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FACT-FINDING AND THE DEATH PENALTY: THE SCOPE OF A CAPITAL DEFENDANT'S RIGHT TO JURY TRIAL

Welsh S. White*

I. Introduction

The Ninth Circuit's decision invalidating the sentencing provision of the Arizona death penalty statute in *Adamson v. Ricketts*¹ raises an important question pertaining to the scope of the defendant's sixth amendment right to jury trial. The Arizona statute provides that the judge will sentence a defendant convicted of first degree murder to death if, but only if, she finds, first, that one or more statutorily specified aggravating circumstances are present,² and, second "that there are no mitigating circumstances sufficiently substantial to call for mercy."³ In *Adamson's* case, the judge imposed the death penalty after finding as aggravating circumstances that the murder was committed with a motive of "pecuniary gain"⁴ and that the murder was committed in an "especially heinous, cruel or depraved" manner.⁵ In *Adamson v. Ricketts*,⁶ the Ninth Circuit held that the Arizona Death Penalty statute deprives capital defendants of their right to a jury decision on the elements of the crime in violation of the sixth and fourteenth amendments.⁷

The Ninth Circuit's holding at first seems inconsistent with two recent Supreme Court decisions: *McMillan v. Pennsylvania*,⁸ holding that an enhanced minimum sentence may be imposed on the basis of a judge's finding that the defendant "visibly possessed a firearm" during the commission of a felony, and *Spaziano v. Florida*,⁹ (affirmed in *Hildwin v. Florida*)¹⁰ holding that the judge may make the sentencing decision in capital cases. In its opinion, the Ninth Circuit distinguished both of these cases: *McMillan*, on the ground that the consequences turning on the judge's

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1 *Adamson v. Ricketts*, 865 F.2d 1011, 1029 (9th Cir. 1988).

2 ARIZ. REV. STAT. ANN. § 13-703(E) (1978).

3 *Id.*

4 *Id.* at § 13-703(F)(5).

5 *Id.* at § 13-703(F)(6).

6 865 F.2d 1011 (9th Cir. 1988).

7 *Id.* at 1023. The Ninth Circuit held that the defendant's death penalty was also unconstitutional on at least two other grounds: First, because the judge had sentenced the defendant to 48-49 years in prison following the defendant's earlier guilty plea to the same charge, the judge's imposition of the death penalty in the defendant's case was arbitrary in violation of the eighth and fourteenth amendments, 865 F.2d at 1020; and, second, the aggravating circumstance that the murder was "especially heinous, cruel, or depraved," which was found to exist in the defendant's case, "violate[d] the Eighth and Fourteenth Amendments by failing to channel adequately the decisionmaker's discretion." *Id.* at 1029.

8 477 U.S. 79 (1986).

9 468 U.S. 447 (1984).

10 109 S. Ct. 2055 (1989).

finding of fact—an increase in the minimum sentence in that case as opposed to a raising of the sentence from life imprisonment to death in *Adamson*—were relatively insignificant,¹¹ and *Spaziano*, on the ground that the Court in that case “never addressed an element of judicial fact-finding as to an element of the offense.”¹²

Near the beginning of its analysis, the Ninth Circuit stated that “[t]he historic roots of the right to jury trial provide an essential backdrop”¹³ to the consideration of the issue presented. In the remainder of its opinion, however, the court did not refer to the historical evidence relating to the scope of the jury’s fact-finding authority but instead assessed the constitutionality of Arizona’s sentencing scheme in light of the modern Supreme Court decisions, particularly *McMillan* and *Spaziano*.¹⁴

In this Article, I will consider historical evidence relating to the scope of the jury’s fact-finding authority as well as the modern Supreme Court decisions that bear on that issue. Using both of these sources, my goal will be to develop a test for determining the circumstances under which a defendant will have the constitutional right to a jury determination of facts that lead to enhanced sentencing. Although my test will have general applicability, my primary focus will be on situations like *Adamson* in which a finding of specific facts leads to a determination that the defendant will be eligible for capital punishment.

