

ORDINANCE No. 114635

COUNCIL BILL No. 107403

AN ORDINANCE related to the Seattle Criminal Code; amending the penalty imposed for violation of certain crimes to conform to state law; amending Section 12A.02.070 to provide for the punishment of crimes designated as gross misdemeanors and misdemeanors; and amending 12A.08.040, criminal trespass, to conform to state law.

The City of

Honorable President:

Your Committee on

to which was referred the within Council report that we have considered the same

7/24/89 held one

COMPTROLLER FILE No.

Introduced: JUL 3 1989	By: NOLAND
Referred: JUL 3 1989	To: <i>F...</i>
Referred:	To:
Referred:	To:
Reported: AUG 7 1989	Second Reading: AUG 7 1989
Third Reading: AUG 7 1989	Signed: AUG 7 1989
Presented to Mayor: AUG 5 1989	Approved: AUG 17 1989
Returned to City Clerk: AUG 17 1989	Published:
Vetoed by Mayor:	Veto Published:
Passed over Veto:	Veto Sustained:

PUBLIC SAFETY

vote 8-1 Smith

# The City of Seattle--Legislative Department

## REPORT OF COMMITTEE

Date Reported  
and Adopted

7-14-89

President:

Committee on

Public Safety

was referred the within Council Bill No.

107403

we have considered the same and respectfully recommend that the same:

4/89 held one week by Roland

Do pass 2-0

8-1 Smith Against

Jane Bland

Committee Chair

DBW:adn  
06/19/89  
VI:ORD3.

# 1  
C.B. 107403

ORDINANCE 114635

AN ORDINANCE related to the Seattle Criminal Code; amending the penalty imposed for violation of certain crimes to conform to state law; amending Section 12A.02.070 to provide for the punishment of crimes designated as gross misdemeanors and misdemeanors; and amending 12A.08.040, criminal trespass, to conform to state law.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Seattle Municipal Code Section 12A.02.070 is amended as follows:

12A.02.070 Punishment of Crime.

A. A Every crime without a specific penalty provision, and every crime designated as a gross misdemeanor, may be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00), or by imprisonment in the City jail for a term not to exceed one (1) year, or by both such fine and imprisonment.

B. Every crime designated as a misdemeanor may be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment for a term not to exceed ninety (90) days, or by both such fine and imprisonment.

Section 2. Seattle Municipal Code Section 12A.04.120 is amended added as follows:

12A.04.120 Criminal attempt.

A. A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act:

1. Which is a substantial step toward the commission of that crime; and

1           2.    Which strongly corroborates his or her intent  
2 to commit that crime.

3           B.    If the conduct in which a person engages otherwise  
4 constitutes an attempt to commit a crime, it is no  
5 defense to a prosecution of such attempt that the crime  
6 charged to have been attempted was, under the attendant  
7 circumstances, factually or legally impossible of com-  
8 mission, if such crime could have been committed had the  
9 attendant circumstances been as such person believed  
10 them to be.

11           C.    When the actor's conduct would otherwise constitute  
12 a criminal attempt under this section, it is an affirma-  
13 tive defense that, under circumstances manifesting a  
14 complete and voluntary renunciation of his or her crimi-  
15 nal intent, he or she:

16           1.    Abandoned his or her effort to commit the  
17 crime; or

18           2.    Prevented the commission of the crime.

19           D.    A person may not be convicted on the basis of the  
20 same course of conduct of both an attempt to commit an  
21 offense and either complicity in or ~~in~~ the commission of  
22 that offense.

23           E.    This section shall not apply to liability for the  
24 conduct of another as defined in Section 12A.4.130.

25           F.    An attempt to commit a crime is a misdemeanor.

26           Section 3.   Seattle Municipal Code Section 12A.08.070 is  
27 amended as follows:

28           12A.08.020   Property destruction.

1 A. A person is guilty of property destruction if he or  
2 she intentionally damages the property of another.

3 B. In any prosecution under subsection A, it is an  
4 affirmative defense that the actor reasonably believed  
5 that he had a lawful right to damage such property.

6 C. Property destruction is a gross misdemeanor, if the  
7 damage to the property is in an amount exceeding fifty  
8 dollars; otherwise, it is a misdemeanor.

9 Section 4. Seattle Municipal Code Section 12A.08.040 is  
10 amended as follows:

11 12A.08.040 Criminal trespass.

12 A. A person is guilty of criminal trespass in the  
13 first degree if he or she knowingly enters or remains in  
14 or upon the premises of another a building when he or  
15 she is not then licensed, invited or otherwise privi-  
16 leged to so enter or remain.

17 B. A person is guilty of criminal trespass in the  
18 second degree if he or she knowingly enters or remains  
19 in or upon premises of another under circumstances not  
20 constituting criminal trespass in the first degree.

