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Retroactivity and Criminal Law in Oklahoma: Procedurally Avoiding Constitutional Provisions

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RETROACTIVITY AND CRIMINAL LAW IN OKLAHOMA: "PROCEDURALLY" AVOIDING CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Gary Thomas Allen murdered his girlfriend, LaWanna Gail Titsworth, by shooting four bullets into her body.[1] Forrest Kinzer Wade murdered Gary Chapman by striking him in the head with a hammer, and murdered Johnny Brewer by eviscerating him with a butcher knife.[2] Maximo Lee Salazar murdered nine year old Jennifer Prill by stabbing her twice in the neck while burglarizing her home.[3] Scott Allen Hain murdered Laura Lee Sanders and Michael Houghton by locking them in the trunk of Sanders' car and setting the car on fire.[4] Allen, Wade, Salazar, and Hain were subsequently arrested and each was charged with First Degree Murder.[5]

At the time each of these crimes was committed, the penalty for first degree murder, as set forth in section 701.9 of the Oklahoma Criminal Code, was either life imprisonment or death.[6] On November 1, 1987, while all four defendants were awaiting trial, an amendment to section 701.9 became effective that added the sentencing option of life without parole.[7]

Without considering the option of life without parole, a jury subsequently convicted all four defendants of First Degree Murder and

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1. Allen v. State, 821 P.2d 371, 373 (Okla. Crim. App. 1991).

2. Wade v. State, 825 P.2d 1357, 1359-60 (Okla. Crim. App. 1992).

3. Salazar v. State, 852 P.2d 729, 731 (Okla. Crim. App. 1993).

4. Hain v. State, 852 P.2d 744, 746-47 (Okla. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1402, *and cert. denied*, 114 S. Ct. 1416 (1994). Robert Wayne Lambert was a co-defendant and tried in a separate case. *See* Lambert v. State, 808 P.2d 72 (Okla. Crim. App. 1991).

5. *Hain*, 852 P.2d at 746; *Salazar*, 852 P.2d at 731; *Wade*, 825 P.2d at 1359; *Allen*, 821 P.2d at 372. Hain, Salazar, and Allen were also charged with and convicted of other crimes, but for present purposes, only the murder charges will be discussed.

6. OKLA. STAT. tit. 21, § 701.9 (1981), *amended by* 1987 Okla. Sess. Laws 96 (current version at OKLA. STAT. tit. 21, § 701.9 (1991)).

7. 1987 Okla. Sess. Laws 96 (codified as amended at OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994)).

sentenced them to death.[8] The Oklahoma Court of Criminal Appeals[9] upheld all four murder convictions, but vacated each death sentence and remanded for resentencing; holding in each case that the trial court erred by not considering the option of life without parole as added by the November 1987 amendment.[10]

Although the court addressed other issues related to the sentencing phase of the trials,[11] the primary basis for its decision in all four cases was the distinction set forth in *Allen*, i.e., the sentencing amendment was procedural and not substantive.[12] The *Allen* court held that, because the amendment did not affect the maximum or minimum punishment to which Allen could have been subjected, it did not alter the punishment beyond that which was in effect at the time of the crime, and therefore, the amendment was procedural and not substantive.[13] In the court's view, this distinction permitted retroactive application of the amendment without violating the constitutional prohibition against ex post facto laws[14] and avoided the saving

8. *Hain*, 852 P.2d at 746; *Salazar*, 852 P.2d at 731; *Wade*, 825 P.2d at 1359; *Allen*, 821 P.2d at 372.

9. The Oklahoma Supreme Court does not hear criminal cases. The Court of Criminal Appeals is the highest state court which hears criminal cases. *See* OKLA. CONST. art. VII, § 4.

10. *Hain*, 852 P.2d at 753; *Salazar*, 852 P.2d at 741; *Wade*, 825 P.2d at 1363; *Allen*, 821 P.2d at 376.

11. In *Hain*, the court considered the need for careful scrutiny of a death sentence, principles of fairness, and the proximity of the time of the crime to the legislative enactment. *Hain*, 852 P.2d at 753.

The court in *Salazar* addressed the applicability of 1) Oklahoma's savings clause; 2) the "death is different" analysis, which proposes that, because a death sentence is different from any other type of punishment, there is a heightened need for care to ensure that the sentence of death is not imposed capriciously; and 3) the legislative purpose for enacting the amendment. *See* discussion *infra* part IV.A; *Salazar*, 852 P.2d at 738-39; *see also id.* at 741 n.9 (noting that the requirement of waiver was not overruled, although Salazar did not make such a waiver. The court further commented that the district court, the district attorney, and Salazar were all under the mistaken impression that life without parole was not an option during sentencing, and the right against ex post facto application was therefore not waived because the defendant did not know he had that right).

Wade, 825 P.2d at 1363 (noting that the defendant specifically waived his constitutional right against application of any ex post facto law and holding that failure of the trial court to instruct the jury on the possibility of life without parole would not have been error without this waiver); *Allen*, 821 P.2d at 375-76 (considering possible ex post facto violations by retroactive application of the amendment, and appropriate remedies upon a finding of error).

12. *Allen*, 821 P.2d at 376.

13. *Id.* at 375-376; *see also Hain*, 852 P.2d at 753; *Salazar*, 852 P.2d at 737; *Wade*, 825 P.2d at 1363.

14. U.S. CONST. art. I, § 9, cl. 3 (stating, while referring to the Congress of the United States, that "[n]o Bill of Attainder or ex post facto Law shall be passed"); U.S. CONST. art. I, § 10, cl. 1 (stating that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility"); OKLA. CONST. art. II, § 15 (stating that "[n]o bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed").

clause[15] contained in the Oklahoma Constitution.[16] However, judicial designation of a statutory amendment as procedural, thereby allowing retroactive application, is not necessarily sufficient to overcome constitutional provisions. Retroactive application of the 1987 amendment may indeed be ex post facto, and it raises equal protection[17] concerns. Furthermore, retroactive application ignores both Oklahoma's saving clause and legislative intent.

This comment examines these constitutional issues as well as the process of determining legislative intent, and the interaction between such issues and retroactive application of an amendment to a criminal statute.[18] The foregoing capital cases will be used for illustration; however, the discussion will be equally applicable to any change in a criminal statute.[19] It will be demonstrated that a court cannot avoid these constitutional provisions by simply designating a new or amended criminal statute as procedural. Finally, the comment will analyze the practical effects of retroactive application, and conclude that enactments which amend or repeal criminal statutes should only apply prospectively.[20]

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15. A saving clause is any statutory or constitutional language which "saves" a pending prosecution from abatement upon the repeal or amendment of the underlying statute. BLACK'S LAW DICTIONARY 1343 (6th ed. 1990); *see also* discussion *infra* part IV.A.

16. *See* OKLA. CONST. art. V, § 54; *see also* discussion *infra* part IV.A.

17. *See* U.S. CONST. amend. XIV, § 1 (stating that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

18. This comment will not consider implications of retroactivity concerning constitutional repeal by the legislature nor judicial decisions which affect the constitutionality of criminal laws. For a discussion of the former, see United States v. Chambers, 291 U.S. 217 (1934). For a discussion of the latter, see Linkletter v. Walker, 381 U.S. 618 (1965); Paul Bender, *The Retroactive Effect of an Overruling Constitutional Decision:* Mapp v. Ohio, 110 U. PA. L. REV. 650 (1962); Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the* Teague *Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046 (1994); Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

Although this comment does focus on four death penalty cases, it is not intended to represent a position for or against imposition of the death penalty.

19. The discussion concerning amendment or repeal of statutes involving the death penalty will not, of course, apply to other criminal statutes which are not punishable by death. However, much of the discussion contained in the opinions is applicable to other amendments. For example, the discussion of procedural classification, legislative intent, saving clauses, ex post facto laws, and equal protection is applicable to any amendment or enactment of a criminal statute.

20. When a statute is declared unconstitutional, the issue of retroactivity is generally one of degree rather than whether it should be applied at all. The United States Supreme Court has wrestled with retroactivity in such cases, and has yet to set forth any clear guidelines for determining the degree of retroactivity which should be allowed in particular types of cases. In fact, the degree of retroactivity seems to be case-specific. *See, e.g.*, Halliday v. United States, 394 U.S. 831 (1969) (allowing retroactivity only for those defendants whose guilty pleas were accepted after a certain date); Desist v. United States, 394 U.S. 244 (1969) (limiting retroactivity to cases in which an electronic surveillance conducted after a certain date is attempted to be introduced

II. PROCEDURAL V. SUBSTANTIVE LAW

Procedural law, in a criminal context, is generally considered to be law which creates or regulates the steps by which a criminal defendant is to be punished,[21] or the rules governing the procedures for investigating, prosecuting, adjudicating, and punishing crimes.[22] Substantive law is law that specifies which acts constitute criminal behavior and prescribes the punishment thereafter.[23] The United States Supreme Court has stated that the term "procedural" refers to changes in the procedures for adjudicating a criminal case, as opposed to changes in the substantive law of crimes.[24]

In Oklahoma, the substantive law of crimes, or penal law,[25] is in Title 21, formally known as the Penal Code,[26] and the law of criminal procedure is in Title 22.[27] The sentencing amendment at issue in *Hain*, *Salazar*, *Wade*, and *Allen*, is contained in Title 21.[28] It is not at all clear how the Court of Criminal Appeals determined that a provision contained in the substantive law of crimes should be classified as procedural without a corresponding statement of legislative intent.[29]

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into evidence); Fuller v. Alaska, 393 U.S. 80 (1968) (holding that the exclusionary rule would only be applicable to trials in which the evidence is introduced after a certain date); DeStefano v. Woods, 392 U.S. 631 (1968) (allowing retroactivity only in trials begun after a certain date); Stovall v. Denno, 388 U.S. 293 (1967) (providing for retroactivity only in those cases involving confrontation for identification purposes, conducted in the absence of counsel, and after a specific date); *Linkletter*, 381 U.S. at 618 (1965) (holding that retroactivity would not be allowed in state court convictions which had become final before a certain date); *see also* Ronald Elliot Metter, Comment, *Partial Retroactivity: A Question of Equal Protection*, 43 TEMP. L.Q. 239 (1970) (providing a more extensive discussion of these cases).