Thus, my approach will be both normative and descriptive. Through examining historical antecedents of the right to jury trial, Part II will identify some of the concerns that should be important in defining the scope of a defendant’s constitutional right to jury fact-finding. Shifting to the modern era, Part III will consider the Supreme Court decisions that are pertinent to the capital defendant’s right to jury trial at sentencing. Drawing upon both of these sources, Part IV will develop and apply to the *Adamson* facts a test for determining the circumstances under which a defendant will have the constitutional right to a jury determination of facts that lead to an enhanced sentence. Part V will conclude with some further applications of the test and some general observations.

II. Historical Antecedents of the Right to Jury Trial

A. *The Relevance of History*

What bearing should historical practices have on the scope of a defendant’s constitutional right to jury trial?¹⁵ Although a strict interpretivist might argue that the jury trial guaranteed by the sixth amendment should conform in all respects to the jury trial afforded criminal defendants at the time of the sixth amendment’s adoption,¹⁶ the Supreme Court

¹¹ 865 F.2d at 1027.

¹² *Id.* at 1028.

¹³ *Id.* at 1023.

¹⁴ See 865 F.2d at 1023-29.

¹⁵ For a discussion of this question, see generally Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1267-69 (1986).

¹⁶ See, e.g., R. BERGER, *DEATH PENALTIES* 66 (1982):

The Framers expressed their consent in well-understood common law terms. Substitution by the Court of its own meaning for that of the Framers changes the scope of the

has already indicated that the scope of the right to jury trial will be dictated not so much by the nature of jury trials that took place in 1791¹⁷ as by the historic concerns relating to jury trials that led to the adoption of the sixth amendment.¹⁸

In *Duncan v. Louisiana*¹⁹ the Court articulated the essential concern that prompted the enactment of the defendant's constitutional right to jury trial:

[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.²⁰

Thus, the jury's essential role is to prevent government oppression by serving as a buffer between the government and the individual.²¹ In assigning the jury this role, the framers of course drew from the English as well as the colonial experience. The right to jury trial that the framers viewed as an indispensable safeguard against government oppression was essentially the right to jury trial that had evolved in England over the course of several centuries.²² Thus, the historic concerns that led to the adoption of the sixth amendment right to jury trial are rooted to some extent in the historical evolution of the English jury. In order to ascertain these concerns, it is necessary to identify those aspects of the English jury that might have seemed particularly pertinent during the period when the Bill of Rights was adopted.

During the late eighteenth century, when the Bill of Rights was adopted,²³ the English jury (and its colonial counterpart) served as a

people's consent, displaces the Framers' value choices, and violates the basic principle of government by consent of the governed.

17 Thus, the Court in *Williams v. Florida*, 399 U.S. 78, 92 (1970), rejected the "assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."

18 "The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial." *Id.* at 99.

19 391 U.S. 145 (1968).

20 391 U.S. at 156.

21 In apparent response to Justice Harlan's observation "that the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared [because] . . . judges . . . are elected by the people or appointed by the people's elected officials," 391 U.S. at 188 (Harlan, J., dissenting), the majority said "[t]he framers of the constitution[] strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing the accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S. at 156.

22 See, e.g., *Duncan v. Louisiana*, 391 U.S. at 151 ("[B]y the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta."). See generally F. McDONALD, *NOVUS ORDO SECLORUM* 40 (1985) ("Having a voice . . . in the lawmaking process was not the only right of Englishmen in regard to government, nor was it even the most important: the genuinely crucial right was that of trial by jury.").

23 The Bill of Rights was adopted in 1791. See, e.g., R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 217 (1955); Levy, *Bill of Rights*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 289 (L. Levy ed. 2d ed. 1987).

buffer against government oppression primarily by being the final arbiter on all questions of fact. In 1765, Sir William Blackstone, an authority who had enormous influence in the United States as well as in England,²⁴ referred to the English jury as the grand "palladium" of English liberty.²⁵ In delineating the jury's authority, he distinguished between questions of fact and questions of law, explaining that "the principles and axioms of law . . . should be deposited in the breasts of the judges But in settling and adjusting a question of fact . . . a competent number of sensible and upright jurymen . . . will be found the best investigators of truth and the surest guardians of public justice."²⁶ Twenty-two years later, a lesser known English commentator stated the same point more emphatically: "All that I have said or have to say upon the subject of Juries, is agreeable to this established maxim: 'that Juries must answer to questions of Fact and Judges to questions of Law.' This is the fundamental maxim acknowledged by the Constitution."²⁷ Later authorities echoed this view of the jury's role.²⁸