21 C. Criminal trespass in the first degree is a gross  
22 misdemeanor. Criminal trespass in the second degree is  
23 a misdemeanor.

24 BD. A license or privilege to enter or remain in a  
25 building which is only partly open to the public is not  
26 a license or privilege to enter or remain in that part  
27 of a building which is not open to the public. A person  
28 who enters or remains upon unimproved and apparently  
unused land, which is neither fenced nor otherwise

1 enclosed in a manner designed to exclude intruders, does  
2 so with license and privilege unless notice against  
3 trespass is personally communicated to him or her by the  
4 owner of the land or some other authorized person, or  
5 unless notice is given by posting in a conspicuous  
6 manner. Land that is used for commercial aquaculture or  
7 for growing an agricultural crop or crops, other than  
8 timber, is not unimproved and apparently unused land if  
9 a crop or any other sign of cultivation is clearly  
10 visible or if notice is given by posting in a conspi-  
11 cuous manner. Similarly, a field fenced in any manner  
12 is not unimproved and apparently unused land.

13 ED. In any prosecution under subsection A or B it is an  
14 affirmative defense that:

15 1. A building involved was abandoned; or

16 2. The premises were at the time open to members  
17 of the public and the actor complied with all lawful  
18 conditions imposed on access to or remaining in the pre-  
19 mises; or

20 23. The actor reasonably believed that the owner  
21 of the premises, or other person empowered to license  
22 access thereto, would have licensed him or her to enter  
23 or remain; or

24 34. The actor was attempting to serve legal pro-  
25 cess, which includes any document required or allowed to  
26 be served upon persons or property by any statute, ordi-  
27 nance, governmental rule or regulation, or court order,  
28 excluding delivery by the mails of the United States.  
This defense is available only if the actor did not  
enter into a private residence or other building not

1 open to the public and the entry onto the premises was  
2 reasonable and necessary for service of the legal pro-  
3 cess.

4 Section 5. Seattle Municipal Code Section 12A.10.020 is  
5 amended as follows:

6 12A.10.020 Prostitution.

7 A. A person is guilty of prostitution if he or she  
8 engages or agrees or offers to engage in sexual conduct  
9 with another person in return for a fee.

10 B. It is an affirmative defense in any prosecution  
11 under this section that the sexual conduct was engage in  
12 as part of any stage performance, play, or other enter-  
13 tainment, open to members of the public.

14 C. Prostitution is a misdemeanor.

15 Section 6. Seattle Municipal Code Section 12A.10.040 is  
16 amended as follows:

17 12A.10.040 Patronizing a prostitute.

18 A person is guilty of patronizing a prostitute if:

19 A. Pursuant to a prior understanding, he or she pays a  
20 fee to another person as compensation for such person or  
21 a third person having engaged in sexual conduct with  
22 him or her; or

23 B. He or she pays or agrees to pay a fee to another  
24 person pursuant to an understanding that in return  
25 therefore such person will engage in sexual conduct with  
26 him or her; or

27 C. He or she solicits or requests another person to  
28 engage in sexual conduct with him or her in return for a  
fee.

1           D. Patronizing a prostitute is a misdemeanor.

2           Section 7. Seattle Municipal Code Section 12A.10.060 is  
3 amended as follows:

4           12A.10.060 Permitting prostitution.

5           A. A person is guilty of permitting prostitution if,  
6 having possession or control of premises which he or she  
7 knows are being used for prostitution purposes, he or  
8 she fails to make reasonable effort to halt or abate  
such use.

9           B. Permitting prostitution is a misdemeanor.

10           Section 8. Seattle Municipal Code Section 12A.16.010 is  
11 amended as follows:

12           12A.16.010 Obstructing a public officer.

13           A. A person is guilty of obstructing a public officer  
14 if, with knowledge that the person obstructed is a pub-  
15 lic officer, he or she:

16           1. Intentionally and physically interferes with a  
17 public officer; or

18           2. Intentionally hinders or delays a public offi-  
19 cer by disobeying an order to stop given by such offi-  
cer; or

20           3. Intentionally refuses to cease an activity or  
21 behavior that creates a risk of injury to any person  
22 when ordered to do by a public officer; or

23           4. Intentionally destroys, conceals or alters or  
24 attempts to destroy, conceal or alter any material which  
25 he or she knows the public officer is attempting to  
26 obtain, secure or preserve during an investigation,  
27 search or arrest; or

1           5. Intentionally refuses to leave the scene of an  
2 investigation of a crime while an investigation is in  
3 progress after being requested to leave by a public  
4 officer.

5           B. No person shall be convicted of violating this sec-  
6 tion if the Judge determines, with respect to the person  
7 charged with violating this section, that the public  
8 officer was not acting lawfully in a governmental func-  
9 tion.