21. State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969); State v. Augustine, 416 P.2d 281, 283 (Kan. 1966); State v. Davis, 483 A.2d 740, 743 (Me. 1984); *see also* 22 C.J.S. *Criminal Law* § 2 (1989).

22. BLACK'S LAW DICTIONARY 374 (6th ed. 1990).

23. Gaspin v. State, 45 S.E.2d 785, 787 (Ga. Ct. App. 1947); State v. Elmore, 155 So. 896, 897-98 (La. 1934); *see also* 22 C.J.S. *Criminal Law* § 2 (1989).

24. Collins v. Youngblood, 497 U.S. 37, 45 (1990).

25. BLACK'S LAW DICTIONARY 1133 (6th ed. 1990) (defining "penal law" as "[s]tatutes that define criminal offenses and specify corresponding fines and punishment").

26. OKLA. STAT. tit. 21, § 2 (1991) (providing that "[n]o act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code. The words 'this code' as used in the 'penal code' shall be construed to mean 'statutes of this State'").

27. OKLA. STAT. tit. 22, §§ 1-2002 (1991 & Supp. 1994).

28. OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994).

29. *See* 1987 Okla. Sess. Laws 96 (codified as amended at OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994)) (containing no plain language statement of the intent of the legislature).

In Oklahoma, there is very little documentation of legislative history, and unfortunately, the legislature did not record any indication of its intent with regard to this amendment. Generally, where the legislature has not included in the enactment a statement of intent and no floor debate existed which might have been recorded, the only way to determine intent before turning to rules of statutory construction is to compare the bill as introduced with the final version. *See*

A. *Intermediate Punishment*

The *Allen* court first determined that the amendment involved an intermediate level of punishment because it did not affect the maximum or minimum punishment to which Allen could have been subjected.[30] This determination places life without parole between life imprisonment and death. In other words, it is more severe than life imprisonment, but less severe than a death sentence. Although this author believes that few legal scholars would disagree with this placement of life without parole,[31] he contends that the court has nonetheless erred in its determination; first, the amendment may in fact affect the maximum punishment to which Allen could have been subjected; and second, even if the amendment does not alter the maximum or minimum punishment, retroactive application should be prohibited because it may substantially disadvantage the offender affected by it.

Currently in Oklahoma, before a sentence of death may be considered in a capital case, certain aggravating circumstances must be present.[32] Unless at least one aggravating circumstance is found, or if aggravating circumstances are present but outweighed by mitigating

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discussion *infra* part III (discussing how Oklahoma courts attempt to determine legislative intent). Occasionally, some degree of intent can be inferred from the changes made during the legislative process. However, the only change made in this amendment between introduction and enactment was the addition of a provision which stated that the amendment would not affect the powers of the Pardon and Parole Board. *See* S. 15, 41st Leg., 1st Sess. (1987); *cf.* 1987 Okla. Sess. Laws 96 (codified as amended at OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994)).

30. Allen v. State, 821 P.2d 371, 376 (Okla. Crim. App. 1991); State v. Jackson, 478 So. 2d 1054, 1056 (Fla. 1985) (using similar analysis).

31. This excludes, of course, an argument concerning the comparative drawbacks of life in prison without chance of parole and actual imposition of the death penalty. The court in *Allen* avoided discussion of such an argument. *See Allen*, 821 P.2d at 376.

32. OKLA. STAT. tit. 21, § 701.11 (1991). Aggravating circumstances are defined as:

> 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
> 2. The defendant knowingly created a great risk of death to more than one person;
> 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
> 4. The murder was especially heinous, atrocious, or cruel;
> 5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
> 6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
> 7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
> 8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Id. § 701.12.

circumstances,[33] the death penalty cannot be imposed and is therefore eliminated as a sentencing option.[34] At the time of the decisions in *Wade* and *Allen*, elimination of the death penalty as a sentencing option left only the options of life without parole or life imprisonment.[35] Similarly, if a jury could not agree on punishment within a reasonable time, the judge was required to dismiss the jury and impose a sentence of either life imprisonment or life without parole.[36]

Prior to the 1987 amendment adding life without parole, in a situation where aggravating circumstances were absent or were outweighed by mitigating circumstances, the death penalty was eliminated as a sentencing option, and the only option remaining was a life sentence.[37] Similarly, if a jury could not agree on a sentence, a life sentence was mandatory.[38] After the *Allen* decision mandated retroactive application of the sentencing amendment, elimination by the court or jury of the death penalty as a sentencing option or failure of the jury to agree on a sentence now *requires* consideration of life without parole, which is a more severe sentence than would have been possible prior to the effective date of the amendment. Thus, by designating the amendment procedural and mandating its retroactive application, the court created a situation wherein actual imposition of a sentence of life without parole can, in effect, subject an offender to an increase in the maximum punishment over what would have been the maximum under existing law. Elimination of the maximum sentence of death by the absence or subordination of the weight of aggravating circumstances, or by failure of a jury to agree on a sentence, now changes the maximum punishment from a death sentence to life

33. There is no statutory definition or list of mitigating circumstances. The finder of fact determines whether a particular circumstance is mitigatory. Malone v. State, 876 P.2d 707, 714 (Okla. Crim. App. 1994) (noting that the trial court's instruction that "it was the jury's decision to determine what the mitigating circumstances were under the facts of the case" reflects the applicable statutes and satisfies constitutional dictates).

34. OKLA. STAT. tit. 21, § 701.11 (1991).

35. *See id.* §§ 701.10a, .11 (1991 & Supp. 1994). The legislature subsequently amended § 701.10a, deleting the words "of life imprisonment or life imprisonment without parole," and changed the statute to read "any sentence authorized by law at the time of the commission of the crime." 1993 Okla. Sess. Laws 325 (codified as amended at OKLA. STAT. tit. 21, § 701.10a (Supp. 1994)). However, the 1993 amendment was not in effect at the time of the decisions in *Allen* (1991) and *Wade* (1992). *See* discussion *infra* part III.

36. *See* OKLA. STAT. tit. 21, § 701.11 (1991). This section was included in the 1987 amendment adding life without parole. *See* 1987 Okla. Sess. Laws 96 (codified as amended at OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994)).

37. OKLA. STAT. tit. 21, §§ 701.9, .11 (1981), *amended by* 1987 Okla. Sess. Laws 96 (current version at OKLA. STAT. tit. 21, § 701.9 (1991)).

38. *Id.* § 701.11.

without parole; whereas prior to the amendment, the maximum penalty was life imprisonment. Such an increase in the maximum penalty over what was in effect at the time of the crime is ex post facto and is constitutionally impermissible.[39]

If a death sentence is actually imposed, the foregoing problem does not arise because the punishment does not change. However, the court, in analyzing this issue, must focus on the potential punishments for a crime, not a specific sentence actually imposed.[40] In *Lindsey v. Washington*,[41] the Supreme Court stated that an increase in the *possible* penalty is ex post facto, no matter what penalty is actually imposed.[42] Since there is a potential increase in the maximum punishment to which the defendants in the four instant cases may be subjected when the amendment is applied retroactively, the procedural classification given to the amendment by the court is not sufficient to prevent violation of the ex post facto prohibition.[43]

B. *Substantial Disadvantage*

Even in cases where a sentencing amendment does not affect the maximum or minimum sentence, retroactive application may be prohibited, including cases in which the death penalty is not an option. In *Miller v. Florida*,[44] the United States Supreme Court held that an amendment which revised sentencing guidelines, although not technically increasing punishment, could not be applied retroactively.[45] The Court further stated that a penal code amendment could be constitutionally challenged even where an actual sentence imposed under the new law is less severe than what could have been imposed under the old law.[46] The *Miller* court decided that the critical question was whether the retroactive application "substantially disadvantages" the offender affected by it.[47]

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39. *See* discussion *infra* part IV.B (analyzing ex post facto concerns raised by this issue).

40. Allen v. State, 821 P.2d 371, 376 (Okla. Crim. App. 1991) (citing Miller v. Florida, 482 U.S. 423 (1987)).

41. 301 U.S. 397 (1937).

42. *Id.* at 400-01.

