The Doctrine of Lesser Included Offenses

Kyron Huigens *

I. INTRODUCTION

Courts occasionally fail to appreciate the genius of their own law. The early Washington cases on lesser included offenses, for example, formed a complex and subtle doctrine—the clash and exacting balance of competing interests lying just below the surface of apparently simple standards. Recent cases, however, present a flat and awkward version of the doctrine. They uniformly ignore, misunderstand, and misapply the early law under the influence of a relatively recent formulation of the governing standard[1] that is inadequate in almost every respect.

This Article attempts to bring the early cases back to life, to uncover the origins and deeper logic of the doctrine, and to re-introduce the older, elegant solutions to the doctrine's central problems back into current practice. This Article is not, however, a simple restoration project. Rather, with regard to the first part of *State v. Workman's*[2] two-pronged standard, this Article explores the innate wisdom of the classic elements test and a failed attempt to supplant it—then proposes changing it. This change involves a minor and little-recognized variation on the classic test that, if expanded with due regard to the root constitutional and strategic concerns of the doctrine, significantly clarifies and strengthens it. With regard to the second prong, this Article proposes a wholesale replacement of the current formulation on the ground that it is fundamentally flawed. This proposed replacement is firmly based on a close and careful reading of the early cases that brings to light, for the first time in decades, the true nature and purpose of the inquiry.

These are ambitious goals, but neither the importance nor the complexity of the doctrine of lesser included offenses can

* Deputy Prosecuting Attorney, Pierce County, Washington. A.B. 1981, Washington University in St. Louis; J.D. 1984, Cornell Law School.

1. *See* State v. Workman, 90 Wash. 2d 443, 584 P.2d 382 (1978).

2. *Id.*

be overstated. The doctrine permits either the defense or the prosecution in a criminal case to obtain a jury instruction on an offense not charged in the indictment or information.[3] At first glance, the doctrine seems odd. Ordinarily, a defendant is not permitted to choose the offense for which he will be tried.[4] Nor is the prosecution ordinarily permitted to obtain a conviction without giving the defendant notice from the outset of the offense he is accused of committing.[5]

The mystery largely dissipates, however, when the governing rule is stated. Under the leading case of *State v. Workman*,[6] a lesser offense is a lesser included offense if two conditions are met. First, each element of the lesser offense must be a necessary element of the greater offense. Second, the evidence in the case must support an inference that the lesser crime was committed.[7] "Put another way, if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime."[8]

It is not surprising, then, that either the defense or the prosecution should be permitted to use the doctrine to obtain an instruction on an offense not charged. The jury may be instructed on a lesser included offense because that accusation is implicit in the offense that has been charged. The defendant necessarily has had notice of, and has defended against, the elements of the lesser offense in the course of the trial of the greater offense. This is true by definition: under *Workman*,

---

3. The doctrine of lesser included offenses was established by the legislature of Washington Territory in 1854. Wash. Terr. § 123, at 120 (1854). As now codified, the statute provides as follows: "In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." WASH. REV. CODE § 10.61.006 (1989). The language "all other cases" refers to a companion statute, also adopted in 1854, that permits conviction of any offense which is a lesser degree of the charge against the defendant. *See infra* note 168.

4. *See* United States v. Batchelder, 442 U.S. 114 (1979) (prosecutor enjoys broad discretion in charging under the equal protection clause); Kennewick v. Fountain, 116 Wash. 2d 189, 802 P.2d 1371 (1991) (same).

5. "It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him. This stricture is based at least in part on the right of the defendant to notice of the charge brought against him." Schmuck v. United States, 489 U.S. 705 (1989) (citations omitted). *See also* State v. Kjorsvik, 117 Wash. 2d 93, 812 P.2d 86 (1991).

6. 90 Wash. 2d 443, 584 P.2d 382 (1978).

7. *Id.* at 447-48, 584 P.2d at 385.

8. State v. Bishop, 90 Wash. 2d 185, 191, 580 P.2d 259, 261 (1978) (quoting State v. Roybal, 82 Wash. 2d 577, 583, 512 P.2d 718, 721 (1973)).

all the elements of the lesser offense were necessarily also included in the charge and trial of the greater offense.[9]

Even from this elementary account of the doctrine, however, one senses its complexity. The doctrine of lesser included offenses, unlike other principles of criminal law, does not simply protect the rights of one or another of the parties. Rather, the doctrine serves both sides, providing each a strategic flexibility—a fall-back position—in the trial of a case, while preserving both prosecutorial discretion and the defendant's right to notice and the opportunity to defend. Properly formulated, the doctrine not only serves the rights and interests of the respective parties, but maintains them in an equitable balance.[10]

Furthermore, and largely beyond the concerns of the litigants, the doctrine preserves the rationality of jury verdicts and the integrity of the criminal law. The evidence prong, of course, forecloses jury speculation by barring verdicts that the evidence will not support. But on a deeper level, the doctrine as a whole ensures a close fit between the evidence actually developed at trial and the offense of which the defendant is ultimately convicted, regardless of the offense with which he was originally charged. In a very real sense, the doctrine of lesser included offenses maintains contact between the criminal code and the world in which crimes are committed.[11]

The remarkable thing is that none of the doctrine's depth or complexity is apparent in the governing standard. The first prong, especially, is easy to apply. For example, a person is guilty of first degree perjury if, in an official proceeding, while

9. *Workman*, 90 Wash. 2d at 447-48, 584 P.2d at 385. Similarly, as the court stated in State v. Copeland:

> It will be noticed that assault in the second degree does not involve any particular intent, as does assault in the first degree, and therefore, of course does not require the charge of any particular intent in the information, as is necessary in charging assault in the first degree. It seems plain then that, if we ignore the allegation of this information of the particular intent to kill, we have a complete and perfect charge of assault in the second degree; because there is still left in the information a charge of facts constituting assault in the second degree under the provisions of sec. 2414 above quoted. This view is supported by the following authorities: Clark v. Territory, 1 Wash. Ter. 68; White v. Territory, 3 Wash. Ter. 297, 24 Pac. 447; State v. Klein, 19 Wash. 368, 53 Pac. 364.

State v. Copeland, 66 Wash. 243, 246, 119 P. 607, 608 (1911). *See also* State v. Romano, 41 Wash. 241, 83 P. 1 (1905).

10. *See infra* text accompanying notes 57-58.

11. *See infra* text accompanying notes 37-38, 194-96.

under oath, he makes a materially false statement that he knows to be false.[12] A person is guilty of false swearing if, while under oath, he makes a false statement that he knows to be false.[13] Because all of the elements of false swearing are three of the five elements of perjury in the first degree, the first prong of *Workman* is met as to false swearing.

The simplicity of the elements test, however, is oddly deceiving. Once one considers the underlying aims of the doctrine, it seems that something more subtle might be needed. For a time, the Ninth Circuit and other Federal Courts of Appeals certainly thought so. Their opinions derided the elements test as mechanistic, artificial, and altogether inadequate to the task. Those courts, consequently, experimented for a time with an alternative approach, the "inherent relationship" test.[14] Section II of this Article will consider that alternative, its flaws, its ultimate rejection by the United States Supreme Court, and the Washington courts' flirtations with it, as a demonstration of the hidden virtues of the modest elements test.[15]

Section III of this Article will show how, in spite of its virtues, the elements test can be improved. This proposal involves expanding a little-known variation that was originally formulated as a solution to perhaps the most difficult issue arising under the elements test. The issue is whether, how, and why there can be a lesser included offense to an attempt.[16] *Workman* itself was an attempt case, and the court coped brilliantly with the problem. It formulated what I will call the "inherent characteristic" rule. The inherent characteristic rule involves a very minor modification to the elements test that solves the attempt problem while faithfully observing the underlying values and logic of the elements test itself. Because *Workman*'s rationale for this rule is cryptic, it is valuable in itself to see what is going on beneath the surface of the opinion.[17]

Ultimately, however, it is important to probe beneath the surface of *Workman* because the problem of lesser included offenses to attempts is but one aspect of a larger issue under the elements test: the threshold question of what counts as an

12. WASH. REV. CODE § 9A.72.040(1) (1989).
13. *Id.* § 9A.72.020(1).
14. *See infra* text accompanying notes 40-73.
15. *See infra* text accompanying notes 74-91.
16. *See infra* text accompanying notes 92-98.
17. *See infra* text accompanying notes 109-18

"element." Not surprisingly, the *Workman* opinion's solution to the attempts problem illuminates the more general issue. Section III of this Article, accordingly, proposes expanding the inherent characteristic rule beyond attempt cases to a general application.[18]

Section IV of this Article considers *Workman*'s second prong: the requirement that the evidence in the case support an inference that the lesser crime was committed.[19] It sounds like a straightforward sufficiency of the evidence test. It is not.[20] What is at issue is not the sufficiency of the evidence, but a type of preclusion by the evidence that is peculiar to the doctrine of lesser included offenses.

It is here that the supreme court's incomprehension of its own rich case law has been most egregious. In at least one passing reference to preclusion, the *Workman* opinion indicates that the court still understood the purpose of the evidence prong.[21] Unfortunately, the court failed to incorporate that understanding into its formulation of the governing test. *Workman*'s reference to evidence that will "support an inference" that the lesser offense was committed[22] suggests, deceptively, that nothing more than sufficiency is at issue. Later courts have fallen completely under the sway of that suggestion, to the point that they have begun to elaborate the purported sufficiency standard,[23] even while ignoring the most basic limitations on appellate review of jury determinations.[24]

The evidence prong, properly understood, has nothing to do with quantities of evidence.[25] Each new case elaborating the test for sufficiency simply buries the true meaning of the evidence prong even deeper. Ironically, however, each new corollary to the specious sufficiency standard, once examined,

18. *See infra* text accompanying notes 144-64.

19. *Workman*, 90 Wash. 2d at 448, 584 P.2d at 385.

20. *See* State v. Pacheco, 107 Wash. 2d 59, 70, 726 P.2d 981, 987 (1986) ("In order for an instruction to be given there must be evidence to support that instruction, or, as in the case of a request for an instruction on a lesser included offense, the evidence must support an inference that the lesser crime was committed."); State v. Parker, 102 Wash. 2d 161, 165, 683 P.2d 189, 192 (1984) ("The evidence in this case supports an inference that the lesser crime was committed.").

21. "Unlike the cases cited by the State, this is not a case where finding the elements of the lesser offense is precluded by the evidence at trial." *Workman*, 90 Wash. 2d at 448, 584 P.2d at 386.

22. *Id.*

23. *See infra* text accompanying notes 199-209, 211-18.

24. *See infra* text accompanying notes 220-23.

25. *See infra* text accompanying notes 177-98.

also turns out to be an attempt to capture the special sort of preclusion to which the evidence prong itself originally attended. Because those corollaries are corollaries to a false rule, they are necessarily flawed.[26] It makes more sense, obviously, to restore the original meaning of the evidence prong. That is the aim of Section IV of this Article.[27]

The sum of these discussions is a formulation of a two-part standard that ought to replace the standard introduced in *Workman.* This Article proposes that an instruction on a lesser included offense is proper where two conditions are met. First, a lesser offense is a lesser included offense if each element of the lesser offense is either an element or an inherent characteristic of the greater offense. Second, an instruction on the lesser included offense may be given only if, construing the evidence in the light most favorable to the party requesting the instruction, there is some evidence in support of the common elements of the greater and lesser offenses that does not also establish the remaining elements of the greater offense.

The purpose of this proposal is to restore subtlety, clarity, and efficacy to the doctrine of lesser included offenses. As matters stand, Washington courts are well on their way to developing a crude and confusing version of what ought to be an especially elegant part of the criminal law.

II. The Legal Prong: The Superiority and Success of an Elements Formula

Two prominent commentators on Washington's criminal law have recently argued that the elements test represents a substantial departure from the earliest case law.[28] Ferguson and Fine contend that to determine whether the jury was properly instructed on a lesser included offense, the courts of Washington originally examined the language of the information rather than the statutes defining the respective offenses.[29] From this they conclude that the elements test is a recent innovation, originating in 1970 with the case of *State v. East.*[30] In a limited sense, they are correct. The statute establishing the doctrine of lesser included offenses in Washington does not

26. *See infra* text accompanying notes 200-24.

27. *See infra* text following note 224.

28. Royce A. Ferguson, Jr. & Seth Aaron Fine, 13A Washington Practice, Criminal Law 7 (1991).

29. *Id.*

30. 3 Wash. App. 128, 474 P.2d 582 (1970).

prescribe a comparison of elements, and *East* seems to be the first case in which the term "offense" in the statute was explicitly correlated with a discrete set of statutorily defined elements.[31]

On the whole, however, Ferguson and Fine are mistaken, and their mistake is fundamental. The elements test is not simply a convenient means of applying the doctrine of lesser included offenses, and it certainly is not a recent innovation. The elements test is constitutionally required and is clearly discernible in cases decided long before *East*. In fact, the test is a corollary to the Washington Constitution's command that every criminal defendant be informed of the nature and cause of the accusation against him.[32]

A. *The Elements Test and the Constitutional Notice Requirement*

In *State v. Ackles*,[33] the first major case on lesser included offenses, the court overturned a conviction for assault with a deadly weapon against a defendant who had been charged with assault with intent to commit murder.[34] The court acknowledged that the the lesser included offenses statute might apply, but it held squarely that the doctrine was subject to the constitutional notice requirement:

> While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an offense necessarily included within that charged, it is also true that "accusation must precede convic-

31. The court provided as follows: "The prosecution may rely on the included offense statute, RCW § 10.61.006, only when *all of the elements* of the included offense are necessary elements of the offense charged." *Id.* at 135, 474 P.2d at 587 (emphasis in original).

32. The Washington Constitution provides in pertinent part: "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him . . . ." WASH. CONST. art. I, § 22.

There are other, less significant reasons why Ferguson and Fine are mistaken. While they are correct in noting that the early courts examined the allegations of the information, they err in inferring that the courts were not, in doing so, examining the statutory elements of the respective offenses. In State v. Ackles, 8 Wash. 462, 464, 36 P. 597, 598 (1894), the court demanded that the information state "every fact constituting an element of the offense charged." If the information must set forth facts constituting every element of the lesser offense, examining the statute and the information will yield precisely the same result. Ferguson and Fine's distinction between the early cases' focus on the information and the recent cases' focus on the statute is thus, at best, a distinction without a difference.

33. State v. Ackles, 8 Wash. 462, 36 P. 597 (1894).

34. *Id.* at 462, 36 P. at 598.

> tion," and that no one can legally be convicted of an offense not properly alleged. The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Const. art. 1, sec. 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.[35]

The court concluded that because the information filed against Ackles did not allege that he had acted without considerable provocation or with a willful, malignant, and abandoned heart—both elements of the lesser offense—he could not, constitutionally, be convicted of the lesser offense:

> At common law an assault with a deadly weapon was a misdemeanor only, but, as above intimated, the legislature of this state has made it a felony, punishable by imprisonment in the penitentiary, when perpetrated with intent to inflict bodily injury, under the circumstances and conditions prescribed by statute. And in order to charge this statutory felony it was necessary to set forth in the information, not only that the assault was with a deadly weapon with intent to inflict bodily injury, but the further fact that it was without considerable provocation, or that it was the impulse of a willful, abandoned and malignant heart. This was not done in this instance, and appellant was therefore convicted of, and sentenced to the penitentiary for, a crime of which he was not charged, either in the language of the statute or in language of similar import.[36]

Thus, *Ackles* not only applied the elements test; it gave a rather thorough account of the test's constitutional basis. The court could not permit the defendant to stand convicted of the lesser offense because, in view of the legislative history of the statute, the elements of the lesser missing from the greater in fact stated the gravamen of the lesser offense. To uphold the conviction on the lesser offense clearly would have resulted in upholding a conviction obtained without notice.