10          C. For purposes of this section, a "public officer"  
11 means those individuals responsible for the enforcement  
12 of the provisions of the Seattle Municipal Code and  
13 empowered to make arrests for offenses under the Seattle  
14 Municipal Code or those individuals responsible for the  
15 enforcement of the criminal laws of the state.

16          D. Obstructing a public officer is a misdemeanor.

17          Section 9. Seattle Municipal Code Section 12A.16.050 is  
18 amended as follows:

19          12A.16.050 Resisting arrest.

20          A. A person is guilty of resisting arrest if he or she  
21 intentionally prevents or attempts to prevent a peace  
22 officer from lawfully arresting him or she.

23          B. Resisting arrest is a misdemeanor.

(To be used for all Ordinances except Emergency.)

Section 1.0.. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 7<sup>th</sup> day of August, 1989,  
and signed by me in open session in authentication of its passage this 7<sup>th</sup> day of August, 1989.

*[Handwritten signature]*  
President of the City Council

Approved by me this 17<sup>th</sup> day of August, 1989  
*[Handwritten signature]* Mayor.

Filed by me this 17<sup>th</sup> day of August, 1989.

*[Handwritten signature]*  
Attest: Norman J. Brooks  
City Comptroller and City Clerk.

(SEAL)

Published \_\_\_\_\_

By *[Handwritten signature]*  
Deputy Clerk.

~~11~~ 3  
C.B. 107403

PUBLIC SAFETY COMMITTEE REPORT  
July 14, 1989

Council Bill No. 107403

An ordinance relating to the Seattle Criminal Code; amending the penalty imposed for violation of certain crimes to conform to state law; amending Section 12A.02-070 to provide for the punishment of crimes designated as gross misdemeanors and misdemeanors; and amending 12A.08.040, criminal trespass, to conform to state law.

Background

A recent Washington State Court of Appeals decision held that Seattle's ordinances cannot provide for a maximum sentence greater than that permitted for the same crime under state law. It requires that city law conform with state law.

Accordingly, this ordinance proposes adopting the state's more lenient penalties for criminal attempt, criminal trespass, resisting arrest, property destruction under \$50, obstructing a public officer, prostitution, patronizing a prostitute and permitting prostitution. The city's current one year/\$5000 maximum penalties for each of these offenses would be changed to the state's 90 days/\$1000 maximum penalties.

Committee Chair Recommendation: Do pass.

For further information:

Doug Whalley 4-7771

MR/misdemean

DBW:adn  
06/19/89  
VI:ORD3.

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LB. 107403

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ORDINANCE \_\_\_\_\_

AN ORDINANCE related to the Seattle Criminal Code; amending the penalty imposed for violation of certain crimes to conform to state law; amending Section 12A.02.070 to provide for the punishment of crimes designated as gross misdemeanors and misdemeanors; and amending 12A.08.040, criminal trespass, to conform to state law.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Seattle Municipal Code Section 12A.02.070 is amended as follows:

12A.02.070 Punishment of Crime.

A. A Every crime without a specific penalty provision, and every crime designated as a gross misdemeanor, may be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00), or by imprisonment in the City jail for a term not to exceed one (1) year, or by both such fine and imprisonment.

B. Every crime designated as a misdemeanor may be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment for a term not to exceed ninety (90) days, or by both such fine and imprisonment.

Section 2. Seattle Municipal Code Section 12A.04.120 is amended added as follows:

12A.04.120 Criminal attempt.

A. A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act:

1. Which is a substantial step toward the commission of that crime; and

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2. Which strongly corroborates his or her intent to commit that crime.

B. If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be.

C. When the actor's conduct would otherwise constitute a criminal attempt under this section, it is an affirmative defense that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal intent, he or she:

1. Abandoned his or her effort to commit the crime; or

2. Prevented the commission of the crime.

D. A person may not be convicted on the basis of the same course of conduct of both an attempt to commit an offense and either complicity in or ~~in~~ the commission of that offense.

E. This section shall not apply to liability for the conduct of another as defined in Section 12A.4.130.

F. An attempt to commit a crime is a misdemeanor.

Section 3. Seattle Municipal Code Section 12A.08.070 is amended as follows:

12A.08.020 Property destruction.

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A. A person is guilty of property destruction if he or she intentionally damages the property of another.

B. In any prosecution under subsection A, it is an affirmative defense that the actor reasonably believed that he had a lawful right to damage such property.

C. Property destruction is a gross misdemeanor, if the damage to the property is in an amount exceeding fifty dollars; otherwise, it is a misdemeanor.

Section 4. Seattle Municipal Code Section 12A.08.040 is amended as follows:

12A.08.040 Criminal trespass.

A. A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains in or upon the premises of another a building when he or she is not then licensed, invited or otherwise privileged to so enter or remain.

B. A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

C. Criminal trespass in the first degree is a gross misdemeanor. Criminal trespass in the second degree is a misdemeanor.

BD. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise

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enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land.

