by a written statement of reasons. “The provision for a written record helps to insure that administrators, faced with possible scrutiny by [other] officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.”²²⁵

A welfare administrator who denies an applicant public assistance is required, as a matter of constitutional law, to “state the reasons for his determination and indicate the evidence he relied on . . . though the statement need not amount to a full opinion or even formal findings of fact and conclusions of law.”²²⁶ But RCW 10.95.040 does not require a prosecutor to state his reason for requesting the death penalty.²²⁷ The law thus requires less for a prosecutor to put a man on trial for his life than it does for an administrator to turn down a request for food stamps.

The requirement of an explanation of reasons is designed to test the fairness of administrative decisionmaking by subjecting it to public scrutiny. Here the legislature has purported to vest total, unrestrained discretion in the prosecutor to seek or not to seek capital punishment, in cases where individuals have committed the same offense, without defining the statutory terms upon which the decision turns. As a final constitutional flaw, the legislature does not even require the prosecution to explain its decision. The prosecution is free to define “mitigating circumstances” as it chooses, to assess their sufficiency by purely personal and subjective standards, and then may announce its decision to request a sentence of death, without providing any explanation as to how this conclusion was reached. The failure to require an explanation thus aggravates the other constitutional defects which so thoroughly pervade RCW 10.95.

223. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 10-15, at 554 (1978).

224. 418 U.S. 539 (1974).

225. *Id.* at 565.

226. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

227. If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

WASH. REV. CODE § 10.95.040(1) (1981).

VII. UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY TO THE EXECUTIVE BRANCH

In *Barry & Barry, Inc. v. Department of Motor Vehicles*,²²⁸ the court adopted a two-part test to determine whether a delegation of legislative authority is constitutional. The delegation of power will be upheld where it can be shown "(1) that the Legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power."²²⁹

RCW 10.95.040 may be deemed to satisfy the first prong of the *Barry* test. The statute does state generally what is to be done and who is to do it. The prosecuting attorney is assigned the general task of determining whether or not capital punishment should be requested. But the statute fails to satisfy the second prong of the *Barry* test since there are no procedural safeguards which exist to prevent the prosecution from making an arbitrary decision to request a death sentence.

It must be clearly understood that the procedural safeguards required by *Barry* are designed to prevent an arbitrary prosecutorial decision *to file* a notice of a special sentencing proceeding. The decision is *not* the decision *to impose* a death sentence. That decision is within the province of the jury, and the delegation of legislative powers doctrine is not applicable to it. The decision subject to *Barry* is the decision to trigger a special sentencing proceeding.

First, it must be noted that the prosecutors could adopt their own standards to guide their decisions. The Washington Supreme Court has emphasized the importance of administrative prosecutorial standards:

The employment of standards to guide a prosecutorial decision minimizes the possibility that the State will act arbitrarily in violation of the due process rights of defendants.²³⁰

In *State v. Rowe*,²³¹ the court approved of the use of objective standards by a prosecutor in deciding whether to charge a

228. 81 Wash. 2d 155, 500 P.2d 540 (1972).

229. *Id.* at 159, 500 P.2d at 542-43 (emphasis deleted). *Accord*, *Polygon Corporation v. City of Seattle*, 90 Wash. 2d 59, 66, 578 P.2d 1309, 1313 (1978).

230. *Cascade*, 94 Wash. 2d at 779, 621 P.2d at 119.

231. 93 Wash. 2d 277, 609 P.2d 1348 (1980).

defendant with being an habitual criminal. If the Washington county prosecutors had self-imposed administrative standards which guided the decision to seek or not to seek capital punishment, then there would exist administrative procedural safeguards against arbitrary decision making. But no such safeguards exist.²³²

Nor are there any procedures adopted which ensure that evidence of mitigating factors will be presented or considered. The police are not directed to look for any mitigating evidence. The statute does not require the prosecuting attorney to make any effort to seek out mitigating circumstances, and the King County Prosecutor's standards do not either. The statute places a limit of thirty days from the time of arraignment during which the prosecutor may consider filing notice of a special sentencing proceeding. But the statute does not direct or require the prosecutor to take action within these thirty days.