From the beginning, then, the question has been whether every element of the lesser offense is a necessary element of the greater offense. Constitutionally, the question had to be

35. *Id.* at 464-65, 36 P. at 598.
36. *Id.* at 465, 36 P. at 598.

framed that way. *Ackles* made it quite clear that the doctrine of lesser included offenses could not be applied in disregard of the constitutional notice requirement. A comparison of the respective offenses' statutory elements was unavoidable given the court's insistence on notice. The elements test, therefore, is an elegant response to the constitutional command; it is a guarantee that, in charging the greater offense, the government will give notice, implicit but constitutionally sufficient, that the defendant also is accused of committing the lesser offense.

B. *The Rise and Fall of the "Inherent Relationship" Test*

The elements test performs its constitutional function so well that one can easily lose sight of its other virtues. There is, for example, its capacity to guard against jury speculation and compromise simply by virtue of the fact that it is equally available to the prosecution and the defense. The doctrine of lesser included offenses originated as a tool of the prosecution, as a means of ensuring conviction where the defendant had committed an offense, but where the evidence did not come in precisely as expected.[37] The defendant's right to such an instruction has long been established, however, not only as a matter of equal treatment, but as required by justice.[38] When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction. The defendant's right to a lesser included offense instruction thus serves to ensure that the verdict accords with the evidence—a function usually ascribed to the second prong of the governing standard, but, in this respect, served equally well by the elements test.

The elements test also maintains a certain balance of power between the prosecution and the defense. Whether either or both sides will request an instruction on a lesser included offense depends primarily on the strength of the State's case. If the State believes that the proof of the offense charged is weak, it might seek an instruction on a lesser included offense in order to give the jury an option other than acquittal. If the defendant believes that the proof on the

37. Beck v. Alabama, 447 U.S. 625, 633 (1980). *See, e.g.*, Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967).

38. Keeble v. United States, 412 U.S. 205, 212-13 (1973).

offense charged is strong, she might seek an instruction on a lesser included offense in order to give the jury an option other than convicting as charged. These are strategic options that are decided upon late in the trial, and the determination differs from case to case and from lawyer to lawyer. The elements test itself favors neither side.

While that point may seem obvious, it is not trivial. If we wish to preserve that sort of symmetry in the doctrine of lesser included offenses, it makes a great difference how the governing standard is formulated. The United States Supreme Court recognized as much when, after several years of conflict among the circuits, it adopted a uniform federal standard to govern the question: a two-part test virtually indistinguishable from *Workman's*.[39] The history of this controversy in the federal courts is instructive on the virtues of that approach, consisting as it does of a struggle to establish the elements test that, until recently, Washington courts have always used.

A form of the elements test was dominant in the federal courts long before the adoption of the governing federal rule in 1941.[40] During the 1970's and 1980's, however, several circuits, including the Ninth, adopted a standard that differed radically from the elements test. The District of Columbia Circuit formulated the "inherent relationship" test in *United States v. Whitaker*[41] as follows:

> [A] [d]efendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an 'inherent' relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of

---

39. Schmuck v. United States, 489 U.S. 705, 716 n.8 (1989).

40. FED. R. CRIM. P. 31(c). In *Schmuck*, the principal federal case on lesser included offenses, the Supreme Court wrote the following:

> This Court's decision in *Stevenson v. United States*, reflects the "practically universal" practice. There, in holding that the defendant in a murder charge was entitled to a lesser included offense instruction on manslaughter under the statutory predecessor to Rule 31(c), the Court engaged in a careful comparison of the statutory elements of murder and manslaughter to determine if the the latter was a lesser included offense of the former. In short, the elements approach was settled doctrine at the time of the Rule's promulgation and for more than two decades thereafter.

Schmuck, 489 U.S. at 720 (citation omitted).

41. 447 F.2d 314 (D.C. Cir. 1971).

the showing of the commission of the greater offense.[42]

The inherent relationship test collapsed the legal and evidence prongs into a single step turning almost entirely on the sufficiency of the evidence to support an instruction on the lesser offense. The fundamental idea that one offense is necessarily included in the other was reduced to a gloss on the vague "caveat" that the offenses relate to the same interest. Even more significant, the idea of necessary inclusion was directed away from the elements of the offenses toward considering the proof of each offense. In contrast to the traditional elements test, then, the inherent relationship test was obdurately factual.

This emphasis on facts rather than on elements was deliberate, explicit, and sometimes strident. The Ninth Circuit adopted the inherent relationship test in *United States v. Stolarz*,[43] an opinion in which the elements test was derided as "mechanistic."[44] The court reiterated its preference in *United States v. Johnson*,[45] adding the charge of "artificiality":

> The mechanical comparison of statutory elements the government invites us to make may be appealing in its promise of certainty and intellectual purity, but its artificiality is unresponsive to the underlying purposes of the lesser included offense doctrine, as is demonstrated by the facts of this case. To the extent we are concerned that a "jury's practice will diverge from theory" and a defendant may be convicted of a crime for which all the elements have not been proven, it makes no sense to confine our discovery of lesser included offenses to the barren words of the criminal code, uninformed by the evidence introduced at trial.[46]

Worries that the "jury's practice will diverge from theory," and that "the barren words of the criminal code" will diverge from reality, are indeed among the primary concerns of the doctrine of lesser included offenses.[47] The *Johnson* court, however, was disingenuous in suggesting that those concerns are neglected in an elements test. An elements test is invariably

42. *Id.* at 319.

43. 550 F.2d 488 (9th Cir.), *cert. denied*, 434 U.S. 851 (1977).

44. *Id.* at 491.

45. 637 F.2d 1224, 1238 (9th Cir. 1980).

46. *Id.* at 1238 (citation omitted).

47. *See supra* text accompanying notes 37-38; *see also infra* text accompanying notes 195-97.

paired with an evidence prong,[48] and safeguarding the rationality of jury verdicts is the defining purpose of the latter.[49] As we will see, that purpose has sometimes been obscured or neglected—Washington's experience with *Workman* being a prime example.[50] As a response to that problem, however, the federal circuits' opting for the inherent relationship standard was a classic case of choosing shoddy goods to replace a fine piece of work that ought to have been repaired.

In *Johnson*, the defendant was accused of striking two victims with the blunt end and handle of an ax.[51] He was charged with assault resulting in serious bodily injury.[52] The defendant requested an instruction on assault with a dangerous weapon with intent to do bodily harm.[53] The trial court refused on the ground that the latter offense involved two elements that the former did not: use of a dangerous weapon and intent to do bodily harm.[54] The Ninth Circuit reversed and granted a new trial, insisting that the facts of the particular case must be given primary consideration in determining whether an instruction on a lesser included offense is warranted:[55]

> The government never suggested the possibility that any weapon other than an ax was employed: Papse so testified, an ax was introduced into evidence, and the prosecutor made a point of securing Dr. Haddock's agreement on the record that the injuries could have been inflicted by an ax wielded

48. In one of the earliest applications of the elements test in federal courts, the Supreme Court wrote the following:

> By section 1035 of the Revised Statutes of the United States it is enacted that "in all criminal causes the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charge in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, That each attempt be itself a separate offence." Under this statute the defendant charged in the indictment with the crime of murder may be found guilty of the lower grade of crime, viz., manslaughter. There must, of course, be some evidence which tends to bear upon that issue. The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect.

Stevenson v. United States, 162 U.S. 313, 315 (1896) (citation omitted). *See also* State v. Young, 22 Wash. 273, 277, 60 P. 650, 651 (1900).

49. *See infra* text accompanying notes 177-96.

50. *See infra* text accompanying notes 199-223.

51. United States v. Johnson, 637 F.2d 1224, 1229 (9th Cir. 1980).

52. *Id. See* 18 U.S.C. § 113(f) (1976) (assault resulting in serious bodily injury).

53. *Johnson*, 637 F.2d at 1234. *See* 18 U.S.C. § 113(c) (1976) (assault with a dangerous weapon with intent to do bodily harm).

54. *Johnson*, 637 F.2d at 1234.

55. *Id.* at 1238.

> in the manner Papse described. The government does not contend, nor could it reasonably do so, that a long-handled ax is not a "dangerous weapon" within the meaning of 18 U.S.C. § 113(c). Nor does the government argue Johnson did not have an "intent to do bodily harm" to Papse, and in our view, evidence that Johnson did inflict the plethora of injuries Papse sustained would support an inference that Johnson intended bodily harm.[56]

Because the elements of the lesser offense were in fact present in the case, the lesser offense was a lesser included offense under the "inherent relationship" standard.

It seemed so simple. The Ninth Circuit later came to appreciate a particular difficulty with the inherent relationship standard, however; a difficulty with constitutional overtones that was largely concealed in *Stolarz* and *Johnson* by the fact that it was the defendant who had requested the instruction on a lesser included offense.

As noted above, the principal constitutional constraint on the doctrine of lesser included offenses is the defendant's right to notice and an opportunity to defend, while historically the doctrine of lesser included offenses developed as a tool of the prosecution to insure against acquittal where the proof did not come in precisely as expected.[57] There is obviously some potential for conflict between that historical purpose and the constitutional constraint. Because, however, the Constitution takes precedence over any common law rationale, the conflict actually plays out as an asymmetry in the availability of lesser included offenses. The defendant, who has the advantage of being able to waive constitutional restrictions by which the prosecution must always remain bound, may be able to obtain a far broader range of lesser included offense instructions than would ever be available to the government.

The elements test is an elegant remedy for that asymmetry. What the defendant has a right to notice *of* is not the facts of the case, but the State's accusation, the theory by which the government will weave the facts into criminal liability.[58]

---

56. *Id.* at 1234-35.

57. *See supra* text accompanying notes 37-38.

58. As the Supreme Court has stated:

> [T]he true test [of the sufficiency of an indictment] is, not whether it might possibly have been made more definite and certain, but whether it contains element of the offence intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other

Under an elements test, both sides must justify their requested instructions on lesser offenses with regard to that accusation by matching the elements of the crime charged. Because the lesser offense is thus implicit in the charged crime, the prosecution will never obtain an instruction that would violate the constitutional right to notice: the defendant necessarily will have had notice of the elements of the lesser offense he is now accused of having committed. Because the defense is bound by the same test, its selection of lesser included offenses is no wider, and the defendant's ability to waive her right to notice never comes into play. The problem of asymmetry never arises.

Under the inherent relationship test, however, the asymmetry is potentially extreme. The government's selection of lesser offenses is bounded by the terms of its information or indictment. The defendant's selection of lesser offenses is bounded only by the more various, more malleable facts of the case. The *Whitaker* court imposed the requirement of an "inherent relationship" between the greater and lesser offenses primarily as a limitation on the number and kind of

---

> proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Cochran v. United States, 157 U.S. 286, 290 (1895). *See also* Hagner v. United States, 285 U.S. 427, 431 (1931).

In State v. Kjorsvik, 117 Wash. 2d 93, 812 P.2d 86 (1991), the Washington Supreme Court held that the information must state all essential elements of the offense, both statutory and non-statutory. In so holding, the court stressed that the defendant's ability to mount a defense is the standard by which the adequacy of charging documents is measured:

> In the case of *State v. Leach*, we recently stated that "the 'essential elements' rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged." This core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime. *Leach* explains that merely reciting the statutory elements of the crime charged may not be sufficient.
>
> > Because statutory language may not necessarily *define* a charge sufficiently to apprise an accused with reasonable certainty of the nature of the accusation against that person, to the end that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense, mere recitation of the statutory language in the charging document may be inadequate.
>
> We have recently reiterated that it is sufficient to charge in the language of the statute *if* the statute defines the offense with certainty.

Kjorsvik, 117 Wash. 2d at 98-99, 812 P.2d at 88 (emphasis in original) (citations omitted).

lesser included offense instructions a defendant might obtain.[59] That limitation was rather vague, however, and it was never intended to restore symmetry in the availability of instructions.

In fact, the *Whitaker* court expressly disavowed symmetry as an objective in lesser included offenses doctrine. Recognizing that the inherent relationship test destroyed symmetry, the *Whitaker* court toyed with the idea of restoring it by fiat. The court considered imposing a requirement of mutuality, under which the defendant would be able to obtain only those instructions on lesser offenses that the prosecution could also obtain.[60] In other words, the defendant's right to waive notice would be artificially curtailed. The terms of the court's rejection of mutuality, however, made it clear that that requirement was never anything more than a straw man for the court's attack on symmetry as a constraint on lesser included offense analysis:

> We do not consider or determine whether there was the requisite mutuality by the traditional test, i.e., whether the prosecutor could have rightfully requested the lesser included offense charge; therefore, whether the defense was entitled to it on request . . . .
>
> We can, and do, rest this decision on a different ground, one which may be of easier applicability in future cases than making a somewhat hindsight determination that the defense received adequate notice of an included lesser offense charge. And that is simply to say that, despite the patina of antiquity, considerations of justice and good judicial administration warrant dispensing with mutuality as an essential prerequisite to the defense's right to a lesser included offense charge.
>
> The defense ought not to be restricted by the stringent constitutional limits upon the prosecutor's right.[61]

In *Johnson*, the Ninth Circuit indicated that it, too, was more than ready to abandon symmetry. The court rejected mutuality as an unwarranted restriction on its "fluid approach to the problem of defining lesser included offenses."[62]

Naturally, as soon as a case arose in which the government

59. United States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971).

60. *Id.* at 320-21.

61. *Id.* at 321.

62. United States v. Johnson, 637 F.2d 1224, 1239 (9th Cir. 1980).

could make a compelling case for a lesser included offense instruction, the court took steps to regain the doctrine's traditional symmetry by the only means left—compromising the defendant's right to notice. The case was *United States v. Martin*,[63] in which the defendant was charged with the same offense Johnson had been: assault resulting in serious bodily harm.[64] The lesser included offense instruction was the same as that requested in *Johnson*: assault with a deadly weapon with intent to do bodily harm.[65] The difference was that the government, not the defendant, requested the instruction. The trial court gave the instruction, the defendant was convicted of the lesser offense, and the defendant appealed, arguing that his constitutional right to notice of the charges against him had been infringed on.[66]

The Ninth Circuit rejected that challenge, finding that the defendant had received adequate notice of the offense for which he was convicted. This is surprising, because the elements of that offense were not stated in the indictment—ordinarily a fatal defect under the Sixth Amendment.[67] An elements test would have precluded the instruction on that ground: its requirement that all elements of the lesser offense must be elements of the greater is an implicit demand for such notice. Following *Whitaker*, however, the *Martin* court treated the notice requirement as an issue separate from the right to the instruction.[68]

The court found, as it had in *Johnson*, that the respective assaults were greater and lesser included offenses under the inherent relationship standard.[69] The court then ensured that the government would be able to obtain the instruction on the lesser included offense by setting a relatively low standard for the separate notice requirement. The government was entitled

63. 783 F.2d 1449 (9th Cir. 1986).

64. *Id.* at 1450. *See* 18 U.S.C. § 113(f) (1982) (assault resulting in serious bodily harm).

65. *Martin*, 783 F.2d at 1450. *See* 18 U.S.C. § 113(c) (1983) (assault with a deadly weapon with intent to do bodily harm).

66. *Martin*, 783 F.2d at 1451.

67. United States v. Debrow, 346 U.S. 374, 376 (1953); United States v. Cruikshank, 92 U.S. 542, 557-58 (1875). *See* 4 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 125 (1982).

68. *Martin*, 783 F.2d at 1452.

69. Martin argued that the offense was not a lesser included offense under the facts of his particular case—as, of course, the inherent relationship test required him to do. Given that the assault had been committed with an ax, however, the court found *Johnson* controlling. *Id.* at 1451-52.

to the instruction on the lesser offense, the court held, because the offense was a lesser included offense "and the defendant had timely actual notice of the facts constituting the lesser charge of which he [was] convicted."[70]

It is important to recognize that, in the context of the inherent relationship standard, "actual notice of the facts" is not a particularly stringent notice requirement. If the facts are such that the lesser offense is a lesser included offense under the very fact-specific inherent relationship standard, it is extremely unlikely the defendant will not have "timely actual notice of *the facts* constituting the lesser charge of which he is convicted."[71] Whether the defendant has had notice of the legal theory the government will use to shape those facts in instructions and closing argument is, of course, a very different question. And, not only is it a different question, it is the only pertinent question. The Sixth Amendment guarantees notice of the elements of the offense precisely so that the defendant can mount an effective defense.[72]

The relaxed notice requirement stated in *Martin* made it easier for the government to obtain instructions on lesser included offenses. In doing so, it redressed the balance upset by *Johnson*'s repudiation of the elements test and its guarantee of symmetry. That balance was regained, however, at the cost of constitutionally required notice to the defendant of the charges levelled against him.[73]

---

70. *Id.* at 1453.