ED. In any prosecution under subsection A or B it is an affirmative defense that:

1. A building involved was abandoned; or

2. The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

23. The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain; or

34. The actor was attempting to serve legal process, which includes any document required or allowed to be served upon persons or property by any statute, ordinance, governmental rule or regulation, or court order, excluding delivery by the mails of the United States. This defense is available only if the actor did not enter into a private residence or other building not

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open to the public and the entry onto the premises was reasonable and necessary for service of the legal process.

Section 5. Seattle Municipal Code Section 12A.10.020 is amended as follows:

12A.10.020 Prostitution.

A. A person is guilty of prostitution if he or she engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

B. It is an affirmative defense in any prosecution under this section that the sexual conduct was engage in as part of any stage performance, play, or other entertainment, open to members of the public.

C. Prostitution is a misdemeanor.

Section 6. Seattle Municipal Code Section 12A.10.040 is amended as follows:

12A.10.040 Patronizing a prostitute.

A person is guilty of patronizing a prostitute if:

A. Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or

B. He or she pays or agrees to pay a fee to another person pursuant to an understanding that in return therefore such person will engage in sexual conduct with him or her; or

C. He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

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D. Patronizing a prostitute is a misdemeanor.

Section 7. Seattle Municipal Code Section 12A.10.060 is amended as follows:

12A.10.060 Permitting prostitution.

A. A person is guilty of permitting prostitution if, having possession or control of premises which he or she knows are being used for prostitution purposes, he or she fails to make reasonable effort to halt or abate such use.

B. Permitting prostitution is a misdemeanor.

Section 8. Seattle Municipal Code Section 12A.16.010 is amended as follows:

12A.16.010 Obstructing a public officer.

A. A person is guilty of obstructing a public officer if, with knowledge that the person obstructed is a public officer, he or she:

1. Intentionally and physically interferes with a public officer; or

2. Intentionally hinders or delays a public officer by disobeying an order to stop given by such officer; or

3. Intentionally refuses to cease an activity or behavior that creates a risk of injury to any person when ordered to do by a public officer; or

4. Intentionally destroys, conceals or alters or attempts to destroy, conceal or alter any material which he or she knows the public officer is attempting to obtain, secure or preserve during an investigation, search or arrest; or

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5. Intentionally refuses to leave the scene of an investigation of a crime while an investigation is in progress after being requested to leave by a public officer.

B. No person shall be convicted of violating this section if the Judge determines, with respect to the person charged with violating this section, that the public officer was not acting lawfully in a governmental function.

C. For purposes of this section, a "public officer" means those individuals responsible for the enforcement of the provisions of the Seattle Municipal Code and empowered to make arrests for offenses under the Seattle Municipal Code or those individuals responsible for the enforcement of the criminal laws of the state.

D. Obstructing a public officer is a misdemeanor.

Section 9. Seattle Municipal Code Section 12A.16.050 is amended as follows:

12A.16.050 Resisting arrest.

A. A person is guilty of resisting arrest if he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or she.

B. Resisting arrest is a misdemeanor.

LAW DEPARTMENT

THE CITY OF SEATTLE

DOUGLAS N. JEWETT, CITY ATTORNEY  
10TH FLOOR MUNICIPAL BUILDING  
SEATTLE, WASHINGTON 98104

(206) 684-8200

UTILITIES DIVISION  
1015 THIRD AVE., SUITE 902  
SEATTLE, WA 98104  
(206) 684-3361

CRIMINAL DIVISION  
1414 DEXTER HORTON BLDG.  
SEATTLE, WA 98104  
(206) 684-7757

June 19, 1989

RECEIVED  
JUN 23 1989

The Honorable Jane Noland  
Chair, Public Safety Committee  
Seattle City Council  
1100 Municipal Building  
Seattle, WA 98104

JANE NOLAND  
SEATTLE CITY COUNCIL

Re: Proposed ordinance adopting state criminal penalties

Dear Councilmember Noland:

Enclosed is an ordinance amending the Seattle Criminal Code to adopt state penalties for offenses identical to state law. The ordinance changes the maximum for the following crimes as indicated:

<u>Crime</u>	<u>Current</u>	<u>New</u>
Criminal attempt	1 year/\$5,000	90 days/\$1,000
Property destruction under \$50	1 year/\$5,000	90 days/\$1,000
Criminal Trespass	1 year/\$5,000	90 days/\$1,000
Obstructing a public officer	1 year/\$5,000	90 days/\$1,000
Resisting arrest	1 year/\$5,000	90 days/\$1,000
Prostitution	1 year/\$5,000	90 days/\$1,000
Patronizing a prostitute	1 year/\$5,000	90 days/\$1,000
Permitting prostitution	1 year/\$5,000	90 days/\$1,000

This change is required by a recent Court of Appeals decision, Seattle v. Hogan, 53 Wn.App. 387 (1989). The Court held that Seattle's ordinances cannot provide for a maximum sentence greater than that permitted for the same crime under state law. The Hogan opinion is attached.