43. *See supra* text accompanying notes 32-39; 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 447 (Norman J. Singer ed., 5th ed. 1993) (commenting that "[t]he designation of changes in a statute as 'procedural' is not in itself the test of whether the statute imposes an ex post facto burden").

44. 482 U.S. 423 (1987).

45. *Id.* at 432.

46. *Id.* (citing Lindsey v. Washington, 301 U.S. 397, 401-02 (1937)).

47. *Id.* at 432.

In *Allen*, the court examined this issue of substantial disadvantage and determined that any alternative to a death sentence cannot be characterized as disadvantageous to the offender.[48] However, this reasoning can only apply after a death penalty has actually been imposed. Since the court must focus on the potential punishment for a crime and not a specific sentence,[49] the court's reasoning creates a standard which does not consider potential punishment, but can only be applied at the appellate level after a specific sentence of death has actually been imposed. A trial court cannot know whether an intermediate penalty advantages or disadvantages an offender at the time of jury instruction, which is the critical time when the decision must be made concerning application of the new law.

It appears that, in *Hain*, *Salazar*, *Wade*, and *Allen*, the court was focusing on specific sentences of death. Consideration of the potential punishments of death, life without parole, and life, indicates that retroactive application of the amendment may result in an increase in punishment. This increase would substantially disadvantage the offender[50] and should be prohibited.[51]

48. Allen v. State, 821 P.2d 371, 376 (Okla. Crim. App. 1991).

49. *See supra* text accompanying notes 40-43.

50. In an Oklahoma death penalty case, evidence of aggravating circumstances is admissible only if it has been made known to the defendant prior to trial. OKLA. STAT. tit. 21, § 701.10(C) (1991); *see also* OKLA. CONST. art. II, § 20; Wilson v. State, 756 P.2d 1240, 1245-46 (Okla. Crim. App. 1988). Suppose, for example, a defendant is charged with first degree murder and the only aggravating circumstance is that the defendant was paid to commit the murder. Suppose further that the only reliable evidence of the aggravating circumstance is a witness who was present at the time the defendant was hired, and this witness dies prior to trial. As the only other evidence available to prove the aggravating circumstance is unreliable, the district attorney chooses not to seek the death penalty. Because the death penalty is not sought, no notice is given to the defendant; thus evidence of the aggravating circumstance is not admissible and the death penalty cannot be imposed.

In such a case, without retroactive application of the 1987 amendment, the only sentencing option upon conviction is life imprisonment. If the amendment is applied retroactively, the sentencing option of life without parole is added. Adding life without parole as an option is clearly an increase in possible punishment. Under *Lindsey*, the trial court must not instruct the jury on the life without parole option because it represents an increase in possible punishment. *See supra* text accompanying notes 41-42. Yet, if the trial court follows *Lindsey* in such a case and does not instruct on life without parole, it cannot at the same time follow *Allen*, which requires instruction on life without parole. *See supra* text accompanying notes 13-16. If the trial court follows *Allen* and does instruct the jury on life without parole, the rule in *Miller* has also been violated; since life without parole is a more severe punishment than life imprisonment, the defendant has certainly been "substantially disadvantaged." Miller v. Florida, 482 U.S. 423, 432 (1987).

51. *Miller*, 482 U.S. at 430 (holding that where a retroactive law disadvantages the offender affected by it, the law is ex post facto, and therefore, it is prohibited).

III. LEGISLATIVE INTENT

The Oklahoma Supreme Court has stated that its primary goal in construing statutes is to effectuate the intent of the Legislature.[52] Therefore, whether a particular statute should apply retroactively or prospectively requires an inquiry into legislative intent. While retroactivity is generally disfavored,[53] deciding when it should apply is not always a simple task. For retroactive application based upon the language of the statute itself, the statute must contain clear language addressing retroactivity, not merely inferences drawn from the purpose of the statute.[54] Where no clear expression of intent is present but the language of the statute indicates unambiguously that it can have only one application, either prospective or retrospective, that language will ordinarily be regarded as conclusive.[55] However, a statement of legislative intent is not always included in a statute and, in its absence or if it is unclear as to retroactivity, the court must attempt on its own to determine that intent. Where the intention of the legislature is ambiguous or unclear, the court will turn to rules of statutory construction in an effort to determine legislative intent,[56] and the general rule dictates that statutes operate only prospectively.[57] By mandating retroactive application of the statute in *Hain*, *Salazar*, *Wade*, and *Allen*, the Oklahoma Court of Criminal Appeals did not follow this general rule.[58]

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52. *In re* Bomgardner, 711 P.2d 92, 95 (Okla. 1985).

53. Landgraf v. USI Film Prod., 114 S. Ct. 1483, 1498 (1994).

54. DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991).

55. Reves v. Ernst & Young, 113 S. Ct. 1163, 1169 (1993).

56. *See* Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 967 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); Patterson v. Globe Am. Casualty Co., 685 P.2d 396, 398 (N.M. Ct. App. 1984); *see also* City of Bristow *ex rel.* Hedges v. Groom, 151 P.2d 936, 940 (Okla. 1944) (stating that "[t]he cardinal rule of statutory construction, to which all other rules are subordinate, is to ascertain the intention of the Legislature").

57. Dutton v. Dixon, 757 P.2d 376, 381 (Okla. Crim. App. 1988), *overruled on other grounds by* Cartwright v. State, 778 P.2d 479 (Okla. Crim. App. 1989); *see also In re* McNeely, 734 P.2d 1294, 1296 n.7 (Okla. 1987); Hammons v. Muskogee Medical Ctr. Auth., 697 P.2d 539, 542 (Okla. 1985); Trinity Broadcasting Corp. v. Leeco Oil Co., 692 P.2d 1364, 1366 (Okla. 1985); Freshour v. Turner, 496 P.2d 389, 392 (Okla. Crim. App. 1972), *overruled on other grounds by* Dean v. Crisp, 536 P.2d 961, 963 (Okla. Crim. App. 1975), *overruled by* Edwards v. State, 591 P.2d 313, 317 (Okla. Crim. App. 1979); 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41.04 (Norman J. Singer ed., 5th ed. 1993).

58. Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1402, *and cert. denied*, 114 S. Ct. 1416 (1994); Salazar v. State, 852 P.2d 729 (Okla. Crim. App. 1993); Wade v. State, 825 P.2d 1357 (Okla. Crim. App. 1992); Allen v. State, 821 P.2d 371 (Okla. Crim. App. 1991).

The court apparently believes that the Legislature enacted the 1987 amendment to provide an alternative to the death sentence.[59] Whereas, the author contends that it is indeed more likely that the Legislature created the sentence of life without parole to provide an alternative to parole. The following statistical analysis demonstrates the author's view.

In 1940, when only about twenty eight states had parole boards, forty four percent of all releases were by parole.[60] By 1967, when every state had a parole board, sixty two percent of all releases were by parole.[61] In 1986, the year before enactment of the amendment, the median sentence length for murder was twenty years, yet the median time served before parole was only five years, seven months.[62] In view of these statistics, it is relatively easy for the author to construe the legislature's intent as correcting a situation in which the punishment for murder actually amounted to less than six years in prison.[63]

By 1993, thirty three states, the District of Columbia, and the federal government enacted the sentencing option of life without parole in an attempt to ensure real life sentences.[64] Fourteen other states impose a life sentence in which parole is not possible until after twenty five years have been served.[65] It is the author's opinion that these figures clearly indicate a nationwide attempt to stop, or at least delay, parole of convicted murderers.[66] The language of the 1987 amendment does not indicate whether it was intended as an alternative to the death penalty or as an alternative to life with parole, but, in light of these statistics, it is not unreasonable for the author to interpret legislative intent as the latter.

In Judge Lumpkin's *Hain* and *Salazar* dissenting opinions, he correctly pointed out that the real issue in these cases is not the constitutionality of retroactivity, but whether the legislature intended the

59. *See Hain*, 852 P.2d at 753 (noting a punishment alternative to death); *Allen*, 821 P.2d at 376 (referring to a sentence which avoids the death penalty).

60. Patrick A. Langan, *America's Soaring Prison Population*, 251 SCIENCE 1568 (1991).

61. *Id.*

62. BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-132291, NAT'L CORRECTIONS REPORTING PROGRAM 36 (1986).

63. *Id.*

64. Helen Prejean, *Should Killers Live? Or Die? Child Murderers and the Death Penalty*, GOOD HOUSEKEEPING, Aug. 1993, at 94.

65. *Id.*

66. Five out of six Americans will be victims of attempted or completed violent crime during their lifetimes. James R. Acker, *Social Sciences and the Criminal Law: Victims of Crime - Plight vs. Rights*, 28 CRIM. L. BULL. 64, 64 (1992).

amendment[67] to apply retroactively.[68] Unfortunately, the majority's only response was to reason that if the amendment was not given retroactive effect, it would create an "anomalous situation" because of a subsequent amendment to section 701.10.[69]

In 1989, the Legislature again amended section 701.10 by adding section 701.10a.[70] Section 701.10a provides the applicable sentencing procedure for situations where a case is remanded for resentencing because of prejudicial error in the sentencing phase.[71] This amendment allows remand for resentencing without the need for a new trial, but requires the court to consider the sentence of life without parole.[72] Section 701.10a(5) further provides that "[t]he provisions of this section are procedural and shall apply retroactively to any defendant sentenced to death".[73]

The majority in *Salazar* noted that, if the 1987 amendment were not given retroactive effect, a defendant whose case was remanded for resentencing under section 701.10a could receive the benefit of consideration of life without parole, while a defendant whose case was not remanded would be denied that benefit.[74] The court reasoned that such a result would 1)create an "anomalous situation";[75] and 2)violate due process and equal protection.[76] Therefore, the court chose to solve this "anomaly" by retroactively applying the 1987 amendment to section 701.9 as well.[77] However, at least four persuasive arguments directly controvert the court's solution.