71. *Id.* (emphasis added).

72. *See* sources cited *supra* note 67. Professor Wright has written the following:

> The fundamental purpose of the pleading is to inform the defendant of the charge so that he may prepare his defense, and the test for sufficiency ought to be whether it is fair to defendant to require him to defend on the basis of the charge as stated in the particular indictment or information.

WRIGHT, *supra* note 67, § 125, at 365.

73. To be fair, in applying its notice standard, the *Martin* court seemed to construe it in the latter sense—as inquiring whether the defense had had a realistic opportunity to respond to the government's new theory of the case. Still, the court's evaluation of that opportunity in the case before it was not especially thorough or incisive. The case was a bench trial, and it appears that the trial judge raised the possibility of convicting the defendant on the lesser offense *sua sponte*, after both the government and the defense had rested. *Martin*, 783 F.2d at 1453. The defense did not move to reopen its case, and defense counsel admitted at oral argument that, had the information been formally amended, there would have been no appealable issue. From this, the court concluded that the defendant had no colorable defense to the lesser offense, and had had adequate notice. The court therefore affirmed the conviction on the lesser offense. *Id.*

The court's analysis, however, hardly exhausted the varieties of possible prejudice to the defendant. The trial court's *sua sponte* inquiry whether a conviction might be

This trend under the "inherent relationship" standard was cut short by the Supreme Court's decision in *Schmuck v United States*.[74] The Court repudiated the "inherent relationship" standard in its entirety, adopting instead an elements test indistinguishable from that of *Workman*:

> Under this test, one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).[75]

The Court relied on the plain language and history of Rule 31(c),[76] but the principal ground of its holding was the Court's preference for traditional symmetry in the availability of lesser included offense instructions. The Court noted that the rule itself made no distinction between prosecution and defense in the availability of such instructions.[77] More importantly, however, the Court clearly recognized the potential of the "inherent relationship" standard to foster just the sort of confusion and unfairness to both sides that *Johnson* and *Martin* exemplified. Either the defendant's right to notice will be curtailed, or the defense will be able to obtain a broader range of lesser included offense instructions than the government can.

Were the prosecutor able to request an instruction on an

---

had on a new, different charge did not provide the defendant with a full opportunity to formulate a theory of the case and a trial strategy—surely not the same opportunity he would have had had the charge been stated at the outset in the indictment. Part of that stategy might have included proposing a plea to the lesser charge, but, speaking realistically, that opportunity too was not available in the context in which this lesser offense was raised.

The defense might have moved to reopen its case, as the *Martin* court noted. *Id.* at 1453. Again, however, the opportunity to put on a little more evidence is hardly comparable to the opportunity to develop and execute a complete trial strategy addressing the charge. Furthermore, in *Martin*, defense counsel might well have hesitated to make such a motion in response to the trial court's inquiry for reasons other than not having a colorable defense to present. Counsel might have feared that the motion would have been construed as a concession that the court's considering the lesser offense was proper or as an acknowledgment of vulnerability to the charge.

74. 489 U.S. 705 (1989).

75. *Id.* at 716. In a footnote, the Court added that "the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Id.* at 716 n.8. That requirement is the equivalent of *Workman*'s second prong. In fact, for reasons given below, it is a preferable formulation of that prong, although the requirement can be formulated more precisely. *See infra* text following note 223.

76. *Schmuck*, 489 U.S. at 716-17, 717 n.9.

77. *Id.* at 717.

> offense whose elements were not charged in the indictment, [the defendant's] right to notice would be placed in jeopardy. Specifically, if, as mandated under the inherent relationship approach, the determination whether the offenses are sufficiently related to permit an instruction is delayed until all the evidence is developed at trial, the defendant may not have constitutionally sufficient notice to support a lesser included offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment. Accordingly, under the inherent relationship approach, the defendant, by in effect waiving his right to notice, may obtain a lesser offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction.[78]

The elements test, in contrast, maintains the balance of power because it "permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge. This approach preserves the mutuality implicit in Rule 31(c)."[79] Because the defendant can obtain a lesser included offense instruction only when she has implicitly been given notice, her natural advantage in being able to waive such notice is rendered irrelevant and symmetry is maintained.

C. *Washington's Flirtations With an "Inherent Relationship" Test*

Given the superiority of the elements test in balancing strategic flexibility on both sides, as well as preserving prosecutorial discretion and the defendant's right to notice and opportunity to defend, it would be extremely surprising if the Washington Supreme Court ever were to depart from that standard. Given the United States Supreme Court's rejection of the inherent relationship standard, it would be even more surprising if the Washington court were to *opt* for that approach. Nevertheless, in the recent case of *State v. Curran*,[80] the state's highest court issued this startling pronouncement:

78. *Id.* at 718 (footnote omitted).

79. *Id.*

80. 116 Wash. 2d 174, 804 P.2d 558 (1991).

> A defendant is entitled to an instruction on a lesser included offense if each of the elements of the lesser offense is a necessary element of the offense charged and the evidence supports an inference that the lesser crime was committed. While the lesser offense might not be a stated element of the greater offense, the lesser must at least be an "inherent characteristic" of the greater one.[81]

As a statement of existing law, that is simply false. *Workman* does indeed state an "inherent characteristic" rule that modifies the elements test.[82] It is not, however, a rule of general applicability. The inherent characteristic rule is an extremely limited modification, with a very precise purpose that applies to only a discrete class of cases: those in which the greater offense, the offense charged, is an attempt.[83] If intended as a proposed modification of the law, the statement in *Curran* is dicta. The facts of the case did not necessitate expanding the scope of the inherent characteristic rule, and the opinion does not even begin to address whether, why, or how that might be done.

Curran's dicta is also rather alarming. The principal reason for concern, of course, is the resemblance and the potential for confusion between the inherent characteristic rule and the inherent relationship test. The Washington Supreme Court has fallen victim to that confusion before. Despite the clear difference between *Workman*'s elements test and the inherent relationship test, the court made the entirely unwarranted concession in *State v. Johnson*[84] that *Workman* had "tacitly recognized" the inherent relationship test.[85] The court apparently had in mind the inherent characteristic rule. That rule, however, is a very slight modification to the elements test, and it is no less incompatible with the inherent relationship test than the elements test itself.[86] The court's confusion on such a point is alarming on several levels.[87]

---

81. *Id.* at 183, 804 P.2d at 563 (citations omitted).

82. *Workman*, 90 Wash. 2d at 448, 584 P.2d at 385.

83. *See infra* text accompanying notes 109-118.

84. 100 Wash. 2d 607, 674 P.2d 145 (1983).

85. *Id.* at 628, 674 P.2d at 157.

86. *See infra* text accompanying notes 119-134.

87. Almost as alarming is the failure of the state's principal commentators on the criminal law to recognize the inherent characteristic rule at all. Ferguson and Fine do not discuss lesser included offenses to attempts as a distinct problem and, as a consequence, do not treat the inherent characteristic rule. FERGUSON & FINE, *supra* note 28, at 6-10. Their error, however, is not merely an error of omission. Where some

It would be comforting to believe that the confusion extends no further than the names. Unfortunately, the higher courts have misunderstood the rationale of the inherent characteristic rule as thoroughly as they have been misled by its title. In *State v. Gatalski*,[88] Division One of the Washington Court of Appeals affirmed the propriety of a lesser included offense instruction on the ground that the facts of the case warranted it—despite the fact that the elements test abjures any reliance on the facts of the particular case—and purported to apply the logic of *Workman* to reach that result.[89] The court's readiness to apply a de facto inherent relationship analysis under a specious claim to *Workman*'s authority can only be encouraged by the supreme court's careless and inaccurate invocation of the inherent characteristic rule in *Curran*.

Division One's error in *Gatalski* is less surprising than perhaps it ought to be, for the supreme court itself has begun to drift away from a strict observance of the elements test. In the recent case of *State v. Pacheco*,[90] for example, the court's application of the elements test was brief and erroneous:

> Further, in regard to the assertion that an instruction should have been given on the unlawful display of a weapon with intent to intimidate, it is clear that being armed with or displaying a deadly weapon is an essential element (*under the evidence of this case*) of robbery in the first degree.[91]

As ought to be clear by now, to rest an analysis of the legal prong on the facts of the particular case is to abandon the elements test altogether and to court a de facto adoption of the inherent relationship test.

Thus, *Curran*, *Pacheco*, *Johnson*, and *Gatalski* raise some questions that, in light of the theory and history of the elements test, are rather surprising. Are Washington courts on the verge of abandoning the elements test? Are they about to

---

courts have interpreted the inherent characteristic rule as a fact-based standard for attempts, Ferguson and Fine argue that *Workman* states a fact-based standard for all offenses. *See infra*, notes 120, 143. They therefore give unwarranted currency to *Curran*'s erroneous statement of the elements test.

88. 40 Wash. App. 601, 699 P.2d 804 (1985).

89. *Id.* at 612-13, 699 P.2d at 810. While Division One has since backed away from that position, its successive opinions give no indication that the court understood the significance of its moves. *See* State v. Falco, 59 Wash. App. 354, 357, 796 P.2d 796, 797 (1990).

90. 107 Wash. 2d 59, 726 P.2d 981 (1986).

91. *Id.* at 70, 726 P.2d at 987 (emphasis added).

re-enact the federal courts' struggles with a fact-based standard for lesser included offenses? Given that the right choices ought to be obvious, it is disturbing that recent opinions even suggest those questions.

The answer to both questions, fortunately, is no. Certainly there is no deliberate trend away from the elements test; at worst, the courts are stumbling. It may be, moreover, that they are about to stumble onto something. The elements test can be improved, and the inherent characteristic rule can serve as the key to that improvement—if, that is, the supreme court can grasp the fundamental issues surrounding the elements test, and if the modification can be made with due regard to the meaning of the inherent characteristic rule as well as the hazards of the inherent relationship test.

III. THE LEGAL PRONG: EXPANDING THE SCOPE OF THE INHERENT CHARACTERISTIC RULE

The inherent characteristic rule holds out a certain promise for the elements test, a key to the obvious threshhold question: for purposes of the comparison prescribed by the elements test, what is an element? Naturally, however, it is impossible to see the relevance and utility of the inherent characteristic rule unless one appreciates the rule itself. The problem is that the rule is not widely recognized or well understood, even in its original context, as a necessary modification to the elements test where the greater offense is an attempt. Consequently, if the scope of the rule is to be expanded, a thorough examination of the attempts problem and of the logic behind the inherent characteristic rule is a necessary prerequisite.

A. *The Elements Test and Lesser Included Offenses to Attempts*

Despite its many virtues and its obvious superiority to the inherent relationship test of the federal circuits, the elements test runs into trouble where the offense charged is an attempt—some rather deep trouble, in fact. Where the greater offense is an attempt, the elements test results in a blanket prohibition on lesser included offense instructions. The principal distinction between an elements test and the inherent relationship test is that the former is concerned exclusively with the statutory elements of the offenses in question, not the facts

of the particular case. If the analysis is confined to the statutory elements of the respective offenses, however, a lesser included offense instruction would never be appropriate where the offense charged is an attempt.

An attempt is committed where the actor does "any act which is a substantial step" toward the commission of the complete offense while he is possessed of the intent to commit the complete offense.[92] On its face, "any act which is a substantial step" is different from any of the acts defining completed crimes, with the result that no offense necessarily will be committed in the course of committing an attempt. Any such lesser offense would have to consist entirely of the one remaining element of the greater offense; that is, of the mental state alone. Under the fundamental principles of criminal law, the mental state alone cannot constitute a crime.[93]

Even relaxing the standard slightly by acknowledging that

---

92. WASH. REV. CODE § 9A.28.020(1) (1989) provides as follows: "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime."

93. The reasons for the requirement of *actus reus* have been succinctly summarized by commentator Leo Katz. Referring to the Statute of 25 Edward III, which made it a crime to "compass" killing the king, he cites Blackstone and writes:

> How could one ever enforce such a statute? "No temporal tribunal can search the heart or fathom the intention of the mind, otherwise than as they are demonstrated by outward actions," an early commentator noted. He overlooked, however, the possibility of confession, not necessarily to the authorities, but perhaps in a letter to a friend. But there were more compelling reasons for not punishing mere thoughts. If criminal thoughts could be punished, observed another writer, "all mankind would be criminals." Another, yet, asked: "What would a system of laws embodying a rule providing for the punishment of intentions look like? When would punishment be administered? As soon as we find out the agent's intentions? But how do we know he will not change his mind? Furthermore, isn't the series—fantasying, wishing, desiring, wanting, intending—a continuum, making it a rather hazy matter to know just when a person is intending rather than wishing?" How would the authorities distinguish between fantasying, wishing, etc? And what about "the difficulties the individual would have in identifying the nature of his emotional and mental state. Would we not be constantly worried about the nature of our mental life?" Am I only wishing the king were dead? Perhaps I have gone further? "The resultant guilt," he concludes, "would tend to impoverish and stultify our mental life." For these reasons, it is now recognized as one of the fundamental principles of the criminal law that one can only be punished for acts, one cannot be punished for harboring criminal thoughts or dispositions.

LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 153 (1989) (quoting S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 81 (1975) (citing JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 78 (1883))); see G. Dworkin & G. Blumenfeld, *Punishment for Intentions*, 75 MIND 396-401 (1966). *See also* Morris, *Punishment for Thoughts*, *in* ON GUILT AND INNOCENCE 22-23 (1976).

a substantial step has to be some particular act, it remains true that in each particular case the substantial step taken will be different. For example, breaking down a door might be a substantial step toward burglary and would also constitute malicious mischief. But there are any number of acts that might constitute a substantial step toward burglary that would not constitute malicious mischief: tampering with but not breaking a lock;[94] trying a locked door while in possession of burglar tools;[95] or going to the roof of one's own building while in possession of the floor plan of an adjoining building. Consequently, it is impossible to say, from consideration only of the elements of the respective offenses, whether a given offense is or is not a lesser included offense to a given attempt. Strictly applied, then, the requirement that only the respective elements should be considered seems to preclude giving a lesser included offense instruction in any case where an attempt has been charged.

The problem with this is that there clearly are cases where in the course of committing an attempt the defendant commits some lesser offense. Suppose, for example, that a gang member opens fire with an automatic weapon on a small group of rival gang members as they stand on a street corner. No one is killed, but the evidence of intent to kill is strong enough to charge the defendant with attempted second degree murder.[96] It seems clear that the defendant has also committed first degree assault,[97] and an instruction on that offense ought to be available.

If the defendant is charged with attempted murder, how-

94. State v. Dupuy, 4 Wash. App. 532, 482 P.2d 794 (1971).

95. State v. Cass, 146 Wash. 585, 264 P. 7 (1928).

96. WASH. REV. CODE § 9A.32.050(1) (1989) provides that "[a] person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; . . . ."

97. *Id.* § 9A.36.011(1) provides in pertinent part: "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death . . . ." The term "assault" is not defined by statute, but by case law:

> Three definitions of assault have been recognized by Washington courts: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.

State v. Hupe, 50 Wash. App. 277, 282, 748 P.2d 263, 266 (1988).

ever, the trial court might well refuse to instruct on first degree assault. It is not at all clear that one who takes a substantial step toward causing the death of another also has necessarily committed an assault with a firearm or deadly weapon or some force or means likely to produce death or great bodily harm. In literal terms, taking a "substantial step" is a different element from any of those alternative means of committing first degree assault. Even taking a less literal approach and acknowledging that a substantial step has to be some particular act, it seems likely that there are some particular acts which might be sufficient to constitute a substantial step toward murder, that are, nevertheless, not among the specified means of committing first degree assault. Lying in wait or laying a deadly trap, for example, would not appear to constitute an assault at all, but could well constitute an attempted murder.[98] Consequently, the instruction would likely be denied where, apart from strict terms of the elements test, justice and common sense would seem to require it.