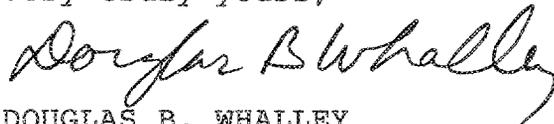
MA - OK

The Honorable Jane Noland  
June 19, 1989  
Page 2

Section 4 amends the definition of criminal trespass to conform to state law. The state divides the offense into entry into a building (first degree) and into premises (second degree). The reference to agricultural land, and the additional affirmative defense, are also part of the state statute. They do not change the scope of our law, and adding them removes a frequent defense claim that we conflict with state law.

The Law Department and the Seattle Police Department urge the Council to enact this ordinance. I am available to provide further information or answer any questions.

Very truly yours,



DOUGLAS B. WHALLEY  
Director  
Criminal Division

DBW:adn  
VII:LET9.

Attachment

cc: Leo Poort,  
Seattle Police Department  
Mark Mayo,  
Mayor's Office  
Don Stout,  
Law Department

which the at-fault driver was speeding, went out of control, crossed the center line, and struck another car, killing the driver. Action was brought against Seattle. At trial, the jury found Seattle negligent, but that its negligence was not the proximate cause of death. Klein appealed, assigning error to instructions. The court affirmed the judgment, holding that, as a matter of law, Seattle's negligence was not the proximate cause (legal cause) of decedent's death and that the City had no duty to protect the decedent from the "extreme carelessness" of the at-fault driver. *Klein*, 41 Wn. App. at 639. The court reasoned that, as a matter of public policy the City could not be expected to guard against this degree of negligence. Otherwise, highways would have to be constructed to protect reasonably prudent motorists from the negligence of the reckless, careless, drunken drivers, rather than for the use and safety of the reasonably prudent motorist.

Applying *Klein* to the facts of this case, policy considerations dictate that the County had no duty to protect Braegelmann. Here, as in *Klein*, we have a head-on collision in which the at-fault driver was speeding, crossed the center line, and struck an oncoming vehicle. The present case also involves the additional factor of Tom, the at-fault driver, being highly intoxicated at the time of the collision. The court in *Klein* determined that, as a matter of public policy, there is no duty to guard against such extreme conduct. Therefore, the County met its burden of showing that it was entitled to summary judgment based on the doctrine of legal causation. Having decided the case on the ground of no duty and therefore no legal causation, cause in fact issues need not be discussed.

Judgment affirmed.

COLEMAN, C.J., and WEBSTER, J., concur.

[No. 20694-0-I. Division One. January 30, 1989.]

THE CITY OF SEATTLE, Respondent, v. CARLOS M. HOGAN, Petitioner.

[1] Criminal Law — Crimes — Discretion To Charge — Equal Protection — State or Local Crime. Permitting a prosecutor to charge a defendant under either a state statute or a municipal ordinance, each having the same elements but different maximum punishments, violates the defendant's constitutional right to equal protection of the laws.

[2] Criminal Law — Punishment — Equal Protection — State and Local Crimes — Different Punishments — Effect. When a local criminal enactment provides for greater punishment than is permitted by a state statute defining the same crime, the local enactment is not void but no punishment may be imposed under the enactment that is greater than that permitted under the statute.

Nature of Action: The defendant was charged with attempting to violate a municipal vehicle prowling ordinance.

Municipal Court: The Seattle Municipal Court, No. 86-3-38003-2, George W. Holifield, J., entered a judgment of guilty on December 16, 1986. Had the defendant been convicted under a state statute prohibiting the same conduct, his punishment would have been less.

Superior Court: The Superior Court for King County, No. 86-1-05067-8, Frank H. Roberts, Jr., J., affirmed the judgment on June 15, 1987.

**Court of Appeals:** Holding that the discretion given the prosecutor to charge the offense under either the ordinance or the statute violated the defendant's right to equal protection of the laws, the court *reverses* the sentence and *remands* the case to municipal court for resentencing.

*Linda Portnoy, Public Defender*, for petitioner.

*Douglas N. Jewett, City Attorney*, and *Stanley Bastian and Charlotte E. Clark-Mahoney, Assistants; Douglas B. Whalley, City Prosecutor*, for respondent.

PEKELIS, J.—Carlos M. Hogan appeals from his conviction for attempted vehicle prowling on the basis that the municipal ordinance under which he was charged provides for a maximum punishment greater than that permitted for the same crime under state law. He argues that this violates (1) constitutional guaranties of equal protection and (2) Const. art. 11, § 11, providing that municipal ordinances must not conflict with general laws. We reverse and remand to the Seattle Municipal Court for resentencing.