Nothing prevents the prosecutor from filing the notice of special sentencing proceeding at the time of arraignment itself. The prosecutor can, if he chooses, make no effort to identify mitigating circumstances. He may simply assume there are none. Neither the statute nor King County Prosecutor filing standards provide a mechanism for defense counsel to make an offer of proof to the prosecutor as to mitigating circumstances.

It is not a sufficient answer to argue that the prosecutor's discretion is restricted by his ability to meet the standard of proof required, because the proof required is undefined and non-existent. The prosecution must prove that something the legislature has not defined does not exist. Even assuming that an oper-

232. The King County Prosecuting Attorney does have a written death penalty standard. Until April, 1983, the standard provided no more guidance than does the statute. The King County Prosecutor's former filing standards did not narrow the discretion granted by WASH. REV. CODE § 10.95.040 by adopting specific guidelines: they simply repeated the general language of the statute.

In April, 1983, the King County Prosecutor promulgated new guidelines for deciding when to file notice of intent to seek the death penalty. Norm Maleng, Filing and Disposition Policies, Criminal Division [King County Prosecutor], (April 21, 1983). Under the new guidelines, the prosecuting attorney must be satisfied that substantial evidence exists to establish premeditation and an aggravating factor. *Id.* at 40. The decision to file is made when the prosecuting attorney has decided that there is not sufficient evidence of mitigation to warrant less than the death penalty. *Id.* The prosecutor's file must contain aggravating factors, mitigating factors existing under WASH. REV. CODE § 10.95.040(1), *Id.* at 41, and other mitigating factors. *Id.* The Chief Deputy shall also seek input from defense counsel and note it in the file. *Id.* As of October, 1983, no death penalty cases have been filed under the new standard.

ational definition of mitigating circumstances existed, to assert a good faith belief that the state could meet its burden of proof, the prosecuting attorney need only close his or her eyes and utter the words, "I don't see any mitigating circumstances." The state need only assert the nonexistence of facts. It need not attempt to determine whether critical mitigating facts do exist. Once the notice of a special sentencing proceeding is filed, it is too late for the defendant to do anything about it.

In the past, the King County Prosecutor's Office has asserted that the existence of disciplinary rules and ethical standards constitute "procedural safeguards" which satisfy the second prong of the *Barry* test.²³³ The state has further argued that Disciplinary Rule 7-103(A) of the ABA Code of Professional Responsibility²³⁴ prohibits a prosecutor from instituting a criminal charge unsupported by probable cause.²³⁵ It is difficult to take this argument seriously. Does the state really mean to suggest that the threat of a disciplinary proceeding against a county prosecutor will prevent arbitrary decisions? Will bar disciplinary committees investigate the good faith of county prosecutors who assert their own subjective belief that capital punishment is warranted in a particular case? Where the decision is so purely subjective and the criteria so completely undefined, there is no meaning to a phrase like "probable cause." One man's honest subjective belief that death is appropriate may strike another equally honest man as absurd. "Probable cause" to believe a crime has been committed is tested by reference to the concrete factual elements of a crime. But how does one assess "probable cause" to believe that leniency is not warranted because undefined mitigating circumstances have never surfaced?

As stated in *State v. Cascade District Court*:

The separation of powers principle requires that the delegation of legislative power to the executive be accomplished along with standards which guide and restrain the exercise of the delegated authority. If the Legislature wishes to make the initial eligibility decision one for the prosecutor, as in California

233. *State v. Hughes*, No. 82-1-01979-4 (King County Super. Ct., Mar. 12, 1983), appeal filed, No. 49493 (Wash. S. Ct., April 14, 1983).

234. "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1981).

235. *Hughes*, No. 82-1-01979-4.

and New Jersey, then standards for guiding decisionmaking are necessary to prevent an unconstitutional delegation of the legislative authority to alter the sentencing process.²³⁶

No procedural safeguards exist to guard against arbitrary prosecutorial decisionmaking. Neither the legislature nor the county prosecutors have devised any such safeguards. Accordingly, RCW 10.95 must be held, as applied in King County and other counties, to confer an unconstitutional grant of legislative power upon the executive branch of government.