The simplest solution would be to allow the instruction on the lesser included offense where (assuming all the other elements of the lesser offense are accounted for) the substantial step actually taken encompasses an element of the lesser offense otherwise missing from the greater. In the example given, firing an automatic weapon at the rival gang members is the substantial step toward second degree murder. It is also clearly an assault with a firearm. Assuming the other elements of first degree assault can be located in the attempt,[99] the substantial step actually taken might suffice to justify the instruction on the lesser included offense. While the element of a "substantial step" does not correspond to the element of "assault," the substantial step actually taken was, in fact, an assault.

To give the instruction because the facts warrant it, however, would be to incorporate consideration of the facts of the particular case into the analysis—a departure from the strict elements test adopted in *Workman* and validated to a great

98. *See Workman*, 90 Wash. 2d at 451 n.2, 584 P.2d at 387 n.2 (quoting MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1962)) for examples of what might constitute a substantial step.

99. It is fairly easy to demonstrate that the intent element of first degree assault, intent to inflict great bodily harm, ought to be treated as an element of attempted second degree murder. *See infra* text accompanying note 152-55.

extent by *Schmuck v. United States.*[100] Division One has, nevertheless, taken such an approach in at least one case. In *State v. Gatalski,*[101] the court affirmed a conviction for unlawful imprisonment,[102] which was obtained in a case originally charged as attempted kidnapping in the first degree.[103] The court approved the lesser included offense instruction on the ground that the substantial step taken toward the kidnapping was, in fact, the restraint of the victim.[104] That is surprising in light of *Workman*'s elements test, but it is far less surprising than the authority the *Gatalski* court cited for its fact-based approach:

> In the case before us, it is clear the evidence supports a finding of unlawful restraint of another, necessary to a conviction of unlawful imprisonment. Unlawful restraint of another is a necessary element of kidnapping in the first degree. Applying the reasoning employed in *Workman* to the facts of this case, we conclude unlawful imprisonment was properly submitted to the jury as a lesser included offense of attempted kidnapping because the substantial step taken was actual unlawful restraint of the intended victim. Gatalski's argument that it is possible for one to attempt a kidnapping without actually reaching the point of unlawfully restraining another, while factually correct, does not preclude the instruction under the particular facts of this case.[105]

The court reiterated its factual approach and its reliance on *Workman* in *State v. Partosa:*[106]

> Attempt is a unique type of crime, as it contains the element of "substantial step", which is not and cannot be statutorily

100. 489 U.S. 705 (1989). *See supra* text accompanying notes 74-79.

101. 40 Wash. App. 601, 699 P.2d 804 (1985).

102. WASH. REV. CODE § 9A.40.040(1) (1989) provides as follows: "A person is guilty of unlawful imprisonment if he knowingly restrains another person."

103. First degree kidnapping is defined in WASH. REV. CODE § 9A.40.020(1) (1989) as follows:

> A person is guilty of kidnapping in the first degree if he intentionally abducts another with intent:
> (a) To hold him for ransom or reward, or as a shield or hostage; or
> (b) To facilitate the commission of any felony or flight thereafter; or
> (c) To inflict bodily injury on him; or
> (d) To inflict extreme mental distress on him or a third person; or
> (e) To interfere with the performance of any governmental function.

104. *Gatalski*, 40 Wash. App. at 613, 699 P.2d at 811.

105. *Id.*

106. 41 Wash. App. 266, 703 P.2d 1070 (1985).

> defined. Therefore, this legal element of attempted offenses will be factually different in each case. *See State v. Workman*, 90 Wash.2d 443, 449, 584 P.2d 382 (1978). Where unlawful restraint of the intended victim is the substantial step involved in an attempt to kidnap, however, it will *invariably* be an element of the greater offense of attempted kidnapping.[107]

To the mystery of a fact-based test purportedly based on *Workman*, this passage adds the question why the court would be concerned with whether the substantial step is invariably an element of the greater offense and, for that matter, what it meant by "invariably."[108]

As it happens, then, the inability of the elements test to accommodate attempts is not just a minor inconvenience in the trial of attempt cases. As *Gatalski* and *Partosa* show, the elements test, because of this particular inadequacy, harbors a natural tendency to foster a fact-based approach to lesser included offense analysis.

B. Workman's Solution to the Attempts Problem

Plainly, a closer examination of *Workman* is in order. This is especially true given that the greater offense charged in *Workman* was an attempt.[109] While *Workman* is commonly cited for its general two-part standard, it is less often recognized that the case contains a slight modification of that standard which accomodates the attempts wrinkle. The problem is that both the modification and the court's explanation for it are cryptic at best.

Returning from a round of bar-hopping in State Line, Idaho, one evening in 1976, Workman and Hughes decided they would rob a convenience store. They took a sawed-off .22 out of the trunk of the car, hid behind a telephone booth in the parking lot, and waited for the store to clear out. The attendant happened to see the two, became alarmed, and called the police. Workman and Hughes were arrested as they gave up the idea and were returning to their car.[110]

Workman and Hughes were originally charged with attempted first degree robbery while armed with a deadly

---

107. *Id.* at 272 n.6, 703 P.2d at 1074 n.6.
108. *See infra* text accompanying notes 130-34.
109. *Workman*, 90 Wash. 2d at 445, 584 P.2d at 385.
110. *Id.* at 446-47, 584 P.2d at 385.

weapon.[111] Both were convicted. New trials were granted. The supreme court affirmed the grant of new trials on the ground, *inter alia*, that the jury should have been instructed on the lesser included offense of unlawfully carrying a weapon.[112]

At first blush, it is not clear how unlawfully carrying a weapon could be a lesser included offense to attempted first degree robbery. The type of first degree robbery charged in *Workman* was robbery involving the use of a deadly weapon.[113] But unlawfully carrying a weapon involves not merely carrying a weapon, but carrying a weapon in a manner or under circumstances warranting alarm for the safety of others. The first degree robbery statute contains no 'circumstances warranting alarm' language, indicating that unlawfully carrying a weapon is not a lesser included offense to first degree robbery.

The supreme court concluded, however, that because the charge was *attempted* first degree robbery, the 'circumstances warranting alarm' element was a component of the greater offense:

> It is clear that the element of carrying a weapon under RCW

---

111. *Id.* at 447, 584 P.2d at 385. Robbery is defined in WASH. REV. CODE § 9A.56.190 (1989) as follows:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Robbery in the first degree is defined in WASH. REV. CODE § 9A.56.200(1) (1989) as follows:

> A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he:
> (a) Is armed with a deadly weapon; or
> (b) Displays what appears to be a firearm or other deadly weapon; or
> (c) Inflicts bodily injury.

112. *Workman*, 90 Wash. 2d at 448-49, 584 P.2d at 385-86. WASH. REV. CODE § 9.41.270(1) (1989) provides as follows:

> It shall be unlawful for anyone to carry, exhibit, display or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

113. 90 Wash. 2d at 447, 584 P.2d at 385.

> 9.41.270, the gross misdemeanor, is a necessary element of the greater crime of first-degree robbery. *Likewise, the element of circumstances warranting alarm under the lesser offense is an inherent characteristic of an attempt to commit a robbery.* The existence of such circumstances therefore qualifies as a necessary element of the greater offense of attempted first- degree robbery. The first condition of the test for an included offense is thus met here.[114]

The question is what the *Workman* court meant by "an inherent characteristic of an attempt," and how that applies to other cases in which the offense charged is an attempt. *Workman* itself offers no definition or discussion in connection with the first prong of the standard: the elements test. The court did, however, provide a key to the term and its logic in its discussion of the second prong.

In holding that the evidence was sufficient to support the instruction on unlawfully carrying a weapon, the court wrote as follows:

> Furthermore, while the State contends the facts do not support a finding of the elements of the lesser crime because the station attendant never saw the gun, it is not necessary in order to prove the crime that the attendant have seen it. The statute only requires that the circumstances *warrant* alarm for the safety of others. They need not actively *cause* such alarm. Surely the circumstances of two men who were armed with a rifle and intending to commit a robbery warrant alarm for the safety of anyone who may chance to be nearby.[115]

In other words, being armed with a deadly weapon while having the intent to commit robbery always, and necessarily, constitutes carrying a weapon under "circumstances warranting alarm." Actual alarm need not be proved.

So construed, the element "circumstances warranting alarm" is indeed an inherent characteristic of attempted robbery with a deadly weapon. If alarm is warranted whenever an armed person is possessed of an intent to rob, the element "circumstances warranting alarm" is inherent in attempted robbery with a deadly weapon in the simple sense that it is always present in such attempts.[116]

---

114. *Id.* at 448, 584 P.2d at 385 (emphasis added).

115. *Id.* at 448-49, 584 P.2d at 386 (emphasis in original).

116. It is also true that if alarm is warranted whenever an armed person is

Where the greater offense is an attempt, therefore, the first prong of the test for lesser included offenses is slightly different from *Workman's* own general formula. *Workman* holds that a lesser offense is a lesser included offense if each element of the lesser offense is either an element of the greater offense or, where the greater offense is an attempt, an inherent characteristic of the attempt. In *Workman*, the lesser offense had two elements. The first, carrying a weapon, was an element in the greater offense: "It is clear that the element of carrying a weapon under RCW 9.41.270, the gross misdemeanor, is a necessary element of the greater crime of first-degree robbery [under RCW 9A.56.200(1)(a)]."[117]

The second element of the lesser offense, "circumstances warranting alarm," was an inherent characteristic of the greater offense, an attempt: "Likewise, the element of circumstances warranting alarm under the lesser offense is an inherent characteristic of an attempt to commit a robbery. The existence of such circumstances therefore qualifies as a necessary element of the greater offense of attempted first-degree robbery."[118] The court therefore concluded that the first prong of the test for lesser included offenses was met. Thus, *Workman* formulated and applied, albeit cryptically, an inherent characteristic rule for attempt cases.

C. *Distinguishing the Inherent Characteristic Rule from the Inherent Relationship Test*

There is no denying that the inherent characteristic rule is easily overlooked. This is particularly unfortunate because, if properly understood and carefully distinguished from the federal inherent relationship test, the inherent characteristic rule has the potential to halt the drift forward a fact-based analysis.

It is interesting to note how and why the *Gatalski* court, which purported to apply *Workman*'s rule for attempts, missed the critical distinction between the state and federal rules. The *Gatalski* court identified the problem in *Workman* as follows:

---

possessed of an intent to rob, the element "circumstances warranting alarm" is inherent in every completed robbery. This point, among several others, justifies expanding the inherent characteristic rule beyond attempt cases. *See infra* text accompanying notes 145-68.

117. *Workman*, 90 Wash. 2d at 448, 584 P.2d at 385.

118. *Id.*

> Being armed with a deadly weapon is not a necessary element of first degree robbery in all cases. The crime can be completed by displaying what appears to be a firearm or other deadly weapon, or by inflicting bodily injury. Bodily injury can be inflicted without the use of a weapon.[119]

In other words, because the greater offense can be committed by alternative means, it is possible to commit the greater offense without having committed the lesser.[120]

As a first step in the analysis, that is clearly a step in the wrong direction. Uncharged alternative means of committing the greater offense[121] are irrelevant to the problem of lesser included offenses. Not all the elements of the greater offense need be present in the lesser to justify the instruction—the requirement is the opposite.[122] Consequently, just as it makes no difference that some elements of the greater are not present in the lesser, it makes no difference that some alternative means of committing the greater are not present in the lesser.

What the *Gatalski* court had in mind, of course, was the short-hand formulation of the rule.[123] If the greater offense

---

119. State v. Gatalski, 40 Wash. App. 601, 612, 699 P.2d 804, 811.

120. Ferguson and Fine rely on the same premise in concluding that *Workman* states a fact-specific standard. FERGUSON & FINE, *supra* note 28, at 8-9. Where the *Gatalski* court concluded that *Workman* states a fact-specific standard for attempts, however, Ferguson and Fine conclude that it states a fact-specific standard *for all cases*:

> *Workman* holds that the crime of carrying a weapon is included within attempted first degree robbery. Although carrying a weapon is usually an element of first degree robbery, this is not always true: first degree robbery can also be committed by inflicting bodily injury without a weapon. Also, an attempt to commit first degree robbery can be committed by taking a substantial step toward commission of that crime, without ever possessing a weapon. Although the Supreme Court did not spell out its reasoning, the holding of *Workman* thus necessarily takes into account the specific facts of the crime involved.

Id. This wildly erroneous conclusion is a consequence of Ferguson and Fine's failure to recognize (1) that *Workman* uses an inherent characteristic rule, (2) that the rule applies only to attempts, or (3) that attempts present any particular difficulty at all. *See infra* note 143.

121. State v. Arndt, 87 Wash. 2d 374, 553 P.2d 1328 (1976). Where alternative means of committing a single crime are charged, the jury need not reach unanimity on the means actually employed so long as there is sufficient evidence as to each means. *Id.* at 376, 553 P.2d at 1329. Whether statutory elements constitute alternative means of committing a single offense or comprise two distinct offenses is a question of legislative intent. *Id.* at 378, 533 P.2d at 1331.

122. "First, each of the elements of the lesser offense must be a necessary element of the offense charged." *Workman*, 90 Wash. 2d at 447-48, 584 P.2d at 385.

123. "Put another way, if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime." State v.

can be committed by several different means, and if the means of committing the lesser offense matches only one of those alternatives, it is possible to commit the greater without committing the lesser because the greater might have been committed by some other means. This short-hand formula, however, is just that: an abbreviated statement of the standard that is useful, but limited. It falls short at precisely this point. An instruction on a lesser included offense is available because it is implicit in the State's formal accusation, with the result that the defendant has notice—implicit but sufficient—that he is also accused of the lesser offense. If the State seeks to convict on a lesser offense that does not involve certain alternative means of committing the greater, then those alternatives are irrelevant.[124]

Contrary to *Gatalski*'s premise, then, the fact that attempted robbery could be committed by other alternative means was not the issue in *Workman*. The crux of the problem in *Workman* was the element of circumstances warranting alarm; the element of the lesser offense that could not be found anywhere in the wording of the robbery statute, even under the deadly weapon alternative.

Having misidentified the basic issue in *Workman*, the *Gatalski* court could do little with the substance of the opinion. Rather than examining the *Workman* court's discovery of "circumstances warranting alarm" in the intersection of the

---

Bishop, 90 Wash. 2d 185, 191, 580 P.2d 259, 261 (1978) (quoting State v. Roybal, 82 Wash. 2d 577, 583, 512 P.2d 718, 721 (1973)).

124. The corresponding problem of alternative means of commission in the lesser offense is also worth comment. As shown above, alternative means of committing the greater offense are irrelevant to the analysis because not every element of the greater must be present in the lesser: the requirement is the opposite. But precisely because of that, alternative means of committing the lesser offense seem to present a knottier problem. For example, it seems impossible for all the various means of committing first degree assault to be present in every attempted murder.

Fortunately, the problem is more apparent than real. On reflection, one quickly realizes that if only one alternative need be present for the offense to have been committed, only one alternative need be present for the offense to constitute a lesser included offense. If any one of the means by which first degree assault can be committed is present in every attempted murder, then attempted murder cannot be committed without also committing first degree assault by that means. Every attempted murder will thus present a complete set of the necessary elements of an assault. The remaining alternative means of committing assault drop out of the problem as irrelevant. Therefore, not every alternative means of committing the lesser offense need be present in every instance of the greater for the lesser to constitute a lesser included offense.

attempt and robbery statutes,[125] the *Gatalski* court seized on a passing reference in *Workman* to "the facts of this case"[126] and propounded its own fact-based standard in *Workman*'s name.[127] *Workman*, however, abjures any examination of the facts of the particular case, and does so—as the federal experience demonstrates—for good and sound reasons. *Gatalski*'s claim to *Workman*'s imprimatur is entirely specious.