When a person is arrested for attempted vehicle prowling in the city of Seattle, two dispositions are possible. The charge may be brought in Seattle District Court under the state statutes, RCW 9A.52.100 and RCW 9A.28.020, or in Seattle Municipal Court under the substantively identical city ordinances, SMC 12A.08.120 and 12A.04.120.<sup>1</sup> Hogan was charged under the city ordinances, and was found guilty by the Municipal Court. His sentence was 365 days in jail, 335 suspended, and \$5,000 fine, \$5,000 suspended. On appeal to King County Superior Court, his conviction and sentence were affirmed. He sought and was granted discretionary review in this court.

Vehicle prowling in the second degree is defined in RCW 9A.52.100 as a gross misdemeanor. An attempt to commit a crime defined as a gross misdemeanor is a misdemeanor.

<sup>1</sup>Although the state and local enactments contain some minor differences in wording, the City does not dispute the proposition that the substantive elements of the crimes are identical for the purposes of this appeal.

RCW 9A.28.020(3)(e). The maximum punishment for a misdemeanor under state law is 90 days in jail or a \$1,000 fine or both. RCW 9A.20.021(3). Under the City's ordinance scheme, on the other hand, the maximum punishment for all crimes, including attempts, is the equivalent of state law maximums for gross misdemeanors, that is, 1 year in jail and a \$5,000 fine or both. Compare SMC 12A.02.060-.070 with RCW 9A.20.021(2).<sup>2</sup> Thus, a defendant charged in Seattle Municipal Court is subject to a significantly greater penalty than that authorized under state law for the identical offense.

Hogan argues that this violates constitutional guaranties of equal protection, contrary to the fourteenth amendment to the United States Constitution and Const. art. 1, § 12, in that it gives unfettered discretion to the charging authority to seek varying maximum penalties. The City replies that differing penalties alone, absent the discretion to charge crimes of different degrees, create no constitutional infirmities.

[1] In *Olsen v. Delmore*, 48 Wn.2d 545, 550, 295 P.2d 324 (1956), our Supreme Court held that "[a] statute which prescribes different punishments or different degrees of punishment for the same act committed under the same

<sup>2</sup>SMC 12A.02.060 reads:

\*Offenses shall be crimes or violations.

\*Every offense defined by this subtitle or conduct made unlawful thereby shall constitute a crime and a jail sentence may be imposed therefor, except for such offenses or unlawful conduct as shall be specifically designated as violations.\*

SMC 12A.02.070 reads:

\*Punishment of crime.

\*A crime may be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00), or by imprisonment in the City Jail for a term not to exceed one (1) year or by both such fine and imprisonment.\*

RCW 9A.20.021 reads in part:  
\*(2) Gross Misdemeanor. Every person convicted of a gross misdemeanor . . . shall be punished by imprisonment . . . of not more than one year, or by a fine . . . of not more than five thousand dollars, or by both such imprisonment and fine.

\*(3) Misdemeanor. Every person convicted of a misdemeanor . . . shall be punished by imprisonment . . . of not more than ninety days, or by a fine . . . of not more than one thousand dollars, or by both such imprisonment and fine.\*

circumstances by persons in like situations" violates both the equal protection clause of the fourteenth amendment to the United States Constitution and Const. art. 1, § 12.<sup>3</sup> The constitutional flaw in such a statute is that it vests in the charging authorities unbridled discretion to charge an offender with either of two crimes, resulting in different sentences for the same offense. *State v. Mason*, 34 Wn. App. 514, 516, 663 P.2d 137 (1983).

In this case, the elements to be proved under either the Seattle Municipal Code or the parallel state statutes are identical. For this reason, this case is distinguishable from *United States v. Batchelder*, 442 U.S. 114, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979), in which it was held that a conviction under one of two overlapping statutes which authorized different maximum punishments would not violate equal protection. See *Mason*, 34 Wn. App. at 518-19 & n.5 (distinguishing *Batchelder*). While the statutes in *Batchelder* served independent legislative goals and required that different elements be proven, *Batchelder*, 442 U.S. at 118-19 & n.5, the provisions at issue here do not.<sup>4</sup>

The only distinction between the two enactments at issue here is the degree of punishment allowed under each scheme. Thus, this case falls squarely within a line of cases

<sup>3</sup>The Fourteenth Amendment states in pertinent part: "No 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."