First, section 701.10a does not operate unless there is prejudicial error in the sentencing proceeding.[78] In *Hain*, *Salazar*, *Wade*, and *Allen*, the only prejudicial error in the sentencing proceeding was the

67. 1987 Okla. Sess. Laws 96 (codified as amended at OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994)).

68. Hain v. State, 852 P.2d 744, 755 (Okla. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1402, *and cert. denied*, 114 S. Ct. 1416 (1994) (Lumpkin, P.J., concurring in part and dissenting in part); Salazar v. State, 852 P.2d 729, 743 (Okla. Crim. App. 1993) (Lumpkin, P.J., concurring in part and dissenting in part).

69. *Salazar*, 852 P.2d at 740.

70. 1989 Okla. Sess. Laws 365 (codified as amended at OKLA. STAT. tit. 21, § 701.10a (Supp. 1994)).

71. OKLA. STAT. tit. 21, § 701.10a (Supp. 1994).

72. *Id.*

73. *Id.*

74. Salazar v. State, 852 P.2d 729, 740 (Okla. Crim. App. 1993).

75. *Id.*

76. *Id.*

77. *Id.*

78. OKLA. STAT. tit. 21, § 701.10a (Supp. 1994).

failure to consider life without parole,[79] which section 701.10a required only *if* prejudicial error existed.[80] This reasoning is clearly circular and does not explain or justify retroactive application of the 1987 amendment, especially when the amendment did not include a procedural classification or a statement of intended retroactive effect.[81]

Second, section 701.10a contains an express classification as procedural and a clear statement that the Legislature intends for it to operate retroactively.[82] This language is absent from section 701.10,[83] but could easily have been included in the 1989 amendment, since it was an amendment to section 701.10. General rules of statutory construction provide that the absence of such language in all sections affected by the 1987 amendment[84] indicates the Legislature's intention against retroactive application.[85]

The author's position is further supported by the third argument against the court's solution. Specifically, the 1987 amendment was approved on May 18, 1987, and section 7 provided that the effective date of the amendment would be November 1, 1987.[86] It is a virtual oxymoron for the legislature to fix a future effective date for an amendment if it really intends to apply the amendment retroactively. Moreover, the very purpose for establishing a future effective date is defeated by a construction giving effect to the statute prior to the time fixed by the legislature.[87]

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79. Hain v. State, 852 P.2d 744, 753 (Okla. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1402, *and cert. denied*, 114 S. Ct. 1416 (1994); *Salazar*, 852 P.2d at 736-41; Wade v. State, 825 P.2d 1357, 1363 (Okla. Crim. App. 1992); Allen v. State, 821 P.2d 371, 375-76 (Okla. Crim. App. 1991).

80. OKLA. STAT. tit. 21, § 701.10a (Supp. 1994).

81. *See* 1987 Okla. Sess. Laws 96 (codified as amended at OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994)).

82. *See supra* text accompanying note 73.

83. *See* OKLA. STAT. tit. 21, § 701.10 (Supp. 1994).

84. *See supra* note 29.

85. As one commentator notes:

> One of the cardinal rules by which courts are governed in interpreting statutes is that they must be construed as prospective in every instance, except where the legislative intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute, which would be inoperative otherwise than retrospectively.

WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS § 34, at 39-40 (1982).

86. 1987 Okla. Sess. Laws 96 (codified as amended at OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994)).

87. WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS § 33, at 39 (1982).

Finally, the above-mentioned analysis arrives at the conclusion that the Oklahoma Legislature did not intend retroactive application of the 1987 amendment and is convincingly supported by another amendment to section 701.10a enacted on June 7, 1993.[88] In a case involving remand for error, the 1993 amendment deleted the specific sentencing options of life imprisonment and life without parole and replaced them with language permitting any sentence which was authorized at the time the crime was committed.[89] This change clearly indicates that the legislature intended the 1987 amendment to operate prospectively, not retroactively, and that the proper penalty in Oklahoma is that which was in effect at the time the crime was committed.

After the decision in *Salazar*, the State filed a petition for rehearing.[90] Then, after the effective date of the 1993 amendment, the State filed a motion to amend its petition, arguing that this amendment warranted a new hearing for Salazar.[91] As previously noted, section 701.10a contains an express statement that it is procedural and is intended to apply retroactively.[92] However, the Oklahoma Court of Criminal Appeals, incredibly, refused to apply this new amendment retroactively, stating that it would deprive Salazar of a sentencing option granted by the court.[93] In short, the court retroactively applied the 1987 amendment, which contained no language regarding retroactivity,[94] and refused to retroactively apply the 1993 amendment to section 701.10a, which contained an express legislative statement that it was to be applied retroactively.[95]

The Oklahoma Court of Criminal Appeals further reasoned that application of the 1993 amendment would result in more severe penalty options because Salazar had relied on the court's earlier decisions, thereby violating the prohibition against ex post facto laws.[96] In his dissenting opinion, Judge Lumpkin pointed out that this type of reasoning would mean that every time the Supreme Court reversed a

88. *See* 1993 Okla. Sess. Laws 325 (codified as amended at OKLA. STAT. tit. 21, § 701.10a (Supp. 1994)).

89. *Id.*

90. Salazar v. State, 859 P.2d 517 (Okla. Crim. App.), *denying reh'g to* 852 P.2d 729 (Okla. Crim. App. 1993).

91. *Id.* at 518.

92. *See supra* text accompanying note 73.

93. *Salazar*, 859 P.2d at 518.

94. *See* Salazar v. State, 852 P.2d 729, 737 (Okla. Crim. App. 1993).

95. *Salazar*, 859 P.2d at 518.

96. *Id.* at 518-19.

lower court, an ex post facto violation would occur because the defendant may have become disadvantaged by reliance on the lower court's ruling until that ruling was reversed.[97] He also noted that *Wade* and *Allen*, in which the court established that the 1987 amendment should apply retroactively,[98] were decided after Salazar's trial.[99] Therefore, Salazar could not have relied detrimentally on those decisions, except perhaps briefly during appeal.[100]

The final argument controverting the court's solution is that retroactive application violates equal protection.[101] By mandating retroactive application of the 1987 amendment, the court has made it possible for two persons separately committing the same offense on the same day to receive different treatment when sentenced.[102] Such a situation violates the constitutional guarantee of equal protection.[103] In addition, the retroactivity solution chosen by the court ignores the saving clause embodied in the Oklahoma Constitution.[104]

97. *Id.* at 520 (Lumpkin, P.J., dissenting).

98. Wade v. State, 825 P.2d 1357, 1363 (Okla. Crim. App. 1992); Allen v. State, 821 P.2d 371, 377-78 (Okla. Crim. App. 1991).

99. *Salazar*, 859 P.2d at 520 (Lumpkin, P.J., dissenting).

100. *Id.*

101. U.S. CONST. amend. XIV, § 1; *see also* discussion *infra* part IV.C (discussing equal protection).

102. Consider the situation where two defendants commit separate crimes on the same day, prior to the effective date of the amendment. One pleads guilty and is sentenced before the amendment becomes effective; the other demands a jury trial and is not tried and sentenced until after the effective date of the amendment. The defendant who pled guilty before the amendment became effective would not receive the sentencing option of life without parole; whereas, the other defendant would receive the option.

103. U.S. CONST. amend. XIV, § 1; *see also* discussion *infra* part IV.C (discussing equal protection).

104. "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute." OKLA. CONST. art. V, § 54.

IV. THE UNCONSTITUTIONALITY OF RETROACTIVE APPLICATION

A. *Saving Clauses*

1. The Doctrine of Abatement: Precursor to Saving Clauses[105]

At common law, absent express language to the contrary, repeal of a statute resulted in the abatement of all pending prosecutions.[106] Historically, repeal includes a re-enactment of the same law with different penalties,[107] such as the amendment at issue in *Allen*.[108] In such a situation, unless the courts found a specific legislative intent to the contrary, the doctrine prevented prosecution under either the old, repealed statute or the new law with different penalties.[109] Under the abatement doctrine, it was reasoned that prosecution could not be continued under the old statute because it had been repealed.[110] If the new law increased punishment or the scope of prohibited conduct, prosecution could not be commenced under it because it would be ex post facto.[111] This interpretation often led to injustice and actual thwarting of legislative intent.[112]

A vivid example of such a result is the case of *In re Medley*.[113] Medley was convicted of murder and sentenced to hang, but Colorado statutes permitted him to be kept in a prison located in the county where his friends, clergy, and legal counsel resided.[114] After his crime, but prior to sentencing, Colorado enacted a statute which provided that 1) a person sentenced to death must be placed in solitary confinement in the state prison until the date of execution; 2) the state could

105. Abatement refers to "[t]he suspension or cessation, in whole or in part, of a continuing charge." BLACK'S LAW DICTIONARY 4 (6th ed. 1990). Under the doctrine of abatement, repeal of a criminal statute causes the abatement, or cessation, of any prosecution pending under the repealed statute. *See* Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120 (1972) [hereinafter *Comment*] (discussing the doctrine of abatement).