The maxim that the jury must determine questions of fact does not in itself clearly define the jury's constitutional role, however. The commentators' statement of the jury's authority indicates that a defendant who has the right to jury trial has a constitutional right to have the jury rather than the judge make certain determinations, but exactly which ones are uncertain. Distinguishing between questions of fact and questions of law (or questions of mixed law and fact) may be extremely difficult.²⁹ Moreover, as Professor James Bradly Thayer pointed out,³⁰ the

24 Included among those who read and acknowledged the authority of Blackstone's *Commentaries* were John Adams, Nathaniel Green, James Madison, Alexander Hamilton, John Jay and Patrick Henry. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 743-45 (1976) [hereinafter Nolan]. See also B. MITCHELL & L. MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF UNITED STATES 22 (1964).

25 4 W. BLACKSTONE, COMMENTARIES *350.

26 3 W. BLACKSTONE, COMMENTARIES *379-80.

27 E. WYNNE, 3 EUNOMUS: DIALOGUES CONCERNING THE LAW AND CONSTITUTION OF ENGLAND 217 (2d ed. 1785).

28 See, e.g., *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (opinion by Story, J.) ("I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law."). See generally J. PROFFATT, A TREATISE ON TRIAL BY JURY 318-19 (1880):

The importance of the distinction was pointed out by Lord Hardwicke when he said: "It is of the greatest consequence to the law of England, and the subject, that the powers of the judge and jury be kept distinct; that the judge determine the law and the jury the fact; and if ever they become to be confounded, it will prove the confusion and the destruction of the law of England." (quoting *Rex v. Poole*, 95 Eng. Rep. 15, 18, *Cases Tempore Hardwicke* 23, 28 (1734));

W. FORSYTH, HISTORY OF TRIAL BY JURY 235 (Morgan ed. 1875):

The distinction between the province of the judge and that of the jury is, in the English law, clearly defined, and observed with jealous accuracy. The jury must in all cases determine the value and effect of evidence The law throws upon them the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect. (emphasis added).

See also 3 COKE ON LITTLETON *155b ("The most usual trial of matters of fact is by twelve . . . men . . . and matters of law the judge ought to decide").

29 "[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive [T]he court has yet to arrive at a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Miller v. Fenton*, 474 U.S. 104, 113 (1985).

jury's power to decide questions of fact is not absolute because the judge has always decided certain questions of fact—the most obvious example being questions of fact that relate to the admissibility of evidence.³¹

Thus, in defining the scope of the jury's constitutional fact-finding power, historical sources will be particularly helpful in identifying the types of determinations that those who adopted the sixth amendment right to jury trial and the commentators who supported and influenced its adoption were likely to view as questions of fact for the jury. Since English legal scholars,³² whose view of the jury trial was shaped by their knowledge of the development of the English jury, undoubtedly influenced the framers, historical material relating to the English jury's role in determining facts may be particularly relevant. In addition, certain controversies relating to the development of the English jury—because of their relationship to events in seventeenth- or eighteenth-century America—would have been likely to have a special impact on the framers. With these considerations in mind, I will examine the English jury's fact-finding role in thirteenth- to eighteenth-century homicide cases and in eighteenth-century seditious libel cases.³³

A. *The English Jury's Role in Homicide Cases*

1. The Jury's Role During the Middle Ages

The precise origins of the English jury are uncertain.³⁴ By the middle of the thirteenth century, however, the jury had displaced trial by

30 J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185 (1898).

31 See generally Kaplan, *Of Mabrus and Zorg—An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987 (1978).

32 For example, in *The Federalist*, Alexander Hamilton, quoting Blackstone's famous phraseology, referred to trial by jury as "the very palladium of free government." THE FEDERALIST No. 83, at 499 (A. Hamilton) (Heirloom ed. 1966). Later, in another work, Hamilton quoted Blackstone again, this time to illustrate the importance of jury trials as safeguards against the "dangerous engine of arbitrary government." *Id.* at 512.