Const. art. 1, § 12 states:

"No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

<sup>4</sup>Other cases relied on by the City can be similarly distinguished. See *State v. Canady*, 69 Wn.2d 886, 891, 421 P.2d 347 (1966); *State v. Reid*, 66 Wn.2d 243, 401 P.2d 988 (1965); cf. *State v. Sherman*, 98 Wn.2d 53, 61, 653 P.2d 612 (1982) (greater punishment for felony flight than for same elements contained in constituent misdemeanor offenses is not violative of equal protection since it is reasonable to provide greater punishment for cumulative effect of two acts occurring in sequence than for isolated acts).

following *Olsen* and holding that equal protection is denied where two separate but identical criminal statutes set forth varying penalties. *State v. Zornes*, 78 Wn.2d 9, 21-24, 475 P.2d 109 (1970); *State v. Ensminger*, 77 Wn.2d 535, 536, 463 P.2d 612 (1970); *Mason*, 34 Wn. App. at 516. This is true even where both statutes are of the same degree, for example, both misdemeanors. *State v. Martell*, 22 Wn. App. 415, 416-18, 591 P.2d 789 (1979).

The City contends that another line of cases which also cite *Olsen* controls here. These cases hold there is no denial of equal protection where a statute merely permits a range or variation in punishment. We note, however, that where this principle is stated, it is accompanied with the proviso that the charging authorities cannot exercise discretion with regard to the degree of the offense charged (i.e., felony or misdemeanor), and that sentencing discretion lies only with the court. See *Jansen v. Morris*, 87 Wn.2d 258, 261, 551 P.2d 743 (1976); *State v. Blanchey*, 75 Wn.2d 926, 939-40, 454 P.2d 841 (1969), cert. denied, 396 U.S. 1045, 24 L. Ed. 2d 688, 90 S. Ct. 694 (1970); *State v. Boggs*, 57 Wn.2d 484, 489-90, 358 P.2d 124 (1961); *State v. Edwards*, 17 Wn. App. 355, 361, 563 P.2d 212 (1977), review denied, 89 Wn.2d 1015 (1978). To allow a prosecutor to set the range of punishment by choosing the degree of the charge would not be in harmony with our State's policy "goals of treating all men equally in the guilt determination process while retaining some flexibility and individualized treatment at the punishment stage." *Blanchey*, 75 Wn.2d at 940.

Only where objective standards govern the decision will a prosecutor be permitted to exercise any discretion at the charging phase. Thus, the court in *Edwards* held that a prosecutor's discretion to charge a firearm or deadly weapon penalty enhancement is constitutional since it is not unfettered but is governed by justifiable standards such as the severity of the offense, criminal propensities of the accused and the past criminal record of the accused. See *Edwards*, 17 Wn. App. at 361; accord, *State v. Workman*, 90 Wn.2d 443, 455-56, 584 P.2d 382 (1978) (discretion to

seek to restrict parole): *State v. Canady*, 69 Wn.2d 536, 891, 421 P.2d 347 (1968) (discretion to charge use of deadly weapon governed by proof requirements).

We find *Jansen* and its progeny inapposite here. The prosecutor's arbitrary, unfettered decision to charge in one jurisdiction or another has a direct impact on the scope of the judge's sentencing discretion, but no justifiable standards related to the particular defendant or to the circumstances of the alleged crime control the prosecutor's discretion.<sup>5</sup>

[2] Thus, we hold that application of the statutory scheme of the Seattle Municipal Code violates equal protection in that it punishes attempted vehicle prowls to a greater extent than our State Legislature has decreed it should be punished. We do not hold that SMC 12A.62.060-.070 is void but rather that it may be enforced only to the extent it is within statutory limitations.<sup>6</sup> We therefore remand for resentencing consistent with state maximum penalties.

WEBSTER and WINSOR, JJ., concur.

<sup>5</sup>*Cf. State v. Barthelomew*, 104 Wn.2d 844, 849, 710 P.2d 196 (1985) (equal protection denied where no guidelines control prosecutor's decision to submit death penalty case to jury at special sentencing proceeding on remand).

<sup>6</sup>The City contends this court must also decide whether the ordinance impermissibly conflicts with state law in violation of Const. art. 11, § 11. See *State v. Mason*, 34 Wn. App. 514, 521, 663 P.2d 137 (1983). We see no need to reach the conflict issue since it could neither affect our conclusion that equal protection has been violated, nor compel a different result. See *Bellingham v. Schampersa*, 57 Wn.2d 106, 118, 356 P.2d 292, 92 A.L.R.2d 192 (1960).

Likewise, we need not address Hogan's further argument that the City's enactment of SMC 3.33.020 providing that it shall impose "no greater punishment . . . than is authorized by state law" is dispositive of the issue here.

[No. 20640-1-1. Division One. January 30, 1989.]

THE STATE OF WASHINGTON, *Petitioner*, v. MICHAEL ANKNEY, *Respondent*.

[1] **Criminal Law — Crimes — Discretion To Charge — Equal Protection — Crime or Civil Infraction.** Criminal enactments permitting the State either to charge a misdemeanor or to seek a civil penalty, or to do both, do not violate the accused's constitutional right to equal protection of the laws.

[2] **Statutes — Validity — Burden and Degree of Proof.** A party challenging the constitutionality of a legislative enactment has the burden of proving its invalidity beyond a reasonable doubt.