106. *See* Bell v. Maryland, 378 U.S. 226, 230 (1964); Cartwright v. State, 778 P.2d 479, 482 (Okla. Crim. App. 1989) (holding that in Oklahoma, a case is considered pending from the time of its commencement until its final determination upon appeal), *cert. denied*, 497 U.S. 1015 (1990).

107. *See Comment*, *supra* note 105, at 123.

108. 1987 Okla. Sess. Laws 96 (codified as amended at OKLA. STAT. tit. 21, §§ 701.9-.11, .15 (1991 & Supp. 1994)).

109. *Comment*, *supra* note 105, at 123.

110. *Comment*, *supra* note 105, at 124-25.

111. *Comment*, *supra* note 105, at 124-25.

112. *See, e.g.*, State v. Henderson, 64 La. Ann. 489 (1858); Commonwealth v. Marshall, 28 Mass. (11 Pick.) 350 (1831).

113. 134 U.S. 160 (1890).

114. *Id.* at 161-62.

not reveal the execution date to the prisoner; and 3) all statutes in conflict with the new statute were repealed.[115]

The Supreme Court held that the new statute was ex post facto, and therefore could not be applied to Medley.[116] Since the old statute was repealed by the new one, he could no longer be held under it either; consequently, he was ordered released.[117] This decision was particularly embarrassing to the Court because there was no error concerning the trial or jury verdict.[118] Medley was guilty and properly convicted, yet the Court was compelled to order his release.[119]

The previous analysis of *Medley* makes it clear that the Supreme Court was attempting to find and implement the intent of the legislature. Thus, despite this effort to follow legislative intent, application of the doctrine of abatement as a rule of construction actually thwarted the purpose of the legislature in cases where the doctrine was legislatively ignored.[120] To overcome this problem,[121] legislatures devised general saving legislation applicable to all repeals, amendments, and re-enactments.[122]

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115. *Id.* at 163-64.

116. *Id.* at 171. The court determined that solitary confinement in a prison located away from friends, clergy, and legal counsel was a more severe penalty than that under the previous law. *Id.* at 170.

117. *Id.* at 173.

118. *Id.* (quoting that "[a] question presents itself, however, to the court which is not a little embarrassing").

119. *Id.* at 173-74.

120. *See, e.g.,* State v. Henderson, 13 La. Ann. 489 (1858); State v. King, 12 La. Ann. 593 (1857); Commonwealth v. Marshall, 28 Mass. (11 Pick.) 350 (1831).

121. Note that although most abatement problems arose from legislative inadvertence or carelessness, the potential existed for effectively creating "legislative pardons." By intentionally refraining from addressing abatement in a repeal of a statute, the legislature could effectively "pardon" an offender. Repeal of the statute under which the offender was charged, with no provision for continuing prosecution under a new or amended statute, would result in the release of the offender. *Cf. In re* Medley, 134 U.S. 160, 174 (1890).

122.

> The history of legislation . . . shows that through the inattention, carelessness and inadvertence of the law-making body crimes and penalties have been abolished, changed or modified after the commission of the offense and before trial in such material way as to effect many legislative pardons. To prevent such mistakes and miscarriages of justice many of the states have enacted general saving statutes.

Comment, supra note 105, at 127 n.50 (quoting La Porte v. State, 132 P. 563, 564-65 (Ariz. 1913)).

2. Effects of a Saving Clause

Currently, forty three states, as well as the federal government, have made a statutory provision for saving pending criminal prosecutions from abatement following repeal of the underlying criminal statute.[123] While most saving clauses are statutes, three additional states have them in their state constitutions: Florida, New Mexico, and Oklahoma.[124] Oklahoma's saving clause states that repeal of a statute will not affect any penalty incurred or proceedings begun under the repealed statute.[125]

The Tenth Circuit Court of Appeals has held that it is immaterial whether an existing statute is specifically repealed and a new one passed, or whether the existing statute is modified by amendment.[126] In either case, a new statute is created and the old one ceases to exist.[127] As a general principle, the court commented that if a criminal statute is amended to reduce punishment, a defendant is normally entitled to the benefit of the new act.[128] This result occurs even where the offense was committed prior to the new law.[129] However, the court ultimately decided that this principle does not apply when there

123. 1 U.S.C. § 109 (1971); ALA. CODE § 1-1-12 (1975); ALASKA STAT. § 01.05.021 (1990); ARIZ. REV. STAT. ANN. §§ 1-246, 1-247 (1989); ARK. CODE ANN. § 1-2-120 (Michie 1987); CAL. GOV'T CODE § 9608 (West 1992); COLO. REV. STAT. § 2-4-303 (1973); CONN. GEN. STAT. ANN. § 54-194 (West 1985); GA. CODE ANN. § 16-1-11 (1992); HAW. REV. STAT. §§ 1-11 (1985); IDAHO CODE § 67-513 (1989); ILL. ANN. STAT. ch. 5, para. 70/4 (Smith-Hurd 1993); IND. CODE ANN. § 1-1-5-1 (Burns 1993); IOWA CODE ANN. § 4.1.26 (West Supp. 1994); KAN. STAT. ANN. § 77-201 (1989); KY. REV. STAT. ANN. § 446.110 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 24:171 (West 1989); ME. REV. STAT. ANN. tit. 1, § 302 (West 1989); MD. RULES OF INTERPRETATION CODE ANN. § 3 (1994); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 1986); MICH. COMP. LAWS ANN. § 8.4(a) (West 1994); MINN. STAT. ANN. § 645.35 (West 1947); MISS. CODE ANN. § 99-19-1 (1972); MO. ANN. STAT. § 1.160 (Vernon 1969); MONT. CODE ANN. § 1-2-205 (1993); NEB. REV. STAT. § 49-301 (1993); NEV. REV. STAT. § 169.235 (1991); N.H. REV. STAT. ANN. § 21:38 (1988); N.J. STAT. ANN. § 1:1-15 (West 1992); N.Y. GEN. CONSTR. LAW § 94 (McKinney 1951); N.D. CENT. CODE § 1-02-17 (1987); OHIO REV. CODE ANN. § 1.58 (Baldwin 1990); OR. REV. STAT. § 161.035 (1993); R.I. GEN. LAWS § 43-3-23 (1988); S.D. CODIFIED LAWS ANN. § 2-14-18 (1992); TENN. CODE ANN. § 1-3-101 (1994); TEX. GOV'T CODE ANN. § 311.031 (West 1988); UTAH CODE ANN. § 68-3-5 (1993); VT. STAT. ANN. tit. 1, § 214 (1985); VA. CODE ANN. § 1-16 (Michie 1987); WASH. REV. CODE ANN. § 10.01.040 (West 1990); W. VA. CODE § 2-2-8 (1994); WIS. STAT. ANN. § 990.04 (West 1985); WYO. STAT. § 8-1-107 (1977).

124. *See* FLA. CONST. art. X, § 9; N.M. CONST. art. IV, § 33; OKLA. CONST. art. V, § 54.

125. OKLA. CONST. art. V, § 54 (stating that "[t]he repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute").

126. Moorehead v. Hunter, 198 F.2d 52, 53 (10th Cir. 1952); *see also* United States v. Tynen, 78 U.S. (11 Wall.) 88, 92 (1870) (holding that, even where not expressly repealed, if the later act covers the whole subject of the earlier act, includes new provisions, and plainly shows it was intended as a substitute for the earlier act, it operates as a repeal).

127. *Moorehead,* 198 F.2d at 53.

128. *Id.*

129. *Id.*

is a general saving statute or a specific saving clause in the repealing statute.[130]

Oklahoma's saving clause contained in its constitution, along with this holding by the Tenth Circuit, indicates that the 1987 amendment should not be applied retroactively.[131] Any proceeding, which begins under a statute that is subsequently repealed or amended, should be continued under the provisions of the repealed or amended statute.[132] The saving clause, in effect, designates the appropriate criminal penalty as that which was in effect at the time of the crime.[133] Moreover, because the clause contains no provision for legislative alteration, even a legislative statement of retroactive intent should be ineffective because no constitutional amendment has been obtained.[134] The Legislature, on its own, cannot revise the constitution, nor can a court.[135] However, the Oklahoma Court of Criminal Appeals, once again, relied on the procedural classification of the 1987 amendment to avoid this constitutional provision.[136]

In *Salazar*, Judge Lumpkin cited *Bowman v. State*,[137] which dealt with the subject of retroactive application of criminal penalties.[138] In *Bowman*, the court mentioned the well established rule that the appropriate penalty is that which was in effect at the time of the

130. *Id.*

131. OKLA. CONST. art. V, § 54 (stating "[t]he repeal of a statute shall not . . . affect any . . . penalty incurred, or proceedings begun by virtue of such repealed statute"); *Moorehead*, 198 F.2d at 53 (holding that amendment of a statute operates as a repeal).