33 The English jury's fact-finding role in thirteenth- to eighteenth-century homicide cases is obviously relevant because it provides the best evidence of the framers' view of the jury's fact-finding role in homicide cases. The jury's fact-finding role in eighteenth-century seditious libel cases would have a particular significance to the framers because controversies relating to freedom of expression, particularly the right to criticize government, were of special interest to the framers of the Constitution and the Bill of Rights. See generally R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 28 (1955) (One of the earliest resolutions of the Declarations of Rights was establishing freedom of the press to diffuse "liberal sentiments on the administration of Government . . . whereby oppressive officers are shamed . . . into more honourable and just modes of conducting affairs."). See also *infra* note 68. See also Levy, *Bill of Rights*, in ESSAYS ON THE MAKING OF THE CONSTITUTION 302-03 (L. Levy ed. 2d ed. 1987).

34 The jury trial system was developed primarily during the reign of King Henry II. The Assizes of Clarendon (12 Hen. 2, c. 1, 1166) and Northampton (22 Hen. 2, c. 7, 1176) provided that twelve men out of every hundred would periodically be summoned to report on crimes occurring in their neighborhoods. If, after evaluating the evidence, these presenting juries determined that the accusations had merit, the perpetrators were subjected to trial by ordeal to determine their guilt.

Suspects were occasionally allowed to circumvent this system through the use of an appeal. Different from the modern day procedure of the same name, little else is known about the twelfth-century appeals process other than it led, if granted, to an inquest. There, the jury (usually different in composition from the presenting jury) would consider the facts of the case. If the accused was found to be guilty, he still had to face the physical proof of trial by ordeal.

When trials by ordeal were forbade by the Fourth Lateran Council in 1215, this inquest system gradually replaced them. At first, prisoners were given a choice between imprisonment (and inevitable torture) and jury trial, but by 1275 the latter was considered to be the common law of the land.

ordeal as the primary means for deciding criminal cases.³⁵ As Professor Thomas Green has shown, “[t]he early English jury was self-informing and composed of persons supposed to have first-hand knowledge of the events and persons in question. The judge instructed the jury on the law, but was himself almost entirely dependent upon the jury for his knowledge of the case.”³⁶ Thus, the original basis for the jury’s role as fact-finder was that the jurors were the only ones who knew the facts.

During the period when the jury had special knowledge of the facts, the law of homicide was harsh. Although Anglo-Saxon law had distinguished between cold-blooded killing and killing in the heat of passion—reserving the death penalty only for the former³⁷—the reforms of Henry II obliterated this distinction and, with a few exceptions, made all intentional killings capital offenses.³⁸

The most important of the exceptions related to killings in self-defense. A defendant who intentionally killed in self-defense committed excusable homicide³⁹ and was not eligible for capital punishment.⁴⁰ The legal definition of self-defense was extremely restrictive, however. Professor Green’s research indicates that “[b]y the early thirteenth century, this crucial category had come to be defined as slaying out of literally vital necessity: the slayer, under mortal attack, had acted as a last resort to save his own life.”⁴¹

This harsh law of homicide—providing the death penalty for people who killed after they were provoked or even after they were feloniously attacked but had an opportunity to flee so as to avoid the use of deadly force—undoubtedly clashed with community perceptions relating to just deserts.⁴² As representatives of the community, the jury had an opportu-

See generally A. KIRALFY, POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 240-48 (4th ed. 1958); T. PLUNCKNETT, A CONCISE HISTORY OF THE COMMON LAW 112-20 (1956); Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1 (1982); Groot, *The Jury in Private Criminal Prosecutions Before 1215*, 27 AM. J. LEGAL HIST. 113 (1983); Groot, *The Early-Thirteenth-Century Criminal Jury*, in TWELVE GOOD MEN AND TRUE 3 (J. S. Cockburn & T. A. Green eds. 1988).

³⁵ Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 414, 421 (1976) [hereinafter Green I]. See also T. GREEN, VERDICT ACCORDING TO CONSCIENCE 19 (1985) [hereinafter GREEN II].