[3] **Criminal Law — Statutes — Vagueness — "Lawfulness" of Victim's Conduct.** Making the "lawfulness" of a victim's conduct an element of a crime does not render the criminal definition unconstitutionally vague.

**Nature of Action:** The owner of a dog which had bitten a person was charged with violating local criminal nuisance ordinances.

**District Court:** The Northeast District Court, No. WA017093J, David S. Admire, J., dismissed the prosecution on February 2, 1987.

**Superior Court:** The Superior Court for King County, No. 87-1-00685-5, Frank H. Roberts, Jr., J., on June 16, 1987, affirmed the dismissal.

**Court of Appeals:** Holding that criminal nuisance ordinances did not violate the defendant's right to equal protection and were not unconstitutionally vague, the court reverses the dismissal.

*Norm Maleng, Prosecuting Attorney, and Susan J. Noonan and Carol D. Spoor, Deputies, for petitioner.*

*Suzanne Elliott of Associated Counsel for the Accused, for respondent.*

WEBSTER, J.—The State of Washington seeks discretionary review of a decision that the penalty scheme for violations of King County's animal control regulations violates

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The undersigned, on oath states that he is an authorized representative of The Daily Journal of Commerce, a daily newspaper, which newspaper is a legal newspaper of general circulation and it is now and has been for more than six months prior to the date of publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of this newspaper. The Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of King County.

The notice in the exact form annexed, was published in regular issues of The Daily Journal of Commerce, which was regularly distributed to its subscribers during the below stated period. The annexed notice, a

ORD: 114635

was published on

08/24/89

The amount of the fee charged for the foregoing publication is the sum of \$ \_\_\_\_\_ which amount has been paid in full.

B. Morris  
Subscribed and sworn to before me on  
August 24, 1989  
Robert D. Hall

Notary Public for the State of Washington,  
residing in Seattle

AN ORDINANCE related to the Seattle Municipal Code, amending the penalty imposed for violation of the City Code, to conform to state law; amending Section 12A.02.070 to provide for the punishment of crimes designated as gross misdemeanors and misdemeanors; and amending 12A.08.040, Criminal trespass, to conform to state law.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Seattle Municipal Code Section 12A.02.070 is amended as follows:

12A.02.070 Punishment of Crime.

A. Every crime without a specific penalty provision, and every crime designated as a gross misdemeanor, may be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00), or by imprisonment in the City Jail for a term not to exceed one (1) year, or by both such fine and imprisonment.

B. Every crime designated as a misdemeanor may be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment for a term not to exceed ninety (90) days, or by both such fine and imprisonment.

Section 2. Seattle Municipal Code Section 12A.04.120 is amended added as follows:

12A.04.120 Criminal attempt.

A. A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act:

1. Which is a substantial step toward the commission of that crime; and
2. Which strongly corroborates his or her intent to commit that crime.

B. If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be.

C. When the actor's conduct would otherwise constitute a criminal attempt under this section, it is an affirmative defense that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal intent, he or she:

1. Abandoned his or her effort to commit the crime; or
2. Prevented the commission of the crime.

D. A person may not be convicted on the basis of the same course of conduct of both an attempt to commit an offense and either complicity in or in the commission of that offense.

E. This section shall not apply to liability for the

2. The premises were at the time of the public and the actor complied with conditions imposed on access to or remains

times; or

3. The actor reasonably believed that the actor, or other person empowered access thereto, would have licensed him or her to enter or remain; or

4. The actor was attempting to serve legal process, which includes any document required or allowed to be served upon persons or property by any statute, ordinance, governmental rule or regulation, or court order, excluding delivery by the mails of the United States. This defense is available only if the actor did not enter into a private residence or other building not open to the public and the entry onto the premises was reasonable and necessary for service of the legal process.

Section 5. Seattle Municipal Code Section 12A.10.020 is amended as follows:

12A.10.020 Prostitution.

A. A person is guilty of prostitution if he or she engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

B. It is an affirmative defense in any prosecution under this section that the sexual conduct was engaged in as part of any stage performance, play, or other entertainment, open to members of the public.

C. Prostitution is a misdemeanor.

Section 6. Seattle Municipal Code Section 12A.10.040 is amended as follows:

12A.10.040 Patronizing a prostitute.

A person is guilty of patronizing a prostitute if:

A. Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or

B. He or she pays or agrees to pay a fee to another person pursuant to an understanding that in return therefore such person will engage in sexual conduct with him or her; or

C. He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

D. Patronizing a prostitute is a misdemeanor.

Section 7. Seattle Municipal Code Section 12A.10.060 is amended as follows:

12A.10.060 Permitting prostitution.

A. A person is guilty of permitting prostitution if, having possession or control of premises which he or she knows are being used for prostitution purposes, he or she fails to make reasonable effort to halt or abate

BROOKS, Comptroller and City Journal of Commerce, Seattle