132. *See, e.g.*, Bilbrey v. State, 135 P.2d 999 (Okla. Crim. App. 1943) (holding that statutes repealing penalties for offenses operate prospectively and are applicable only to offenses committed after the statute becomes effective); Penn v. State, 164 P. 992 (Okla. Crim. App. 1917) (holding that the constitutional saving clause prevents the legislature from removing penalties for crimes committed prior to the effective date of a repealing statute); Lilly v. State, 123 P. 575 (Okla. Crim. App. 1912) (holding that the district court, in a trial for robbery, should submit the punishment as it existed at the time of the crime because of the constitutional provision).

133. *See, e.g.*, Rozinsky v. State, 298 So. 2d 546, 547 (Fla. 1974) (holding that sentence must be imposed under the law in effect at the time of the crime); Gourley v. State, 432 So. 2d 755, 755 (Fla. Dist. Ct. App. 1983), *appeal dismissed sub nom.* Gourley v. Wainwright, 458 So. 2d 272 (Fla. 1984); State v. Pizarro, 383 So. 2d 762, 763 (Fla. Dist. Ct. App. 1980) (holding that, under Florida law, the punishment in effect at the time of the crime controls the penalty at sentencing).

Florida's constitutional saving clause states that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." FLA. CONST. art. X, § 9.

134. *See* OKLA. CONST. art. XXIV, §§ 1-3 (requiring a vote of the people for any amendment to the constitution).

135. *Id.*

136. *See* Salazar v. State, 852 P.2d 729, 738 (Okla. Crim. App. 1993) (holding that Oklahoma's saving clause does not apply to procedural changes).

137. 789 P.2d 631 (Okla. Crim. App. 1990).

138. *Salazar*, 852 P.2d at 741 (Lumpkin, P.J., concurring in part and dissenting in part).

crime.[139] In response to Judge Lumpkin, the majority distinguished *Bowman* from *Salazar* by noting that *Bowman* relied on the Oklahoma saving clause.[140] The *Salazar* court stated that the Oklahoma saving clause did not apply to procedural changes in the law, and therefore had no bearing on the case.[141]

As previously discussed, classification of the 1987 amendment as substantive or procedural has been disputed.[142] If substantive, the Oklahoma saving clause would apply in *Salazar*, as well as *Hain*, *Wade*, and *Allen*.[143] Even if, however, the amendment is procedural, the saving clause does not distinguish between procedural statutes and substantive statutes;[144] it merely states that repeal will not affect any penalty incurred or proceedings begun under the repealed statute.[145] Hain, Salazar, Wade, and Allen were all defendants in proceedings that began prior to the 1987 amendment, and thus, they were subject to either the death penalty or life imprisonment; i.e. the penalty incurred under the repealed statute. Accordingly, the author opines that the defendants should not have been entitled to the option of life without parole.

B. *Ex Post Facto*

A fundamental principle underlying American criminal law dictates that the public is entitled to some advance warning as to what conduct is criminal and the penalties for engaging in such conduct.[146] Governmental restraint and lack of fair notice preclude the legislature from increasing punishment over that which was in existence at the time the crime was committed.[147] In addition, the ex post facto prohibition upholds the separation of powers by confining the legislature to criminal enactments with prospective effect, and the judiciary and executive to applications of criminal law.[148]

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139. *Bowman*, 789 P.2d at 631 (citing Penn v. State, 164 P. 992 (Okla. Crim. App. 1917); Alberty v. State, 140 P. 1025 (Okla. Crim. App. 1914)).

140. *Salazar*, 852 P.2d at 738 (holding the saving clause inapplicable to procedural amendments).

141. *Id.* at 738.

142. *See supra* Part II.

143. *See Salazar*, 852 P.2d at 738 (citing Penn v. State, 164 P. 992 (Okla. Crim. App. 1917) and Alberty v. State, 140 P. 1025 (Okla. Crim. App. 1914), both holding that Oklahoma's saving clause allowed the prior law to be applied).

144. OKLA. CONST. art. V, § 54.

145. *Id.*

146. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 8 (2d ed. 1986).

147. Weaver v. Graham, 450 U.S. 24, 29 (1981).

148. *Id.* at n.10.

The United States Constitution prohibits enactment of any ex post facto law by Congress[149] or state legislatures.[150] The Oklahoma Constitution contains a similar provision.[151] Although the constitutional prohibitions specifically address only legislative action, the United States Supreme Court has held that judicial action also falls within this prohibition.[152]

A precise definition of ex post facto has not been established, but most courts rely on the classifications set forth by *Calder v. Bull*[153] in 1798. In that opinion, Justice Chase set forth four types of laws which he considered to be within the prohibition: 1)any law making an act criminal which was not a criminal act when committed; 2)any law making a criminal act more severe than when committed; 3)any law which increases the punishment over the punishment in effect when the crime was committed; and 4)any law which alters rules of evidence in order to convict an offender.[154]

Of these four categories, laws included in the third section pertain to this discussion. A violation of the third prohibition requires examination of the law and judicial application, not an analysis of the specific penalties imposed in a certain case.[155] An increase in the *possible* penalty is ex post facto because the clause looks to the standard of punishment in a statute rather than a sentence actually imposed.[156]

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149. U.S. CONST. art. I, § 9, cl. 3.

150. *Id.* § 10, cl. 1.

151. *See* OKLA. CONST. art. 2, § 15.

152. *See* Bouie v. City of Columbia, 378 U.S. 347, 352-55 (1964) (noting that judicial action which operates ex post facto is actually prohibited by the Due Process Clause, since the ex post facto prohibition applies only to legislative action. When an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law"); *see also* Riggs v. Branch, 554 P.2d 823, 825 (Okla. Crim. App. 1976) (holding that an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law).

153. 3 U.S. (3 Dall.) 386, 390 (1798).

154. *Id.* The opinion of Justice Chase is most often quoted, but should probably not be treated as the opinion of the Court. Justice Chase's actual categories were:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence [sic], in order to convict the offender.

Id.

155. Allen v. State, 821 P.2d 371, 376 (Okla. Crim. App. 1991) (citing Miller v. Florida, 482 U.S. 423 (1987)).

156. *See* Lindsey v. Washington, 301 U.S. 397, 401 (1937); Allen v. State, 821 P.2d 371, 376 (Okla. Crim. App. 1991).

Application of this rule to the 1987 amendment indicates that retroactive application violates the constitutional prohibition against ex post facto laws.[157] As demonstrated earlier, it is possible for retroactive application to result in an increase in punishment over that in effect at the time of the offense.[158] The Oklahoma Court of Criminal Appeals has apparently not considered the potential for increased punishment. Instead, the court has only considered the specific sentence of death imposed upon Hain, Salazar, Wade, and Allen and determined that each should receive the benefit of the amended statute.[159]

In *Allen*, the court held that the 1987 amendment did not violate ex post facto because it was a procedural amendment.[160] However, in *Collins v. Youngblood*,[161] the Supreme Court stated that simply labelling a law procedural does not prevent scrutiny under the ex post facto prohibition.[162] Whereas, in *Beazell v. Ohio*,[163] the Court stated that the constitutional prohibition is addressed to laws, in any form, which increase punishment or alter the definition of an offense.[164]

Ultimately, in *Weaver v. Graham*,[165] the court refined Justice Chase's four categories of ex post facto laws into two: 1)the law must apply to events occurring before its enactment; and 2)the law must disadvantage the offender affected by it.[166] The procedural classification given the 1987 amendment by the Oklahoma Court of Criminal Appeals does not, under *Collins*,[167] prevent ex post facto scrutiny.[168] Under such scrutiny, judicial retroactive application of the amendment potentially disadvantages the offender by increasing punishment,[169] and is therefore constitutionally prohibited.[170]

157. *See* Salazar v. State, 852 P.2d 729, 737 n.5 (Okla. Crim. App. 1993) (stating that "laws which materially prejudice the defendant cannot be applied retroactively").

158. *See supra* text accompanying notes 37-43.

159. Hain v. State, 852 P.2d 744, 753 (Okla. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1402, *and cert. denied*, 114 S. Ct. 1416 (1994); *Salazar*, 852 P.2d at 740-41; Wade v. State, 825 P.2d 1357, 1363 (Okla. Crim. App. 1992); Allen v. State, 821 P.2d 371, 376-77 (Okla. Crim. App. 1991).

160. *Allen*, 821 P.2d at 376.

161. 497 U.S. 37 (1990).

162. *Id.* at 46 (1990). *But cf.* Hopt v. Utah, 110 U.S. 574, 590 (1884) (approving procedural changes "leaving untouched the nature of the crime and the amount or degree of proof essential to conviction").

163. 269 U.S. 167 (1925).

164. *Id.* at 170.

165. 450 U.S. 24 (1981).

166. *Id.* at 29.

167. Collins v. Youngblood, 497 U.S. 37 (1990).

168. *Id.* at 46.

169. *See supra* text accompanying notes 156-58.

170. *See supra* text accompanying notes 160-68.