³⁶ Green I, *supra* note 35, at 414. This strict division of labor was not uniformly observed, however; juries sometimes passed on questions of law as well as fact. Chief Justice Green acknowledged this in 1364 when he instructed a jury to “[t]ell us the whole case, and let us get together . . . on the law.” Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 AM. J. LEGAL HIST. 267, 277 (1974). This occasional acquiescence to the juries’ ability to determine questions of law was partly due to the prevailing view during the middle ages that law and morals were essentially coterminous. Therefore, a juror who voted his conscience was usually well within the confines of the law. *Id.* at 279.

³⁷ Green I, *supra* note 35, at 416.

³⁸ See 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 458-60 (2d ed. 1898).

³⁹ By the thirteenth century, both felonious (slaying with criminal intent) and nonfelonious homicide were recognized. The latter included two categories: justifiable and excusable. A killing was justifiable if it occurred during an arrest of thieves or outlaws or by execution following a lawful court order. Excusable homicide was reserved for those who killed accidentally, in self-defense, or were of unsound mind. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 358-59 (4th ed. 1927).

⁴⁰ Felonious homicide was punishable by forfeiture of life or limb whereas a justifiable killing led to acquittal. Excusable homicide was not as simple. The slayer was required to secure a royal pardon; although this granted him immunity from royal suit, he was still vulnerable to a suit by the victim’s family. *Id.*

⁴¹ Green I, *supra* note 35, at 420.

⁴² *Id.*

nity to mitigate the harshness of the law by finding the facts in a way that would restrict the use of capital punishment. Professor Green's research indicates that the early jury took advantage of this opportunity.⁴³ Based on a comparison between the original charges and verdicts as well as an examination of the proportion of cases involving acquittals and findings of self-defense,⁴⁴ he concludes that by the end of the fourteenth century the jury exercised substantial nullification power: "[D]uring the later Middle Ages jury convictions were largely limited to the most culpable homicides. Defendants who had committed simple homicides, loosely corresponding to the modern categories of unpremeditated murder and manslaughter, received acquittals or were found to have killed in the course of excusable self-defense."⁴⁵

2. The Jury's Role During the Sixteenth to Eighteenth Centuries

During the sixteenth and seventeenth centuries, the modern criminal trial evolved.⁴⁶ By the end of this period, witnesses testified to evidence in a court presided over by a judge. After being charged by the judge, the jury returned its verdict based on the evidence presented.⁴⁷ Because the jury no longer had personal knowledge of the facts, the Crown's power to control or influence jury verdicts increased. Professor John Langbein's examination of seventeenth-century criminal trials⁴⁸ indicates that judges sometimes exercised this power by essentially directing a guilty verdict⁴⁹ or refusing to accept the jury's not guilty verdict.⁵⁰ Moreover, when the jury was recalcitrant, judges sometimes resorted to even sterner measures. On occasion, juries were threatened with fines or even imprisonment if they failed to return the verdict sought by the Crown.⁵¹

During this same period, the law of homicide became more complex. The concepts of killing in "hot blood"⁵² or without premeditation⁵³ became important for the purpose of determining which offenders would be likely to be spared capital punishment because they were eligible for

43 *Id.* at 432.

44 *Id.* at 430.

45 *Id.* at 432.

46 See generally Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 314-15 (1973) [hereinafter Langbein, *Origins*].

47 See GREEN II, *supra* note 35, at 273.

48 Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978) [hereinafter Langbein, *Criminal Trial*].

49 Langbein, *Criminal Trial*, *supra* note 48, at 286.

50 *Id.* at 291-96.

51 4 W. BLACKSTONE, COMMENTARIES *361; 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 344 (5th ed. rev. 1942); T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 138 (6th ed. rev. 1905); GREEN II, *supra* note 35, at 209.

52 By 1612 the charge for any killing in hot blood, upon provocation, was manslaughter, not murder. Half a century later the definition narrowed. Mere words were no longer sufficient to constitute provocation unless they resulted in a brawl in sudden heat. 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 303 (4th ed. 1927).