VIII. THE UNEQUAL ADMINISTRATION OF THE LAW

Where a grant of discretionary power is exercised according to the personal whims of an administrator, rather than in accordance with an ascertainable legal standard, the result is the denial of the equal protection of the laws guaranteed by the fourteenth amendment. The fuzzier the legal standard, the more susceptible the administration of law becomes to personal caprices. In the seminal case of *Yick Wo v. Hopkins*,²³⁷ the Supreme Court held that though a law be "fair on its face and impartial in appearance," yet if applied and administered with "an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances," the guarantee of equal protection of the law is unconstitutionally abridged.²³⁸ The Court recognized that the equal protection clause is rooted in the doctrine that ours is a government of laws, not of men:

When we consider the nature of the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

. . . For the very idea that one man may be compelled to hold *his life*, or the means of living, or any material right essential to the enjoyment of life, *at the mere will of another*, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.²³⁹

Recent experience with the death penalty in Washington

236. 94 Wash. 2d at 781, 621 P.2d at 120 (citations omitted).

237. 118 U.S. 356 (1886).

238. *Id.* at 373-74.

239. *Id.* at 369-70 (emphasis added).

State reflects a chilling pattern of drastically unequal administration of the law. In Snohomish County, in the case against defendant Charles Campbell,²⁴⁰ the prosecuting attorney officially acknowledged the receipt of a petition containing thousands of signatures, calling on the prosecutor to seek the death penalty.²⁴¹ The prosecutor placed the petition in his official file and ultimately sought the death penalty.²⁴² In King County, when labor reform leaders were gunned down by hired killers, the Asian community asked the prosecutor *not* to seek the death penalty against codefendants Ramil and Guloy.²⁴³ In that case, the absence of political pressure to seek capital punishment, coupled with the presence of political pressure not to seek a death sentence, may have produced a decision not to initiate death penalty proceedings.

The presence or absence of petition signatures or vocal community expressions of sentiment is completely unrelated to the statutory directive to consider whether mitigating circumstances meriting leniency are present. But because the statute is so completely devoid of any meaningful standards, the county prosecutors throughout the state are left highly vulnerable to the influence of political pressures. The upshot may well be an emerging pattern of executions according to prevailing local community standards. Where local community sentiment in favor of capital punishment runs high, prosecutors will seek death sentences more frequently than those whose communities are characterized by philosophical objections to capital punishment. The result is the haphazard infliction of death across the state. The executioner's song will play in Yakima County, but for an identical crime, it may not play in Kitsap County.

IX. CONCLUSION

The interlocking threads of various constitutional defects in the statutory scheme of RCW 10.95 reinforce each other repeatedly. By vesting sole authority in the prosecution to initiate a death penalty proceeding, the legislature has granted prosecu-

240. *State v. Campbell*, No. 82-1-00241-5 (Snohomish County Super. Ct., Nov. 30, 1982), *appeal filed*, No. 49244 (Wash. S. Ct., Dec. 21, 1982).

241. *Id.*

242. *Id.*

243. *State v. Ramil*, No. 81-1-01924-9 (King County Super. Ct., Sept. 24, 1981), *appeal filed*, No. 48311-6 (Wash. S. Ct., Jan. 16, 1981), *appeal filed sub. nom. State v. Guloy*, No. 48248-9 (Sept. 18, 1981).

tors an unconstitutional veto power over a sentencing alternative, in violation of the separation of powers doctrine. The systematic failure to seek input from the lay community by ignoring the institution of the grand jury compounds the problem by leaving the power of the prosecutor unchecked. By authorizing prosecutors to seek different degrees of punishment, even though defendants have committed identical crimes, the legislature has sanctioned a violation of equal protection principles. Simultaneously, the absence of legislative standards or definitions leaves county prosecutors free to legislate their own death penalty schemes, in violation of the due process vagueness principles. A legislative delegation of such enormous power, without guiding standards, permits intolerable variances between capital punishment practices from one county to the next. While discretion is permissible, the exercise of sound discretion demands responsibility. The defects in RCW 10.95 fail to ensure that sentences of death are responsibly administered in Washington State.