Where *Gatalski* equated *Workman*'s inherent characteristic rule with the Ninth Circuit's inherent relationship test in practice, the supreme court itself has equated them in name. In *State v. Johnson*,[128] the defendant urged the court to adopt the Ninth Circuit standard and cited *Workman* in support. He was rebuffed. The court's reasoning, while sound, was confusing:

> We decline to recognize and apply the "inherent relationship" test in the circumstances of this case. We did tacitly recognize such a test in *State v. Workman*, where we held that the element of "circumstances warranting alarm" necessary to prove unlawful possession of a weapon was included within attempted first degree robbery because it was "an inherent characteristic of an attempt to commit a robbery." There, however, the elements of the lesser offense were *invariably* inherent in the greater offense and were part of the same act.[129]

The court apparently was unable to appreciate the fundamental difference between *Workman*'s elements test and the Ninth Circuit's fact-based standard: *Workman* clearly does not "tacitly recognize" a fact-based standard for attempts.

Nevertheless, the distinction drawn in *State v. Johnson* is critical to understanding the inherent characteristic rule of *Workman*. The key to that distinction is the mysterious term noted in *Partosa*: "invariably."[130] While both the inherent characteristic rule for attempts and the inherent relationship standard look at inherent properties of the respective offenses, the Ninth Circuit test permitted the court to find a lesser included offense even where proof of the greater offense did

---

125. *Workman*, 90 Wash. 2d at 448-49, 584 P.2d at 385-86.

126. *Id.* at 447, 584 P.2d at 385.

127. *Gatalski*, 40 Wash. App. at 612-13, 699 P.2d at 810.

128. 100 Wash. 2d 607, 674 P.2d 145 (1983).

129. *Id.* at 628, 674 P.2d at 157-58 (emphasis in original) (citations omitted).

130. State v. Partosa, 41 Wash. App. 266, 272 n.6, 703 P.2d 1070, 1074 n.6 (1985). *See supra* text accompanying note 108.

"not necessarily invariably" involve proof of the lesser offense.[131] In contrast, *Workman*'s inherent characteristic rule for attempts does require proof of the lesser offense in the course of proving the greater offense *in every case*.[132] The element of the lesser is said to be inherent in the greater offense precisely because it is always present in such attempts.

Viewed in this light, *Workman*'s inherent charactistic rule is not really so great a departure from the general elements test. The general rule is that each element of the lesser offense must be an element of the greater offense.[133] Where the greater offense is an attempt, *Workman* permits "an inherent characteristic of the attempt" to substitute for "an element of the greater offense" in that test.[134] The meaning *Workman* gives to the term inherent characteristic, however, is highly restrictive. An element of the lesser offense is an inherent characteristic of the attempt (the greater offense) only if that element is invariably present in such attempts. As in the elements test itself, the focus is not on the facts of the individual case, but on the nature of the offense.

Workman's inherent characteristic rule, then, provides a rather brilliant solution to the problem of lesser included offenses to attempts. By means of a very slight modification to the elements test, which faithfully observes that test's underlying logic, the inherent characteristic rule removes the blanket prohibition on lesser included offenses to attempts and makes such instructions as freely available as in any other case.

D. *Expanding the Scope of the Inherent Characteristic Rule*

Still, there is not much point in providing a brilliant solution to a problem if the problem is never recognized and the solution is never used. The supreme court has never expressly acknowledged that attempts present any particular difficulty for the analysis of lesser included offenses. Neither that court nor the court of appeals has ever analyzed the problem thoroughly. In *State v. Johnson*, as a consequence, the supreme court was somehow convinced that it had "tacitly recognize[d]" the inherent relationship test in *Workman*.[135]

---

131. United States v. Johnson, 637 F.2d 1224, 1239 (9th Cir. 1980); *see* United States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971).

132. *Workman*, 90 Wash. 2d at 448-49, 584 P.2d at 386.

133. *Id.* at 447-48, 584 P.2d at 385.

134. *Id.* at 448, 584 P.2d at 385.

135. State v. Johnson, 100 Wash. 2d at 628, 674 P.2d at 157.

Furthermore, no appellate court has actually used the inherent characteristic rule to decide an attempt case. In *State v. Jackson*,[136] for example, the defendant was accused of having kicked in a plexiglass door to a store and was charged with attempted second degree burglary.[137] He requested an instruction on third degree malicious mischief, which was refused.[138] He was convicted and he appealed, arguing that by kicking in the door he had in fact committed malicious mischief, and that, therefore, the instruction on the lesser offense ought to have been given.[139]

The supreme court rejected that contention.[140] In doing so, however, the court failed even to hint at the issues lying behind Jackson's argument. The opinion cites *Workman* only for its general standard, with no mention whatever of the inherent characteristic rule.[141] The court failed to acknowledge that *Workman* was an attempt case, that justifying a lesser included offense to an attempt is a singular problem, or that *Workman* propounded a modification to the general rule to cope with that problem. The court simply noted, correctly, but too succinctly, that because burglary might be committed by entering an unlocked door without permission, malicious mischief is not invariably present in burglaries.[142] Why this precluded its being considered a lesser included offense to the attempt was never explained.[143]

136. 112 Wash. 2d 867, 774 P.2d 1211 (1989).

137. *Id.* at 870, 774 P.2d at 1212. WASH. REV. CODE § 9A.52.020(1) (1989) defines first degree burglary as follows:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling and if, in entering or while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person therein.

138. Jackson, 112 Wash. 2d at 871, 774 P.2d at 1212. WASH. REV. CODE § 9A.48.090(1) (1989) defines malicious mischief in the third degree as follows:

> A person is guilty of malicious mischief in the third degree if he knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree.

139. *Jackson*, 112 Wash. 2d at 870, 774 P.2d at 1212.

140. *Id.* at 878, 774 P.2d at 1216.

141. *Id.* at 877, 774 P.2d at 1216.

142. *Id.* at 878, 774 P.2d at 1216.

143. One consequence of the *Jackson* opinion is Ferguson and Fine's conclusion that *Workman* states a fact-based standard for all offenses, not just attempts. *See* discussion *supra* notes 87, 120. Because they fail to perceive the inherent characteristic rule at all, let alone the fact that it is a minor variation on the elements test, Ferguson and Fine seize on *Jackson*'s reference to the elements of the lesser offense being

Given the neglect of the inherent characteristic rule even in attempt cases, it is rather surprising that it should surface in *State v. Curran*,[144] a case in which the greater offense was not an attempt, but completed vehicular homicide. It would not have been necessary to extend the inherent characteristic rule to completed offenses to decide *Curran*, even if the court had any idea how or why that might be done—and the opinion bears no sign that the court did. *Curran*'s invocation of the inherent characteristic rule seems to have been completely inadvertent.

Nevertheless, the inherent characteristic rule can and should be extended to completed offenses. Properly understood and applied, the rule could provide a certain flexibility to the elements test without infringing on its constitutional notice function.

"invariably" present in the greater offense. In doing so, they categorize *Jackson* as an attempt case in which the elements test was strictly applied. Because these commentators view *Workman* as taking a fact-based approach, they find *Workman* "irreconcilably inconsistent" with *Jackson*. Because *Jackson* is an attempt case, they reason, *Workman* cannot be read as stating a rule for attempt cases. They conclude, then, that *Workman* states a fact-based standard for all offenses. FERGUSON & FINE, *supra* note 28, at 9.

Once the inherent characteristic rule and its rationale are drawn out, however, it is clear not only that *Jackson* is a correct application of the inherent characteristic rule, but that it is entirely consistent with *Workman*. The real question is whether the court was at all conscious that it was analyzing the issue properly. One feels a temptation to write "show your work" in the margin.

144. 116 Wash. 2d 174, 176, 804 P.2d 558, 559 (1991). Perhaps it is not so surprising, however, given *Curran*'s inept application of the elements test to the question before it. The greater offense was, as noted, vehicular homicide. That offense is defined in WASH. REV. CODE § 46.61.520 (1989 & Supp. 1990-91), which provides in pertinent part:

> When the death of any person ensues within three years as a proximate result of injury proximately caused by . . . the operation of any vehicle in a reckless manner or with disregard for the safety of others, the person so operating such vehicle is guilty of vehicular homicide.

The lesser offense asserted in *Curran* was reckless driving: "Any person who drives any vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving." WASH. REV. CODE § 46.61.500 (1989 & Supp. 1990-91). The *Curran* court concluded that reckless driving was not a lesser included offense to vehicular homicide because the greater offense could be committed by driving with disregard for the safety of others as well as by driving recklessly. *Curran*, 116 Wash. 2d at 183, 804 P.2d at 563. The error here is that alternative means of committing the greater offense are irrelevant to the analysis. So long as one of several alternative means of commission corresponds to the elements of the lesser offense, all elements of the lesser offense will be included among the elements of the greater. *See supra* text accompanying notes 123-24.

Reckless driving is not a lesser included offense to vehicular homicide because the greater offense requires proof of only "disregard for the safety of others," while the lesser requires proof of "*wilful or wanton* disregard for the safety of persons."

The need for such flexibility arises from the threshhold question that is seldom, if ever, addressed in the reported cases: for purposes of the comparison of elements prescribed by the rule, what is an element? There are several dimensions to that issue. The problem of lesser included offenses to attempts is one. Another problem is the status of non-statutory elements, although that issue is fairly trivial. Given the roots of the elements test in the constitutional notice requirement, it is clear that non-statutory elements must be included in the analysis.[145]

The interesting question is what can only be termed inherent characteristics of offenses. In other words, the issue is whether, for purposes of the elements test, an element of the lesser offense can be considered an element of the greater offense simply because that fact or act is necessarily present in each instance of the greater offense.

For example, in *State v. Wilson*,[146] the defendant was charged with unlawful delivery of a controlled substance,[147] and he requested a lesser included offense instruction on unlawful possession of a controlled substance.[148] The State conceded that the elements prong was met and the trial court, as well as Division Three, simply accepted that concession.[149] Similarly in the case of *State v. Rodriguez*,[150] Division One faced the same issue, and the court actually cited *Wilson* as authority for the proposition that unlawful possession of a controlled substance is a lesser included offense to unlawful delivery.[151]

One might well ask, however, if that is true. The statute

---

145. The Washington Supreme Court recently held that "[a]ll essential elements of a crime, *statutory or otherwise*, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." State v. Kjorsvik, 117 Wash. 2d 93, 97, 812 P.2d 86, 88 (1991) (emphasis added). The necessity of including non-statutory elements in the analysis is also reflected in *Workman*'s requirement that each element of the lesser offense be a "necessary" element of the greater. *Workman*, 90 Wash. 2d at 447-48, 584 P.2d at 385.

146. 41 Wash. App. 397, 704 P.2d 1217 (1985).

147. WASH. REV. CODE § 69.50.401(a) (1989) provides as follows: "[I]t is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."

148. WASH. REV. CODE § 69.50.401(d) (1989) provides as follows: "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid presecription or order of a practitioner while acting in the course of his professional practice. . . ."

149. *Wilson*, 41 Wash. App. at 399, 704 P.2d at 1219.

150. 48 Wash. App. 815, 740 P.2d 904 (1987).

151. *Id.* at 816-17, 740 P.2d at 905.

defining unlawful delivery does not use the term possession, except with regard to the distinct offense of possession with intent to deliver. Nor does case law establish possession as an element of unlawful delivery of a controlled substance. How, then, is the elements test met as between unlawful delivery and unlawful possession? In the nature of things, of course, one cannot deliver something without having possession of it. Yet, the question is whether that is enough to make "possession" in the lesser offense an element of the greater offense for purposes of the elements test.

Older versions of the assault statutes present another instance of the same problem. In *State v. Young*,[152] the court considered whether assault with a deadly weapon with intent to do bodily harm[153] could be considered a lesser included offense to assault with intent to commit murder.[154] The court did not hesitate to find that it could, by delving into the necessary, logical relationship between the two states of mind. Obviously the intent to inflict bodily injury is always present where the actor has an intent to kill. To say that an actor intended death without intending to cause bodily injury that would make death probable would be absurd. To cause death without also causing life-threatening bodily injury is an impossibility.

> [T]he argument that the allegation "with intent to kill and murder" is an equivalent allegation, and has included within it the allegation "to inflict bodily injury," is not only in consonance with common sense, but is suppported by universal authority. In fact, no other conclusion could be reached without reversing the laws of nature.[155]

Young's common sense approach is typical of the way courts treat issues of inherent characteristics. Ad hoc, practical resolutions predominate in the case law, usually with little or no reflection on the general problem, let alone any proposal to modify the elements test to accomodate it. There would be no reason to tamper with that tradition if the issues were always as clear as they seemed to be in *Wilson*, *Rodriguez*, and *Young*. As it happens, however, there are hard cases, and an express, rigorous solution to the problem of inherent characteristics of offenses is needed to deal with them.

152. 22 Wash. 273, 60 P. 650 (1900).
153. Bal. Code § 7057 (1897).
154. *Id.* § 7058.
155. *Young*, 22 Wash. at 275, 60 P. at 651.

Division One and Division Two each recently faced such a hard case and split over the proper analysis. In *State v. Hodgson*,[156] Division One held that indecent liberties[157] is not a lesser included offense to statutory rape in the first degree.[158] The former offense requires proof that the victim is not married to the defendant while the latter does not. Because the lesser offense includes an element not found in the greater, the court quite reasonably concluded that the elements test was not met.[159]

Faced with the same issue in *State v. Bailey*,[160] Division Two offered an altogether different answer. The court concluded that the elements test was met as between indecent liberties and first degree statutory rape because non-marriage is "an implicit element" of the greater offense:

> We believe that the analysis in *Hodgson* leads to absurd results. First, the Legislature cannot possibly have contemplated statutory rape in the first degree being perpetrated on one's spouse. In the unlikely event that a child of 10 years or less establishes sufficient necessity to receive permission from the superior court to marry, it is inconceivable that the Legislature intended to criminalize consensual sexual intercourse between spouses, regardless of their ages. The fact that the Legislature did not expressly make nonmarriage an element of first degree statutory rape can lead to only one logical conclusion: the Legislature did not expect that children under the age of 10 would be marrying. Therefore, the only plausible reading of former RCW 9A.44.070 is to consider nonmarriage an implicit element of the crime.[161]

As in the case of possession and delivery, the court treated an element of the lesser offense as an element of the greater because it concluded that the defendant's committing the elements of the greater necessarily must have been accompanied by such an act or fact.

---

156. 44 Wash. App. 592, 722 P.2d 1336 (1986).

157. Former WASH. REV. CODE § 9A.44.100(1) (1989) (amended 1988) stated that "[a] person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another: . . . ."

158. Former WASH. REV. CODE § 9A.44.070(1) (repealed 1988) provided that "[a] person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old."

159. *Hodgson*, 44 Wash. App. at 599-600, 722 P.2d at 1340.

160. 52 Wash. App. 42, 757 P.2d 541 (1988).

161. *Id.* at 46, 757 P.2d at 544.

There is, however, reason to doubt that conclusion. As the *Hodgson* court recognized, it may be unlikely that a ten-year old would marry, but it is not impossible.[162] Nor is it physically or logically impossible, however unreasonable or unlikely, that the legislature would criminalize intercourse with children under eleven, married or not. Such a law would indeed contradict the law permitting ten-year-olds to marry,[163] but rules of statutory construction are not laws of nature. The contradiction presented in *Hodgson* and *Bailey* is qualitatively different from the contradictions, the literal impossibilities, presented in *Young*, *Wilson*, and *Rodriguez*.

As a general solution to the problem of inherent characteristics of offenses, and as a rule to decide the hard cases, the inherent characteristic rule of *Workman* is an obvious choice. Possession can be treated as an element of unlawful delivery of a controlled substance because possession is an inherent characteristic of unlawful delivery; that is, possession is present in every case of delivery. Intent to inflict bodily injury can be treated as an element of assault with intent to murder because it is an inherent characteristic of such an assault. In other words, intent to inflict bodily injury is always and necessarily present where there is an intent to kill. One cannot say with the same certainty, however, that nonmarriage is an inherent characteristic of first degree statutory rape. It is not impossible that a person younger than eleven will marry and engage in sexual intercourse with his or her spouse. Nor is it impossible, however unreasonable or unlikely, that the legislature might have intended to criminalize it.