C. *Equal Protection*

The Fourteenth Amendment to the United States Constitution prohibits any state from denying any person within its jurisdiction the equal protection of its laws.[171] Upon first reading, the equal protection clause appears to guarantee equal operation of the laws upon all citizens. However, laws need not affect every citizen exactly alike to satisfy equal protection requirements.[172] Equal protection essentially guarantees that no person or class of persons will be denied rights enjoyed by other persons or classes of persons in like circumstances.[173] The equal protection clause concerns governmental actions which classify. It does not prohibit nor prevent classifications since virtually all laws require some type of classification.[174] However, it does prohibit classifications which are arbitrary or unreasonable.[175] Unfortunately, determining whether a classification is arbitrary or unreasonable presents a difficult problem.

Traditionally, a "reasonable basis" or "rational basis" test has been applied where equal protection is challenged concerning a social or economic classification, such as in the area of criminal law.[176] Under the rational basis test, the court first determines whether a legitimate government purpose exists for the classification; then, it decides whether the classification is arbitrary, capricious, irrational, or irrelevant to the government's purpose.[177]

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171. U.S. CONST. amend. XIV, § 1 states:

> [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

172. Stebbins v. Riley, 268 U.S. 137, 142 (1925).

173. Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923); Truax v. Corrigan, 257 U.S. 312, 333 (1921); Gardner v. Michigan, 199 U.S. 325, 334 (1905); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 559 (1902); Mallett v. North Carolina, 181 U.S. 589, 598 (1901).

174. For example, a law which creates a state income tax rate of 33% only for persons making $35,000 per year "classifies" all those making $35,000 per year as a group, and only that group must pay a 33% tax. This classification, by itself, does not necessarily mean that equal protection has been denied.

175. Walters v. City of St. Louis, Mo., 347 U.S. 231, 237 (1954); Niemotko v. Maryland, 340 U.S. 268, 272 (1951). In the example, *supra* note 174, imagine now that a state created the 33% tax rate only for persons who unsuccessfully ran against incumbent state legislators. This law would undoubtedly fail as capricious and arbitrary, as well as unreasonable.

176. Peterson v. Garvey Elevators, Inc., 850 P.2d 893, 897 (Kan. 1993). There are two other tests generally used by the courts for different types of challenges: 1)intermediate-level scrutiny; and 2)strict scrutiny. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16 (2d ed. 1988).

177. *See* Ross v. Peters, 846 P.2d 1107, 1116 (Okla. 1993).

In *Hain* and *Salazar*, the court held the retroactive application of the 1987 amendment was limited to cases where the amendment was in effect at the time of the trial.[178] This holding effectively created a classification of defendants who were charged with first degree murder prior to November 1, 1987, and whose trials were not completed before that date.[179] The purpose of the court's classification was to provide an alternative to the death penalty for those whose crime occurred a short time before the effective date of the amendment.[180] However, the court limited application of this alternative to those defendants not yet sentenced at the time the amendment became effective.[181] This appears to be an arbitrary classification because it excludes others similarly situated. Establishing the cutoff date for sentencing on November 1, 1987, omits persons who would also benefit from an alternative to the death penalty. Apparently, a defendant whose death sentence was imposed just three days before the amendment became effective would not receive the benefit.[182] Even a death sentence imposed years earlier that was still in the process of direct review would not receive the benefit.[183] Two persons committing the

178. *See* Hain v. State, 852 P.2d 744, 753 (Okla. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1402, *and cert. denied*, 114 S. Ct. 1416 (1994); Salazar v. State, 852 P.2d 729, 740-41 (Okla. Crim. App. 1993).

179. *Salazar*, 852 P.2d at 738 (quoting that "[t]his Court has never suggested that the life without parole option is applicable to cases where a defendant's trial and conviction occurred before the effective date of the amendment").

180. *Hain*, 852 P.2d at 753; *Salazar*, 852 P.2d at 737.

181. *See Hain*, 852 P.2d at 753; *Salazar*, 852 P.2d at 741.

182. Daniel Juan Revilla is currently on Oklahoma's death row under a sentence of death. ATTORNEY GENERAL'S DEATH BOOK (on file with the Okla. Att'y Gen.'s Office). He was sentenced on October 29, 1987, just three days prior to the amendment's effective date. *Id.* Darrell Lynn Thomas, also on death row, was sentenced on October 9, 1987. *Id.*

183. *Salazar*, 852 P.2d at 740 (stating that "[t]he length of time it takes to process a death penalty case to finality is patently absurd.")

This process can indeed be lengthy. Scott Hain committed his crime on October 6, 1987, and the Court of Criminal Appeals did not decide his direct appeal until September 14, 1993. *See Hain*, 852 P.2d at 744, 746. Upon remand for resentencing, Hain was again sentenced to death on September 30, 1994. His appeal process has begun anew.

Another example of the length of time required for final disposition of a death sentence case is Dutton v. Dixon, 757 P.2d 376 (Okla. Crim. App. 1988). Dutton was convicted and sentenced to death in May, 1979, and his conviction and sentence were affirmed on direct appeal by a unanimous decision in 1984. Dutton v. State, 674 P.2d 1134 (Okla. Crim. App. 1984), *cert. denied*, 467 U.S. 1256 (1984). Dutton then appealed the denial of state post-conviction relief, which was denied in an unpublished order on February 8, 1985. Dutton v. State, No. PC-84-665 (Okla. Crim. App. Feb. 8, 1985). He filed a petition for a writ of habeas corpus in the U.S. District Court for the Western District of Oklahoma, which was denied on July 12, 1985. The Tenth Circuit Court of Appeals affirmed the denial of habeas corpus relief. Dutton v. Brown, 788 F.2d 669 (10th Cir. 1986), *rev'd on reh'g*, 812 F.2d 593 (10th Cir.) (en banc), *cert. denied sub nom.* Dutton v. Maynard, 484 U.S. 836, *and cert. denied*, 484 U.S. 870 (1987). Following rehearing en banc, however, Dutton's death sentence was vacated by the Tenth Circuit. Dutton v. Brown, 812 F.2d 593 (10th Cir.) (en banc), *cert. denied sub nom.* Dutton v. Maynard, 484 U.S.

same offense on the same day could easily receive different treatment if one is tried and convicted prior to the effective date of the amendment and the other is not.[184]

Classification based upon sentencing date may also violate equal protection because of economic classification. Persons unable to afford bail generally receive speedier trials than persons who are not held in jail because they are able to make bail.[185] In *Griffin v. Illinois*,[186] the Supreme Court declared that there is no equal justice if the kind of trial a person gets depends upon his financial situation.[187] If defendants can slow down the criminal process, classifications based upon the sentencing date can be the ultimate reward. For example, where a defendant successfully postpones the sentencing date, the penalty may be reduced if a newly enacted law lessens punishment. Such a result could violate equal protection.[188]

The Supreme Court, in *Eisenstadt v. Baird*,[189] stated that the crucial question in any equal protection argument is whether some rational basis exists for the different treatment of persons who commit the same act on the same day but are apprehended, convicted, or whose appeals are finalized on different days.[190] Arguably, no

836, *and cert. denied*, 484 U.S. 870 (1987). The Tenth Circuit directed the district court to issue a writ of habeas corpus, modifying Dutton's sentence to life imprisonment unless the State commenced new sentencing proceedings to relitigate the issue of punishment. *Id.* The process begins again after resentencing.

184. Scott Hain did not commit his crimes alone. *See Hain*, 852 P.2d at 746. His co-defendant, Robert Wayne Lambert, was also convicted and sentenced to death; in December of 1994, his conviction was overturned by the Court of Criminal Appeals and remanded for a new trial. Lambert v. State, No. F-88-388, 1994 WL 697500 (Okla. Crim. App. Dec. 8, 1994) (finding reversible error where the trial court instructed the jury on felony murder when only malice aforethought murder was charged in the information), *remanded by* 808 P.2d 72 (Okla. Crim. App. 1991). Because of the reversal of convictions, the Court of Criminal Appeals did not consider issues concerning the second stage proceedings, and therefore, made no decision regarding the sentencing option of life without parole. Imagine though, if Lambert had pled guilty and been sentenced prior to the effective date of the amendment; two co-defendants in the same case could have received different sentencing options.

185. *See* W. Peter Doren III, Note, *Criminal Law - Retrospective Application of Statute Reducing Penalty*, 18 WAYNE L. REV. 1157, 1169 (1972).

186. 351 U.S. 12 (1956).

187. *Id.* at 19.

188. *See infra* text accompanying notes 189-92.

189. 405 U.S. 438 (1972).