Accordingly, the elements test might be modified so as to provide that: *each element of the lesser offense must be a necessary element or an inherent characteristic of the greater offense.* That formula, of course, is essentially the same as that stated in *Curran*.[164] The difference is that the *Curran* court's statement was nothing more than a slip of the pen. The formula offered here is part of a serious proposal that existing law be changed. The need, at least, is illustrated by *Young*, *Wilson*, *Rodriquez*, and especially by the hard cases of *Hodgson* and *Bailey*.

---

162. *Hodgson*, 44 Wash. App. at 599, 722 P.2d at 1340.

163. WASH. REV. CODE § 26.04.010 (1989) provides that a person under the age of eighteen may marry upon a showing of necessity before the Superior Court.

164. *Curran*, 116 Wash. 2d 174, 804 P.2d 558. *See supra* text accompanying notes 80-83, 144.

E. Defending a General Application of the Inherent Characteristic Rule

One might reasonably ask whether the inherent characteristic rule can or should be extended. Does its original rationale work outside the context of attempts? How is the constitutional notice function of the elements test affected? Is there still a danger of drifting into a fact-based approach to lesser included offense analysis reminiscent of the ill-fated federal experiments?

For proof that the rationale for the inherent characteristic rule can be extended to completed offenses, one need look no further than *Workman* itself. While the inherent characteristic rule was prompted by the attempts problem, the rationale the case offers in support of the rule is not, in fact, limited to attempts. Recall that the court found "circumstances warranting alarm" to be an inherent characteristic of attempted first degree robbery because a person being armed with a deadly weapon while possessed of the intent to rob is a circumstance that, objectively, warrants alarm for the safety of others.[165] On reflection, one quickly realizes that that is just as true for a completed robbery as it is for an attempted robbery. An armed robber who succeeds, no less than one who does not, is possessed of that same combination of intention and being armed in such a manner that warrants alarm, objectively, for the safety of others. Consequently, unlawfully carrying a weapon can be considered a lesser included offense to a completed first degree robbery, just as it is a lesser included offense to attempted first degree robbery.[166]

As for the constitutional function of the elements test, it remains intact even with the addition of an inherent characteristic rule. Admittedly, however, there is some cause for concern. The theory behind the elements test is that, by the information's stating the greater offense, the defendant receives notice, implicit but sufficient, that he is also charged with the lesser offense. This rationale assumes that defense counsel, going over an information with her client, will be able

---

165. *Workman*, 90 Wash. 2d at 448-49, 584 P.2d at 385-86.

166. The courts' assumption in State v. Pacheco, 107 Wash. 2d 59, 726 P.2d 981 (1986), that the elements test was met as between first degree robbery and unlawfully carrying a weapon, could be justified on such a theory. As in *Curran*, however, there is no sign that the court's statement to that effect was based on this or any other close interpretation of *Workman*.

to see that the elements stated in the information can be subdivided and, in fact, state two offenses, one inside the other. Because an inherent characteristic of the greater offense is not an express element, it might be overlooked in such a review of the information. If this is the case, counsel might overlook the possibility of conviction on the lesser included offense as well.

That possibility does not, however, fatally infringe on the constitutional notice function of the elements test. Constitutionally, the State is entitled to all fair inferences from its charging language—and it is entitled to rely on a certain amount of common sense on the part of the defense:

> [W]e observe that it has never been necessary to use the exact words of a statute in a charging document; it is sufficient if words conveying the same meaning and import are used. This same rule applies to nonstatutory elements. It is therefore not fatal to an information or complaint that the exact words of a case law element are not used; the question in such situations is whether all the words used would reasonably apprise an accused of the elements of the crime charged. Words in a charging document are read as a whole, construed according to common sense, *and include facts which are necessarily implied.*[167]

As defined by *Workman* and *Johnson*, the inherent characteristics of an offense are inherent in the greater offense in the simple sense that they are present in every instance of it. Under that definition, they are "facts that are necessarily implied" in an information. Consequently, the inherent characteristics of the greater offense are stated, in an otherwise adequate information, just as the elements of the greater offense are. If, then, the information adequately states the greater offense, the defendant necessarily will receive constitutionally sufficient notice of the lesser offense—just as the implicit notice rationale supposes—regardless of whether the elements of the lesser offense are elements or inherent characteristics of the greater.[168] Therefore, to expand the elements

---

167. State v. Kjorsvik, 117 Wash. 2d 93, 108-109, 812 P.2d 86, 93-94 (1991) (emphasis added).

168. Furthermore, the absence of word-for-word notice of the elements of the lesser offense has never been deemed a problem in the related but distinct doctrine of lesser degree offenses. The doctrine of lesser degree offenses was established by statute in 1854 at the same time as the doctrine of lesser included offenses. The statute, currently codified as WASH. REV. CODE § 10.61.003 (1989), provides as follows:

> Upon an indictment or information for an offense consisting of different

test to provide that each element of the lesser offense must be a necessary element *or an inherent characteristic* of the greater offense does not infringe on the constitutional notice function of the test.

While there may be no constitutional impediment to incorporating the inherent characteristic rule into the elements test generally, it is still fair to ask whether there is some danger in doing so. As the supreme court demonstrated in *State v. Johnson*, the inherent characteristic rule and the inherent relationship test of the federal circuits are easily confused. In light of cases like *Pacheco* and *Gatalski*, it seems that the danger extends beyond the names. It is not inconceivable that if courts begin looking into the inherent characteristics, as well as the elements of the greater offense, they will eventually drift off into examining the characteristics of the crime before them, rather than those things that truly are present in every instance of the offense. If they do, it might well result in the beginning of a fact-based standard and a re-enactment of the federal experience.

That danger can be reduced to a minimum, however, sim-

> degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

The effect of this statute is to make an instruction on a lesser offense available where it seems it should be available, but where, due to the vagaries of legislative drafting, it is not. For example, one would expect that a defendant charged with first degree assault could also obtain jury instructions on second, third, and fourth degree assault. And so he could. However, such instructions would not be available under the doctrine of lesser included offenses. The various assaults are distinguished by the means used and the type of harm inflicted. Those distinct means and harms do not fit, conceptually, within one another, with the result that justifying instructions on lesser degrees of assault under the elements test is impossible. The instructions on the lesser assaults would be available, not as lesser included offenses under WASH. REV. CODE § 10.61.006 (1989), but as lesser degree offenses under WASH. REV. CODE § 10.61.003 (1989).

The supreme court tends to ignore the doctrine of lesser degree offenses. In State v. Dennison, 115 Wash. 2d 609, 801 P.2d 193 (1990), for example, the court chided the defendant for failing to understand that second degree murder and first and second degree manslaughter are not lesser included offenses to first degree felony murder. The court, however, failed to understand that second degree murder and first and second degree manslaughter are lesser degree offenses to first degree felony murder. Following State v. Gottstein, 111 Wash. 600, 191 P.2d 766 (1920), *Dennison* could and should have been decided not on the first prong, but on the second prong. That is, the court should have acknowledged that the first prong was met under the doctrine of lesser degree offenses, then held that the proof of the acts alleged to constitute second degree murder or manslaughter also established first degree burglary. That proof, establishing as it did a felony upon which first degree felony murder could be premised, precluded any finding that any lesser degree homicide had been committed.

ply by the courts' attending to the various points made above. The inherent relationship test was fundamentally inconsistent with the classic elements test because it turned on an examination of the particular facts of the individual case rather than on the nature of the offense. Consequently, the inherent relationship test authorized instructions on lesser offenses that were "not necessarily invariably" part of the greater offense. The result was an erosion of the symmetry in the availability of lesser included offense instructions, which historically has been considered a prime value in the doctrine.

The inherent characteristic rule, in contrast, is but a slight modification to the elements test. Like the elements test, the inherent charactistic rule turns not on an examination of the facts of the individual case, but rather on the nature of the given offense. Like the elements test, the inherent characteristic rule requires that the element of the lesser offense be, if not an element of the greater, at least present in every instance of the greater. The rule thus preserves symmetry in the availability of the instructions. Even more important, it preserves the constitutional notice function of the elements test.

If courts keep these distinctions in mind, they should have no difficulty in carrying out the modest experiment of extending the inherent characteristic rule beyond attempt cases to general application as part of the elements test itself. The primary benefit of such a modification—obviating any difficulties over what counts as an element for purposes of the elements test—is well worth the risk.

IV. THE EVIDENCE PRONG: THE INSUFFICIENCY OF THE SUFFICIENCY OF THE EVIDENCE FORMULA

In *State v. Bowerman*,[169] the defendant was charged with aggravated first degree murder.[170] It was alleged that she had

169. 115 Wash. 2d 794, 802 P.2d 116 (1990).

170. WASH. REV. CODE § 9A.32.030(1) (1989) provides as follows: "A person is guilty of murder in the first degree when . . .[w]ith a premeditated intent to cause the death of another person, he causes the death of such person or of a third person; . . . ." Relatedly, WASH. REV. CODE § 10.95.020 (1989) provides in pertinent part as follows:

> A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by WASH. REV. CODE § 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist: . . .
>
> (5) The person solicited another person to commit the murder and had paid

hired Hutcheson to kill Nickel, a former boyfriend. Bowerman requested an instruction on second degree murder,[171] which was refused. The supreme court affirmed, concluding that because the evidence did not support giving the instruction, *Workman*'s second prong was not met.[172]

While it was dispositive in *Bowerman*, the second prong of *Workman* can easily be made to appear unnecessary in two different ways. First, no party is ever entitled to an instruction that the evidence will not support.[173] There seems no reason to suppose, from the way in which the *Workman* case framed it, that the evidence prong is anything more than a convenient reminder of that general limitation. But few, if any, of those involved in assembling the instructions in criminal trials need such a reminder.

Second, it seems, at first glance, that the second prong of *Workman* must always be met where the first prong is. *Bowerman*'s holding ought to cause at least a moment's hesitation. Given that the first prong of *Workman* was clearly met,[174] how is it that the second was not? If the evidence was sufficient to enable the State to obtain an instruction and go to

---

or had agreed to pay money or any other thing of value for committing the murder; . . . .

171. WASH. REV. CODE § 9A.32.050(1) (1989) provides as follows: "A person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; . . . ."

172. *Bowerman*, 115 Wash. 2d at 806, 802 P.2d at 124.

173. State v. Hughes, 106 Wash. 2d 176, 191, 721 P.2d 902, 910 (1986).

174. One who premeditates and intends to kill, WASH. REV. CODE § 9A.32.030(1)(a) (1989 & Supp. 1990-91), obviously intends to kill. *Id.* § 9A.32.050(1). Causing the death of another, the only remaining element of either type of murder, is also common to both.

In fact, the elements test is met as to all degrees of homicide under the doctrine of lesser included mental states. State v. Jones, 95 Wash. 2d 616, 621, 628 P.2d 472, 475 (1981); State v. Collins, 30 Wash. App. 1, 15, 632 P.2d 68, 75 (1981). The doctrine of lesser included mental states was created as part of the revised criminal code adopted in 1975. In that code, the legislature, for the first time, expressly defined the mental states on which certain offenses are premised. In an apparent attempt to coordinate those definitions with the doctrine of lesser included offenses, the legislature adopted a provision setting forth the doctrine of "lesser included mental states." LEGISLATIVE COUNCIL JUDICIARY COMMITTEE, REVISED WASHINGTON CRIMINAL CODE § 9A.08.020 cmt. at 34-35 (1970). Currently codified as WASH. REV. CODE § 9A.08.010(2) (1989), the statute provides as follows:

> Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.

the jury on first degree murder, and if the defendant could not have committed the elements of first degree murder without also committing the elements of second degree murder, it seems that the evidence must have been sufficient for an instruction on second degree murder. If, by definition, the lesser offense is necessarily committed in the course of committing the greater offense, then it seems that the evidence should always support giving the instruction on the lesser offense.

Of course, both objections to the second prong are illusory. Taken together, however, they indicate why and how the second prong ought to be reformulated. Thinking through the objections, one begins to see the distinctive issues that lie behind the evidence prong of the test for lesser included offenses. It also becomes apparent that *Workman*'s overly general "evidence in support" formula has obscured those issues.

This might not have been a problem. Because it is so general, the second prong of *Workman* is broad enough to capture the cases an evidence prong ought to. However, given that the evidence prong serves a purpose unique to the doctrine of lesser included offenses, there has been a natural trend in the cases toward drawing that purpose out. In doing so, however, the courts of the state have been remarkably inept. Their efforts have produced several fundamentally flawed corollaries to *Workman*'s second prong, none of which reflect a clear understanding of the primary purpose of the evidence prong. What is needed at this point is a different formulation of the

---

When acting knowingly suffices to establish an element, such element is also established if the person acts intentionally.

The black-letter rule that manslaughter is a lesser included offense to murder is, under the current code, entirely dependent on this provision. As first and second degree manslaughter are defined in the present criminal code, an intuitively strong case can be made that they are not lesser included offenses to murder. First degree manslaughter is premised on recklessness, while second degree manslaughter is premised on negligence. Recklessness and negligence have to do with risk: disregard of a known risk or failure to recognize risk. Both degrees of murder, however, are premised on an intent to kill. How can it be, then, that the mental element of either type of manslaughter is necessarily proved in the course of proving the murder? Proof of intent—a deliberate, object-oriented frame of mind—would seem, rather, to disprove recklessness and negligence. To bar precisely this inference, the legislature has intervened to ensure, by fiat, that the mental elements of the homicides stack up neatly, one inside the other. Hence, the doctrine of lesser included mental states.

The same result can be reached under the doctrine of lesser degree offenses as set forth in WASH. REV. CODE § 10.61.003 (1989). *See supra* note 168.

evidence prong, one that captures the logic of the earliest cases. After examining the history and purpose of the rule, this section will propose such a test.

A. *The Early Cases and Preclusion by the Evidence*

Why then was Bowerman properly denied an instruction on second degree murder? The opinion in *Bowerman* is of little help:

> The defendant asserted that, due to her diminished capacity, she did not have the intent to kill Nickel. If the jury believed Bowerman's defense then it could not have found her guilty of second degree murder. Therefore, the only choices the jury would have had were to find Bowerman guilty of aggravated first degree murder, or to find her not guilty of any crime. Under those circumstances, a lesser included instruction is not warranted.[175]

At face value, this explanation is absurd. Why should the possibility that the jury might accept her defense of diminished capacity deprive Bowerman of an instruction on second degree murder? As the court says, if the jury believed Bowerman's defense, she would be acquitted of second degree murder. But it is equally true that, if the jury believed she suffered from diminished capacity, she would be acquitted of the charge of aggravated first degree murder. Her chosen defense would not preclude instructing the jury on that charge. Why should it preclude instructing the jury on second degree murder?

The court seems to be saying that Bowerman waived any right to such an instruction by her choice of defense. Clearly, however, that cannot be what the court means to say. Not only is there no requirement that the defense choose a single theory of the case,[176] but strictly speaking, the instruction on the lesser included offense is not part of the defendant's case at all. The instruction on the lesser offense is available because it is

---

175. State v. Bowerman, 115 Wash. 2d 794, 806, 802 P.2d 116, 123 (1990) (citations omitted).

176. There is no prohibition as such on inconsistent defenses. A defendant is entitled to instructions on inconsistent theories of the case so long as there is some evidence in support of each theory. "If any one of the theories argued by the defendant was supported by substantial evidence, it should have been submitted to the jury." State v. Griffith, 91 Wash. 2d 572, 574- 75, 589 P.2d 799, 802 (1979). In *Griffith*, the defendant requested instructions on accidental homicide and self-defense. Both of those theories rely on an absence of the intent to kill, but differ in what they suppose really did happen. The facts did not support either theory, but the court was not troubled by the inconsistency between them. Similarly, in State v. Manuel, 94 Wash.

implicit in the greater charge. As such, it constitutes an accusation by the State no less than the greater charge itself. The defendant cannot justly be said to contradict her own defense if she does no more than draw out the implications of the State's accusation. Even less can she be said to have waived the right to draw out those implications merely by choosing a given defense.

Still, if Bowerman did not waive her right to an instruction on the lesser included offense, why was she properly denied the instruction? There is no question that *Bowerman* was correctly decided. The case's true logic, however, lies buried in the pre-*Workman* case law. The evidence prong has both a substantial ancestry and a compelling rationale—neither of which is apparent from *Workman*.

In the earliest case discussing the evidence prong, *State v. Robinson*,[177] the defendant was accused of having conspired to murder the victim and was charged with being an accessory before the fact to murder in the first degree.[178] He was convicted of manslaughter.[179] The supreme court reversed.[180]

The court held that the verdict was contrary to the evidence and was in all likelihood a compromise verdict. All the evidence presented in court pertained to murder; that is, a crime involving malice. Because manslaughter was defined as a killing without malice, no evidence of manslaughter was presented. Indeed, to the extent it proved malice, it disproved manslaughter. Because there was nothing on which the jury could have based a finding of manslaughter, their verdict was arbitrary:

2d 695, 697, 619 P.2d 977, 978 (1980), both accidental homicide and self-defense instructions were given.

In another example, State v. Montague, 10 Wash. App. 911, 521 P.2d 64 (1974), a defendant accused of burglary argued that he had consent to enter from someone entitled to grant it, and that if that person did not have authority, he reasonably believed that the person did have the authority. The court found that the evidence did not support the claim of reasonable belief. However, the court found nothing wrong in principle with instructing the jury on those two inconsistent theories of the case.

177. 12 Wash. 349, 41 P. 51 (1895).

178. Former Washington Penal Code § 1 (1891) provided as follows: "Every person who shall purposely, and of deliberate and premeditated malice . . . kill another, shall be deemed guilty of murder in the first degree, and upon conviction thereof, shall suffer death."

179. Former Washington Penal Code § 7 (1891) provided as follows: "Every person who shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter."

180. *Robinson*, 12 Wash. at 353, 41 P. at 55.

> It was conceded by the learned counsel for the state, upon the argument of the cause in this court, that if the information had charged no higher offense than manslaughter the evidence introduced would be incompetent to establish such a crime . . . . Conspiring with another to kill a human being necessarily involves malice, whereas manslaughter is the "unlawful killing without malice," and does not admit of a preconcerted design. The only offense which the evidence in this case tended to establish was murder in either the first or second degree, and the verdict which found appellant guilty of manslaughter was farcical and "contrary to the law and the evidence." It was the duty of the jury, if they entertained a reasonable doubt of the appellant's guilt of the only crime which the evidence tended to prove, to acquit and "not compromise with that doubt by finding him guilty of a lower grade of offense.[181]

Sixteen years later, the court provided a more general, and even more compelling, statement of the rationale. In *State v. Pepoon*,[182] the defendant gave his wife poison, which caused her death. He claimed that he had made a mistake. The State charged him with first degree premeditated murder.[183] The defendant requested instructions on manslaughter[184] and second degree murder.[185] The instructions were refused, and he was convicted as charged.[186]

The supreme court affirmed, relying principally on *Robinson*. The court acknowledged that under the legal prong, second degree murder and manslaughter are lesser included offenses to murder in the first degree.[187] Nevertheless, the court reasoned that the jury could not have found the lesser offenses:

181. *Id.* at 350-51, 41 P. at 51 (citations omitted).

182. 62 Wash. 635, 641, 114 P. 449, 451-52 (1911).

183. Former Rem. & Ball. Code and Statutes § 2391 (1909) provided as follows: "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed . . . [w]ith a premeditated design to effect the death of the person killed or another; . . . ."

184. Former Rem. & Ball. Code and Statutes § 2395 (1909) provided as follows: "In any case other than [first or second degree murder or killing in a duel], homicide, not being excusable or justifiable, is manslaughter."

185. Former Rem. & Ball. Code and Statutes § 393 (1909) provided as follows: "The killing of a human being, unless it is excusable or justifiable, is murder in the second degree when— . . . [c]ommitted with a design to effect the death of the person killed or of another, but without premeditation; . . . ."

186. *Pepoon*, 62 Wash. at 639, 114 P. at 451.

187. *Id.* at 640, 114 P. at 451.

> [The jury's] determination must, of course, be based upon evidence. That is all that gives the determination any value. The anxiety of the law is to give the defendant the full benefit of trial by jury on all questions of fact, and it will not give its sanction to a farcical and arbitrary determination of any alleged fact which the jury has had no possible means of determining. If the defendant had been informed against for manslaughter and the state had failed to produce any evidence tending to show the commission of manslaughter, as it did fail in this case to do, there would have been no duty resting upon the jury, and it would clearly have been the duty of the court to discharge the jury because there was nothing upon which the function of a jury could take hold, and to discharge the defendant. The legal function of the jury is not at all changed because the question for determination arises upon an information in the first degree.[188]

The reason the jury could not have found manslaughter or second degree murder was that the murder, if there was a murder at all, was committed by poison. Murder by such means is necessarily murder in the first degree: if death is intended, the administration of poison requires such a degree of deliberation and preparation that it necessarily entails premeditation.[189] In other words, the evidence of the greater offense precluded a finding that the lesser had been committed.

This preclusion by the evidence is quite distinct from the concept of sufficiency of the evidence. Take first degree perjury[190] and false swearing,[191] for example. If the evidence is

188. *Id.*

189. The *Pepoon* court reasoned as follows:

> The testimony shows that the wife of appellant, whom he is charged with murdering, was of unsound mind, and on the day of her death was in a highly nervous condition; that either in an attempt to allay this condition, or for the actual purpose of murdering her, the appellant, with the aid of Wilcox, who by appellant's direction was waiting upon his wife, consulted as to where the medicine was which they desired to administer to her; that they secured the medicine, put it in a glass tumbler, and urged her to drink it; and that she did drink it, and immediately went into spasms and died from the effects of it. Under such circumstances one of two things is certain: either the potion was administered by mistake, in which event no degree of murder was committed, or it was administered with a premeditated, deliberate, and malicious intent to murder. There is no room under the testimony for any other theory, and no testimony whatever upon which any other verdict than the one rendered could have been based. Hence, it would be farcical to reverse the judgment on the ground complained of.

Id. at 640-41, 114 P. at 451-52.

190. WASH. REV. CODE § 9A.72.020(1) (1989) provides as follows: "A person is

insufficient to establish any of the elements of false swearing—knowledge of falsity for instance—that lesser offense cannot be submitted to the jury. While true, that is not the point of the evidence prong. If the evidence is insufficient to support an inference of knowledge of falsity, neither the greater nor the lesser offense can be submitted to the jury. Like all elements of the lesser offense, knowledge of falsity is an element of both the greater and the lesser offenses. Evidence sufficient to support a proposed instruction,[192] and to support the submission of a charge to the jury,[193] is generally required. If the evidence is insufficient on an element of the lesser, it is also insufficient on an element of the greater, and neither charge will be submitted to the jury. That is clearly different from a case in which the evidence prong is not met, where the greater offense will be submitted to the jury, though the lesser cannot be.

What the evidence prong really addresses is the state of the evidence on the elements of the greater offense that are absent from the lesser. The question is whether proof of the elements common to both offenses also establishes the remaining elements of the greater, thereby precluding a finding that the lesser offense was committed. In both *Robinson* and *Pepoon*, the proof of a common element, causing the death of another, also established the remaining elements of the greater offense. In *Robinson*, proof that the defendant caused the death of another entailed proving a conspiracy, thereby establishing premeditated malice. In *Pepoon*, proof of the defendant's causing death entailed proof of poisoning, thereby establishing premeditated design. In both cases, a finding that the lesser offense of manslaughter or second degree murder had been committed was positively precluded by the evidence.

Robinson and *Pepoon* not only demonstrate that such preclusion can occur, they indicate why it occurs. While it is possible to separate and compare the various elements of the greater and lesser offenses as they are laid out in the books—the focus of *Workman*'s first prong—the acts that the statu-

---

guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law."

191. WASH. REV. CODE § 9A.72.040(1) (1989) provides as follows: "A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law."

192. State v. Hughes, 106 Wash. 2d 176, 191, 721 P.2d 902, 910 (1986).

193. State v. Knapstad, 107 Wash. 2d 346, 349-53, 729 P.2d 48, 50 (1986).

tory elements describe cannot be separated into various parts. Suppose, for example, that a defendant is accused of striking his victim with an ax and is charged with second degree assault.[194] The defendant does not deny the act, but requests an instruction on fourth degree assault.[195] The instruction properly would be denied. It is not possible to separate the defendant's striking the victim from his striking her with an ax. An instruction on simple assault would be justified only if the former act could somehow stand alone, separate from the latter. Necessarily, it cannot. Our ability to separate, analytically, the element of assault from the element of using a deadly weapon is a reflection of how criminal statutes are drafted—not of the world in which crimes are committed. The mere fact that the elements of the assault statutes can be made to agree in a certain way cannot justify a verdict that, in fact, simple assault was committed. As stated by the court in *Pepoon*,

> [t]he anxiety of the law is to give the defendant the full benefit of trial by jury on all questions of fact, and it will not give its sanction to a farcical and arbitrary determination of any alleged fact which the jury has had no possible means of determining.[196]

This, of course, goes a long way toward explaining the result in *Bowerman*. Bowerman was not entitled to an instruction on second degree murder because, if any murder at all was committed, it must have been murder in the first degree: hiring another to kill one's victim necessarily entails premeditation. Moreover, murder by hire is an aggravating factor, raising the offense to aggravated first degree murder.[197]

194. WASH. REV. CODE § 9A.36.021(1) (1989) provides as follows: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . [a]ssaults another with a deadly weapon . . . ."

195. WASH. REV. CODE § 9A.36.041(1) (1989) provides as follows: "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another."

196. State v. Pepoon, 62 Wash. 635, 640, 114 P. 449, 451 (1911).

197. WASH. REV. CODE § 10.95.020 (1989) provides in pertinent part:

> A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by WASH. REV. CODE § 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist: . . .
>
> (5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder; . . . .

Hence, the court's statement that the jury had a choice only between acquittal or aggravated first degree murder.[198] Either Bowerman suffered from diminished capacity and should be acquitted, or she did have the capacity to intend to kill, in which case a murder was committed. The only murder that the jury could have found, however, was a premeditated murder accompanied by aggravating circumstances. The evidence would not support a finding of second degree murder.

Bowerman, in other words, presents a relatively straightforward application of the second prong of *Workman*. Once its roots in *Robinson* and *Pepoon* are exposed, however, *Bowerman* also demonstrates the weaknesses inherent in *Workman*'s version of the evidence prong. The evidence did not simply fail to support an inference that the lesser offense was committed. Rather, the instruction on the lesser offense was actually precluded by the evidence. The proof of the elements that first and second degree murder have in common (intent to kill and causing the death of another) also proved the remaining elements of the greater offense (premeditation and murder for hire), thereby precluding any inference that the lesser offense was committed. *Workman*'s "insufficiency" formulation of the evidence prong does not describe that sort of preclusion. The *Bowerman* court, relying on *Workman*, consequently failed to perceive preclusion in the case before it. Yet it is that preclusion which is special to this part of the doctrine of lesser included offenses, and it is that preclusion which separates the evidence prong from the general rule against instructions unsupported by the evidence.

B. Confusion Over Sufficiency of the Evidence and Waiver Under Workman*'s Evidence Prong*

The adverse consequences of *Workman*'s formulation do not stop with the *Bowerman* court's failure to articulate clearly the preclusive effect of the evidence. Preclusion by the evidence did not escape the *Bowerman* court's attention entirely. The court was aware that, somehow, the only rational choice the jury could make was between acquittal and aggravated first degree murder. Having only *Workman*'s overly general evidence prong to work with, however, the court struggled to express how that had come about. The court's vague sense

198. State v. Bowerman, 115 Wash. 2d 794, 806, 802 P.2d 116, 123 (1990).

that the instruction was precluded led it to suggest that Bowerman had waived her right to it.

In this respect, *Bowerman* is typical. Because *Workman*'s overly general formulation of the evidence prong does not properly describe preclusion by the evidence, later courts confronted with an instance of it have started from scratch in trying to describe it. The opinions struggle to articulate what the facts suggest: not only is the evidence insufficient to support the instruction, but the instruction is actually precluded by—something.[199] Unfortunately, in *Bowerman* and elsewhere, courts have suggested that it is the defendant himself who is responsible, somehow, for that preclusion.[200] Their explanations of preclusion by the evidence are presented as a corollary

---

199. For example, in *Pacheco* the Supreme Court offered this confusing discussion:

> In order for an instruction to be given there must be evidence to support that instruction, or, as in the case of a request for an instruction on a lesser included offense, the evidence must support an inference that the lesser crime was committed. Here, as forcefully argued by the defendant in his brief, the only question was one of identification, not whether robbery in the first degree was committed. The evidence supports an instruction on robbery in the first degree or nothing; it does not support an instruction on robbery in the second degree there being no question about the presence and use of a knife.

State v. Pacheco, 107 Wash. 2d 59, 70, 726 P.2d 981, 987 (1986). The suggestions that the instruction on the lesser offense is not available where the sole issue is identity, and that it is not available where the facts show the greater offense "or nothing," both appear frequently in the case law as rough formulations of preclusion by the evidence.

The "greater crime, or none at all" formulation comes from State v. Much, 156 Wash. 403, 410, 287 P. 57, 60 (1930). Much engaged in an elaborate scheme in which he lured his female victim from Boston by corresponding with her under an assumed name "with a view to marriage." As expected, she arrived with her life savings, which was later found buried in Much's yard. Much's defense was identity; he claimed that an actual person with the name he had used in the correspondence had committed the murder. He requested an instruction on second degree murder, which was properly refused. As the court said: "It was either murder in the first degree, or nothing." *Id.* *Bowerman* gives a blind citation to *Much*, but does not state the "all or nothing" rule. *Bowerman*, 115 Wash. 2d at 806, 802 P.2d at 123.

While it has the virtue of addressing the evidence rather than suggesting waiver, the *Much* "all or nothing" rule still fails to articulate preclusion. Much was not entitled to an instruction on second degree murder because the same evidence that established intent to kill also established premeditation, the remaining element of the greater offense.

The *Pacheco* court begins to identify the problem when it notes that there was no question that a knife was used, but stops well short of a complete account of why that matters. *Pacheco*, 107 Wash. 2d at 70, 726 P.2d at 987. *See infra* text accompanying notes 224-33.

200. *See Bowerman*, 115 Wash. 2d at 206, 802 P.2d at 123; State v. Speece, 115 Wash. 2d 360, 363, 798 P.2d 294, 295 (1990); State v. Fowler, 114 Wash. 2d 59, 67, 785 P.2d 808, 813 (1990).

to the evidence prong, and they almost invariably slip into suggestions of waiver.

For example, in *State v. Speece*,[201] Division One formulated the corollary as follows: "Where acceptance of the defendant's theory of the case would necessitate acquittal on both the charged offense and the lesser included offense, the evidence does not support an inference that only the lesser was committed."[202] This, of course, makes no sense. The jury's decision cannot cause a deficiency in the evidence. "[A]cceptance of the defendant's theory of the case" is not the decisive factor.[203] The question is not what the jury might find, but what it can plausibly and properly be asked to find. To say that the defendant is not entitled to an instruction on the lesser included offense because the jury might accept her theory of the case, improperly suggests that the defendant has waived the instruction by asserting that defense.

The supreme court decided *Speece* under a different waiver corollary.[204] Following the rule announced a few months before in *State v. Fowler*,[205] the court held that Speece was not entitled to a lesser included offense instruction because he had failed to come forward with evidence in support of his requested instruction.[206] Speece had been charged with first degree burglary under the "armed with a deadly weapon" alternative.[207] That allegation rested on the fact that he had stolen two handguns in the burglary.[208] Speece requested a lesser included offense instruction on second degree burglary.[209] The supreme court held that the instruc-

---

201. 56 Wash. App. 412, 783 P.2d 1108 (1989).