190. *Id.* at 447. Consider the case of Forest Wade, who committed his crime in 1986 but was not apprehended until two years later. *See* Wade v. State, 825 P.2d 1357, 1360 (Okla. Crim. App. 1992). By not being apprehended until after the amendment became effective, he received the benefit of the new sentencing option, whereas others committing similar crimes in 1986 but who were captured earlier, did not. *Id.*; *see also* United States v. Meyers, 143 F. Supp. 1, 4 (D. Alaska 1956) (stating that a statute prescribing differing degrees of punishment for the same offense committed under the same circumstances by persons in like situations violates equal protection); State v. King, 149 N.W.2d 509, 516 (S.D. 1967) (noting imposition of different punishments or

grounds exist to explain or justify such different treatment in the instant cases. The court in *Hain* and *Salazar* stated that interests of "fundamental fairness" compelled those decisions,[191] yet, much in those decisions is not at all fair.[192]

V. Practical Effects of Retroactivity

Thus far, discussion has centered around decisions of the Oklahoma Court of Criminal Appeals, the reasoning employed in those decisions, and viable arguments against such decisions. It is also important to contemplate the practical effect of those decisions. Accordingly, this section will analyze the inequities of a situation where an intermediate level of punishment becomes effective after commission of the crime but prior to sentencing, the expense and difficulty of remanding for resentencing, and the effect such inequities have on the families of the victims.

Consider first the current dilemma of an Oklahoma trial judge in a capital case in which a sentencing amendment containing a new, intermediate level of punishment becomes effective after commission of the crime but prior to sentencing. In the sentencing phase of the trial, the judge must instruct the jury on the range of punishment the jury is allowed to consider.[193] Because of the decisions in *Hain*, *Salazar*, *Wade*, and *Allen*, the trial judge must now instruct the jury on the new punishment option as well as options existing prior to the amendment.[194] However, the trial judge does not, at the time of jury instruction, know whether a death sentence will actually be imposed. For example, if the jury cannot agree on a verdict and thereafter eliminates the death penalty as a sentencing option, the judge may err by

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degrees of punishment upon one than is imposed on all for like offenses denies equal protection).

191. Hain v. State, 852 P.2d 744, 753 (Okla. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1402, *and cert. denied*, 114 S. Ct. 1416 (1994); Salazar v. State, 852 P.2d 729, 739 (Okla. Crim. App. 1993).

192. For example, in many cases where there are multiple defendants, the defendants are not tried at the same time. Court schedules, defensive tactics, motion hearings, and the like can delay the trial of one defendant longer than the trial of another. If an amendment lessening penalties becomes effective before the trials of all co-defendants are complete, a rule of retroactivity based on a specific date is unfair to any defendant unfortunate enough to have a "speedier" trial. Similarly, a criminal who successfully avoids capture until after the effective date of an ameliorative statute will get the benefit of the new statute. Such occurrences are certainly unfair to those captured and tried under the old statute.

193. *See, e.g.*, Wade v. State, 825 P.2d 1357, 1363 (Okla. Crim. App. 1992) (holding that trial court erred by refusing to instruct the jury on the amended sentencing option).

194. *Hain*, 852 P.2d at 753; *Salazar*, 852 P.2d at 740; *Wade*, 825 P.2d at 1363; Allen v. State, 821 P.2d 371, 377 (Okla. Crim. App. 1991).

instructing on a more severe penalty than was in effect at the time of the crime. In such a case, an appellate court may very well reverse and remand for resentencing because of that error.[195] Yet, if the trial judge does not instruct on the new option, the Court of Criminal Appeals will reverse and remand for resentencing because *Allen* was not followed.[196] In effect, the trial judge is forced to err.

Consider also the expense and difficulty of remanding for resentencing. For example, Scott Allen Hain committed his crime in 1987, but the case was not remanded for resentencing until 1993.[197] The ability of the State to present its case after many years have lapsed can be significantly affected. During such a length of time, witnesses may die, evidence can deteriorate or get lost, and memories can fade.[198] The added expense of a new proceeding is also burdensome to strained court budgets and overcrowded dockets.[199]

Consider also the effect on the families of the victims.[200] Family members are often witnesses in such cases, and will, in any event, normally attend the trials and other proceedings.[201] Most capital cases receive much media attention, and family members are reminded during each proceeding of the loss of their loved one as well as the often

195. *See* Beazell v. Ohio, 269 U.S. 167, 170 (1925) (holding that laws which increase punishment are constitutionally prohibited).

196. *Allen*, 821 P.2d at 377 (holding that the court must give proper consideration to all three possible punishments).

197. *Hain*, 852 P.2d at 744-46.

198. *See* Alan F. Blakley, Comment, *The Cost of Killing Criminals*, 18 N. KY. L. REV. 61, 77 (1990).

199. The cost of a jury trial has been estimated to be as high as $176,000. *Id.* at 76 n.129.

200. Laura Lee Sanders and Michael Houghton, killed by Scott Hain and Robert Lambert, left behind families who have been forced to relive the tragedy four times over seven years, and must do so at least once more when Lambert is retried. Imagine receiving news of a family member being cruelly and heinously murdered, then having to sit through separate trials of the two persons who killed that family member and listen to the horrible details of the crime each time. Then, seven years later, the case is remanded for resentencing, and the ordeal begins again. Studies indicate that violent crime affects the families of victims as well as the victims themselves. Divorce, severe depression, alcoholism, drug addiction, and stress related illnesses can occur among family members; and, suicide is not uncommon. Tom Gibbons, *Victims Again - Survivors Suffer Through Capital Appeals*, 74 A.B.A. J. 64, 67 (1988). Resentencing after a period of years requires the evidence to be re-introduced because a different jury is empaneled than that at the original trial. This process virtually amounts to a completely new trial because the newly empaneled jury must hear all the evidence before it can render a verdict.

201. About 31 states have crime-victim bills of rights; 39 states allow victim-impact statements; 34 states, and the federal government have crime-victim restitution laws; and most states require victim notification of critical court proceedings. *Id.* These proceedings, as well as cases which require family members as witnesses, keep the families of victims actively involved with court proceedings throughout the course of the judicial process. *Id.* "Families of murdered victims are forced to serve a life sentence without parole." *Id.* at 66.

grisly details of the crime. When a case is remanded for new proceedings, this process can continue for years and further traumatizes the families of the victims.[202]

These problems are unavoidable and must be dealt with when an error of constitutional significance forces remand. However, a purely arbitrary decision for retroactive application by a court, not made for protection of constitutional rights, should not be allowed to create such problems. In *Salazar*, the court stated that its decision to retroactively apply the amendment and remand for resentencing would save "valuable state and judicial resources as well as provide certainty and resolution to this case."[203] This statement is as unexplainable as the decision itself.

VI. CONCLUSION

Constitutional provisions which protect the rights of individuals, as well as the interests of the State, cannot be dismissed by simply labelling a criminal statute procedural and applying it retroactively. No matter what label is attached, retroactive application must be examined for constitutional violations of the ex post facto prohibition, the saving clause provision, and the guarantee of equal protection. Most importantly, it must be determined whether the legislature intended retroactive application.

After analyzing the Oklahoma Court of Criminal Appeals decisions in *Hain*, *Salazar*, *Wade*, and *Allen*, no compelling argument exists to conclude that the Oklahoma Legislature intended the 1987 amendment to apply retroactively. In fact, the opposite is true. Many compelling arguments show that the amendment was intended to operate prospectively only. Thus, a question is raised as to why the Court of Criminal Appeals decided that the amendment must operate retroactively. It is true that a sentence of death should be carefully examined to ensure that such a drastic and final sentence be imposed judiciously and with utmost care. However, such an examination should not result in a decision to vacate the death sentence when that decision violates constitutional provisions and ignores obvious legislative intent.

With the possible exception of a statute which is deemed unconstitutional, there is little justification for retroactive application of a

202. *See* Gibbons, *supra* note 200, at 67.
203. Salazar v. State, 852 P.2d 729, 740 (Okla. Crim. App. 1993).

criminal enactment, whether the enactment creates a new statute, or amends or repeals an existing one. Retroactive application creates many problems, particularly those involving the degree of retroactivity. Even the United States Supreme Court has been unable to establish rules for retroactivity which can be applied to new cases in a uniform and just manner. In the absence of such rules, each court is free to decide on its own whether to apply an enactment retroactively and, if so, how far back in time it should be applied. This freedom inevitably leads to unequal treatment and prevents certainty and uniform application of the law.

Perhaps a court, when considering retroactive application of a criminal statute, should engage in a balancing test such as is used in cases of negligence or nuisance.[204] The court could balance the social utility of retroactive application against the harm done if retroactively applied. At the very least, such a test would force the court to consider the consequences of retroactive application, and perhaps conclude that retroactivity of criminal laws, unless required for protection of fundamental rights, is not an adequate solution.

However, the simplest solution is to follow the general rule of prospective application only. The simple, but effective, rule that the statute in effect at the time of the crime controls the case from its inception through final appeal avoids the problems inherent in retroactivity, comports with constitutional provisions, and is one which can be relied upon by courts in any jurisdiction. The stability provided by such a rule is essential to efficient operation of the judiciary and, if strictly followed, could significantly lessen public dissatisfaction with the legal system by eliminating many retrials and resentencing proceedings, and thereby hastening the finalization of criminal adjudications.

Mark A. Ihrig

204. To determine whether an actor has been negligent, an evaluation of the unreasonableness of his actions is performed by balancing the risk of harm to another against the utility of the act. JAMES A. HENDERSON, JR., & RICHARD N. PEARSON, THE TORTS PROCESS 338 (3d ed. 1988). Intentional nuisance problems involve a similar evaluation of the unreasonableness of action by balancing the gravity of the harm against the utility of the conduct. *Id.* at 920.