202. *Id.* at 419, 738 P.2d at 1112.

203. *Id.*

204. *Speece*, 115 Wash. 2d 360, 798 P.2d 294.

205. 114 Wash. 2d 59, 785 P.2d 808 (1990).

206. *Speece*, 115 Wash. 2d at 363, 798 P.2d at 295. *See Fowler*, 114 Wash. 2d at 67, 785 P.2d at 813.

207. WASH. REV. CODE § 9A.52.020(1) (1989) provides as follows:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling and if, in entering or while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon . . . .

208. *Speece*, 115 Wash. 2d at 363, 798 P.2d at 295.

209. WASH. REV. CODE § 9A.52.030(1) (1989) provides as follows: "A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling."

Given that first degree burglary involves entering or remaining in a dwelling,

tion was properly refused:

> Speece's defense at trial was solely that he did not commit the burglary. The State established prima facie evidence that the burglar took two guns. Speece in no way disputed this evidence. Thus, there is no affirmative evidence in the record that would support an inference that Speece was not armed during the burglary, once the jury found that he was, indeed, the burglar. Speece was not entitled to a lesser included offense instruction on second degree burglary.[210]

Once again, however, the suggestion that the defendant was responsible for the instruction's being refused—either because he chose identity as his defense or because he failed to offer evidence to rebut the State's proof that he was armed—is incorrect. Speece was not entitled to the instruction he sought, not because he failed to present evidence in support of it, but because no evidence could support it. The instruction was precluded in the manner peculiar to lesser included offenses. The proof of an element that first and second degree burglary have in common—intent to commit a crime on the premises—consisted entirely of the completed theft of the guns. Consequently, the proof of that common element also established an absent element of the greater offense—being armed with a deadly weapon—making it impossible for the jury rationally to find that the lesser offense was committed. The problem was not insufficient evidence of Speece's not being armed, but that the proof on which he would have had the jury rely in finding the lesser offense ineluctably would have carried them beyond that offense to find that the greater had been committed.

It is possible to see, from this vantage point, how the courts have slipped into a waiver theory. By requesting the instruction, the defendant does indeed ask the jury to rely on the evidence of the greater offense that the State has presented in order to find an element of his requested lesser offense. Under certain combinations of facts, that can be self-contradicting: the evidence on which the defendant would

while second degree burglary involves entering or remaining in a building other than a dwelling, the instruction must have been requested as a lesser degree offense rather than a lesser included offense. *See supra* note 168. That distinction does not affect the outcome of *Speece*, however, inasmuch as it pertains only to the first prong of the analysis. The application of the evidence prong, on which *Speece* turns, is the same under either the doctrine of lesser included offenses or the doctrine of lesser degree offenses. State v. Gottstein, 111 Wash. 600, 602, 191 P. 766, 767 (1920).

210. *Speece*, 115 Wash. 2d at 363, 798 P.2d at 295.

have the jury rely in finding the lesser offense will necessarily lead them to find the greater offense was committed. The courts have settled on a waiver theory perhaps because the contradiction in the defendant's request is so striking.

Yet it is clear there is no waiver. First, the defendant asks the jury to rely on the State's evidence of the greater offense in order to find the lesser offense in *every* request for a lesser included offense instruction—on such non-controversial elements as commission within the jurisdiction, for example. If that reliance were a waiver, the instruction would never be proper. That is not the case. The request is self-contradicting only under certain facts; that is, only where the proof of the common elements of the lesser and the greater also establishes the remaining elements of the greater. Second, where there is a contradiction in the defendant's request, it is not attributable to anything the defendant has done or failed to do. It is due to the particular facts of the case, and to the impossibility of separating acts as easily as one separates abstract elements—a problem peculiar to the doctrine of lesser included offenses.[211]

C. *Confusion Over the Defendant's Burden of Production Under* Workman's *Evidence Prong*

Significantly, preclusion has nothing to do with whether the defendant has come forward with evidence. The case of *State v. Fowler*,[212] on which *Speece* turned, arose out of a traffic dispute in which the defendant was the aggressor and was alleged to have drawn a handgun and pointed it at the victim, another driver.[213] The defendant asserted that, at most, the victim had had a glimpse of a gun in the defendant's shoulder holster.[214] The State charged Fowler with second degree assault.[215] He requested an instruction on the same lesser offense at issue in *Workman*: unlawfully carrying a weapon.[216] The State conceded that the elements test was

---

211. *See supra* text accompanying notes 194-96.

212. 114 Wash. 2d 59, 785 P.2d 808 (1990).

213. *Id.* at 61, 785 P.2d at 810.

214. *Id.*

215. WASH. REV. CODE § 9A.36.021(1) (1989) provides as follows: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . [a]ssaults another with a deadly weapon; . . . ."

216. WASH. REV. CODE § 9.41.270(1) (1989) provides as follows:

> It shall be unlawful for anyone to carry, exhibit, display or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner,

met.[217] The lower court held that the evidence prong was not.[218]

The supreme court affirmed and offered a string of non sequiturs as its rationale:

> Fowler did not offer evidence at trial which would support a theory he intended to intimidate the Verbons with his gun or that he displayed his gun in a manner which would cause the Verbons alarm. Instead, his testimony only addressed whether he had a gun at all, and if he did, whether it would have been visible as he began to remove his shirt. This testimony served merely to discredit the Verbons' testimony rather than support an instruction on the lesser included offense. It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given.[219]

This clearly has nothing to do with preclusion. The court assumes that the evidence prong concerns sufficiency of the evidence, and it then elaborates on that assumption using a flawed waiver theory. Not only must there be a certain amount of evidence, but the defendant must produce a certain portion of it. Just as the defendant can disavow his right to an instruction by choosing a particular defense, he can waive it by failing to come forward with evidence. The only problem with these corollaries to *Workman*'s second prong is that they have nothing to do with *Robinson*, *Pepoon*, or the preclusion that is unique to the doctrine of lesser included offenses.

Even more importantly, the *Fowler* court's analysis is an odd sort of appellate review for sufficiency of the evidence. When appellate courts do properly examine sufficiency of the evidence, the evidence is viewed in the light most favorable to the non-moving party. Furthermore, the question is not how the court would decide the issue, but whether the jury could rationally reach its conclusion.[220] These requirements are fun-

---

under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

217. *Fowler*, 114 Wash. 2d at 67, 785 P.2d at 813.

218. *Id.*

219. *Id.* (citations omitted).

220. As the court held in State v. Green, 94 Wash. 2d 216, 221, 616 P.2d 628, 632 (1980) (*Green* II) (citations omitted) (emphasis in original):

> This inquiry does not require the reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt.

damental because they frame a test of minimal rationality that guards against invasion of the jury's province to weigh the evidence and to arrive at its own conclusion. The same deference is due the jury in the context of lesser included offenses:

> Inasmuch, then, as the law gives the defendant the unqualified right to have the inferior degree passed upon by the jury, it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions. If there is even the slightest evidence that the defendant may have committed the degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given.[221]

These limitations were disregarded in *Fowler*. If the State happens to produce evidence in support of the lesser offense, but the defendant does not, *Fowler*'s requirement deprives the jury of a legitimate inference from the evidence it has before it. That, however, is an invasion of the jury's province to determine the case on a complete and accurate understanding of the law.

That, of course, was the hazard inherent in treating the evidence prong as a sufficiency of the evidence test. From the moment the court lost sight of preclusion and began to treat the evidence prong as something it is not, it was always free to disregard the restraints imposed on true sufficiency tests. In *Fowler*, the court did so.

Furthermore, *Fowler*'s burden of coming forward with evidence runs contrary to the underlying logic of the doctrine of lesser included offenses. By making the instruction unavailable even where there is evidence to support it, *Fowler*'s requirement increases the danger that a jury, faced with evidence of wrongdoing that is not quite sufficient to prove the offense charged, will nevertheless opt for conviction. This danger is the primary reason why lesser included offense instructions are available to the defense.[222] By disregarding this

---

> "Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*."

The criterion impinges upon a jury's discretion only to the extent necessary to protect the constitutional standard of reasonable doubt.

221. State v. Young, 22 Wash. 273, 276-77, 60 P. 650, 651 (1900) (citations omitted).

222. Keeble v. United States, 412 U.S. 205, 212-13 (1973).

danger, the *Fowler* court effectively repudiated decades of received wisdom on the subject.

Fowler's focus on the defendant's production of evidence is an example of the court's mistaking a symptom for the disease. If there is any evidence in support of the common elements that does not also establish the elements of the greater offense, that evidence is indeed most likely to come from the defendant. It is in his interest and often solely within his power to do so. By imposing a burden of coming forward with evidence, however, the *Fowler* court confused the effect of the evidence with its source. The court assumed that if the defendant did not come forward with evidence, there would be no evidence in support of the common elements that would not also establish the elements of the greater. That assumption is unwarranted. It is entirely possible that the State's case will include evidence that establishes the lesser offense but not the greater. There is no reason, given the general presumption in favor of giving the instruction, why the defendant should be denied the right to ask the jury to find the lesser offense so long as there is some evidence, from whatever source, upon which it rationally could do so.[223] After *Fowler*, however, there was almost no hope that the court would recognize preclusion by the evidence, even in a case as clear as *Speece*.

D. *Reformulating the Evidence Prong*

Having gone so far astray, it is now time for the Washington Supreme Court to return to a true understanding of the evidence prong. It should abandon *Workman*'s overly general requirement that the evidence support an inference that the lesser offense was committed. It should discard the corollaries like *Fowler*'s, which focus on the quantity of evidence, and those like *Bowerman*'s, which suggest that the defendant can somehow waive his right to a lesser included offense instruction. The court must adopt a standard properly premised on the type of preclusion by the evidence that is distinctive to lesser included offense analysis.

So far, this Article has employed the following formula: does the proof of the elements that the greater and lesser offenses have in common prove the absent elements of the greater offense? If the answer is yes, the instruction on the

---

223. This was once well recognized. *See* State v. Gottstein, 111 Wash. 600, 602, 191 P. 766, 767 (1920).

lesser offense is precluded. The jury could not rationally find the lesser offense was committed because the same evidence they would rely on in finding the lesser offense will inexorably carry them beyond it to a finding that the greater offense was committed.

Some refinements and clarifications are needed, however, before this test can be considered an effective evidence prong. To begin with, *Workman* framed the standard for lesser included offenses as two conditions that must be met in order to justify the instruction. The refinement of the first prong developed in Section III of this Article incorporates the inherent characteristic rule into the elements test, but otherwise retains *Workman*'s formulation. For the sake of consistency and clarity, then, it is best to also frame the evidence prong as a condition that must be met in order to justify the instruction. The following is probably the most clear: *An instruction on the lesser included offense may be given only if, construing the evidence in the light most favorable to the party requesting the instruction, there is some evidence in support of the common elements of the greater and lesser offenses that does not also establish the remaining elements of the greater offense.*

One point may need clarification. The evidence must be construed in favor of the party requesting the instruction because the law must err on the side of giving the instruction. Instructions on lesser included offenses are made available not only to give each side a fall-back strategy in the trial of the case, but also to ensure a close fit between the criminal code and the world in which crimes are committed. There is, therefore, a general presumption in favor of giving the instruction. The only limitation on that presumption is identified by *Robinson*: the need to avoid outright jury compromise or speculation. If, therefore, construing the evidence in the light most favorable to the requesting party, there is any evidence upon which the jury rationally could find that the lesser, but not the greater, offense was committed, the instruction ought to be given.

The case of *State v. Pacheco*[224] can be used to illustrate the proposed evidence prong. Pacheco robbed a grocery store.[225] He used a knife.[226] The robbery was videotaped, and the knife

224. 107 Wash. 2d 59, 726 P.2d 981 (1986).

225. *Id.* at 61, 726 P.2d at 982.

226. *Id.*

was plainly visible.[227] Pacheco was charged with first degree robbery under the deadly weapon alternative.[228] He requested instructions on second degree robbery, which is identical to first degree robbery without the deadly weapon element,[229] and on unlawfully carrying a weapon.[230] The instructions were properly refused.[231]

The reason the instructions were properly refused is clear from the test proposed above. The jury could not rationally find that second degree robbery had been committed. The evidence that would have established the common elements of first and second degree robbery—the taking of property from a person or in his presence by the use or threatened use of force—was the videotape. That evidence of the common elements, however, also established the remaining element of the greater offense: the use of a deadly weapon. It was not possible to separate the threatened use of force from the use of a knife. The jury was precluded from finding the lesser offense had been committed.

Likewise, the jury could not have found Pacheco guilty of unlawfully carrying a weapon. The only evidence demonstrating that Pacheco had carried a knife also showed that he had

227. *Id.* at 61-62, 726 P.2d at 982-83.

228. Robbery is defined in WASH. REV. CODE § 9A.56.190 (1989) as follows:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Robbery in the first degree is defined in WASH. REV. CODE § 9A.56.200(1) (1989) as follows:

> A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he:
> (a) is armed with a deadly weapon; or
> (b) displays what appears to be a firearm or other deadly weapon; or
> (c) inflicts bodily injury.

229. WASH. REV. CODE § 9A.56.210(1) (1989) provides as follows: "A person is guilty of robbery in the second degree if he commits robbery."

230. WASH. REV. CODE § 9.41.270(1) (1989) provides as follows:

> It shall be unlawful for anyone to carry, exhibit, display or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

231. *Pacheco*, 107 Wash. 2d at 70, 726 P.2d at 987.

committed a robbery with it. Because the proof of the common elements also proved the remaining element of the greater offense, the jury could not rationally have found that the lesser offense was committed.

In articulating this sort of preclusion, the proposed evidence prong is clearly superior to *Workman*'s formulation. It addresses the distinctive danger to rational jury verdicts that lesser included offense analysis presents. In a sense, the evidence prong is a cure for the elements prong. No one would ever request an instruction that the evidence does not support were it not for the specious objection with which this discussion began: If the defendant necessarily committed the elements of the lesser in the course of committing the greater offense, it seems the evidence must always be sufficient to support an instruction on the lesser. As *Robinson* demonstrated, however, the mere comparison of elements raises a danger of compromise verdicts.[232] There must be an inquiry beyond comparing the elements of the offenses, *i.e.*, something to tie that inquiry to the real world in which bad acts and the means by which they are accomplished are inseparable. As *Pepoon* stressed, the mere comparison of elements is an abstraction, and a jury verdict based on that alone, without regard to the evidence, cannot be just.[233]

The proposed rule provides that inquiry without duplicating the general requirement that there be sufficient evidence to support the instruction, and without suggesting that the defendant, in his choice of defense or otherwise, has waived the right to draw out the implications of the State's case.

V. CONCLUSION

It is no light matter to suggest that the Washington Supreme Court ought to abandon a legal standard that has been in use for over a decade. This Article has demonstrated, however, that the *Workman* standard for lesser included offenses is hemmed in on all sides by error. The cases before *Workman* were misunderstood and misrepresented in the formulation of the evidence prong. The cases after *Workman* have failed to appreciate the elements prong or to capitalize on the promise represented by the inherent characteristic rule. Reform is, if anything, overdue.

232. State v. Robinson, 12 Wash. 349, 350-51, 41 P. 51, 51 (1895).
233. State v. Pepoon, 62 Wash. 635, 640, 114 P. 449, 451 (1911).

The reform proposed here is a replacement of *Workman*'s formulation of the two prong test. The proposed first prong consists of the elements test as stated by *Workman*, with the addition of the inherent characteristic rule. The second prong is a complete re-statement of the evidence prong derived above. The proposed standard provides as follows: *An instruction on a lesser included offense is proper where two conditions are met. First, a lesser offense is a lesser included offense if each element of the lesser offense is either an element or an inherent characteristic of the greater offense. Second, an instruction on the lesser included offense may be given only if, construing the evidence in the light most favorable to the party requesting the instruction, there is some evidence in support of the common elements of the greater and lesser offenses that does not also establish the remaining elements of the greater offense.*

Because it heeds the meaning of the early cases, this proposed standard would serve the courts and the criminal law bar, the defense and the prosecution, as well as the criminal code and justice itself, far better than the present law.