53 Several statutes during this time noted the distinction of killing with malice aforethought including: 4 Hen. 8 (1512) ("murder upon malice prepensed"); 23 Hen. 8 (1531) ("willful murder of malice prepensed"); and 1 Edw. 6 (1547) ("murder of malice prepensed"). See 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 44 (1883).

benefit of clergy.⁵⁴ Since these concepts related to a defendant's state of mind,⁵⁵ the murkiness of the required factual determinations inevitably vested the jury with considerable discretion. Confronted with a case in which a defendant killed another person under extenuating circumstances, a jury's determination that the defendant acted in "hot blood" or without premeditation could not easily be called into question. "[I]n fact many cases lay so close to the legal line between capital and clergy-able homicide that the bench had no grounds for second-guessing the jury."⁵⁶

Because of these doctrinal developments, the law of homicide now more closely mirrored community values. This change, as well as the subjective nature of the factual findings required, decreased the possibility of friction between the Crown and juries. In contrast to the earlier period,⁵⁷ juries would be more likely to find the facts in a way that judges would view as acceptable. Moreover, to the extent that the jury continued to find facts against the evidence in order to remove a particular homicide defendant from the threat of the death penalty, judges may have sometimes welcomed this means of mitigating the law's harshness.⁵⁸

Nevertheless, by the end of the seventeenth century, it was apparent that the tension between judges and juries had increased. This heightened tension was particularly obvious in trials involving seditious libel or other political offenses.⁵⁹ But it was also evident in homicide trials. When Chief Justice Kelynge was charged with improper judicial conduct in 1667, three of the charges against him related to his coercion of juries in homicide cases.⁶⁰ In one, for example, "a master's helper had beaten a boy 'about the head with a broomstaff' for doing careless work.

54 The concept of benefit of clergy developed late in the twelfth century. Ordained clergymen who committed felonies were initially tried by the Crown, and, if found guilty, were subsequently tried by an ecclesiastical court. If convicted a second time, the clergymen were subjected only to such punishment as the latter courts could inflict. These included relegation to a monastery, branding with an iron and life imprisonment, but stopped short of the death penalty. I F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 441-42 (2d ed. 1898).

By the end of the fifteenth century, the nature of the protection had changed. Although it had expanded to include not only anyone even marginally connected with the church but also anyone who could read, certain crimes were excluded from its scope. Statutes were enacted between the sixteenth and eighteenth centuries that declared at least 160 offenses, including murder, to be felonies without benefit of clergy. The protection was abolished altogether in 1827. 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 297, 301 (5th ed. rev. 1927). See also 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 465-72 (1883); A. MANCHESTER, *MODERN LEGAL HISTORY* 249 (1980).

55 See, e.g., *Regina v. Mawgridge*, 84 Eng. Rep. 1107, 1111 (1708):

[H]e that designs and useth the means to do ill is malicious. . . . He that doth a cruel act voluntarily, doth it of malice prepensed. . . . Therefore when a man shall without any provocation stab another with a dagger . . . this is express malice, for he designedly and purposely did him the mischief.

56 GREEN II, *supra* note 35, at 126.

57 See *supra* text accompanying notes 32-44.

58 GREEN II, *supra* note 35, at 149.

59 See 8 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 345 (7th ed. 1956); T. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 124 (10th ed. 1946).

60 Chief Justice Kelynge was only two years into his service as Chief Justice of the King's Bench when charges against him for scandalous behavior were brought before the House of Commons. In addition to vilifying the Magna Carta and making arbitrary rulings, he was accused of compelling jurors to find verdicts contrary to their inclinations. When they returned verdicts in opposition to his direction, Chief Justice Kelynge did not hesitate to threaten them with fines or imprisonment until the desired results were reached. This conduct was seen as particularly indefensible with re-

Kelynge would not accept a verdict of manslaughter and threatened the jury with a fine. This produced the result he wanted: murder was found, and the defendant was hanged, in spite of the recommendation of 'gentlemen' of the county that he be spared."⁶¹ The charges against Kelynge led to a House of Commons resolution that a bill should be drafted making the threatening of jurors with fines and imprisonment as a result of their verdicts illegal. Although the bill died in committee, the principle stated therein was essentially adopted in *Bushell's Case*, decided three years later.

Bushell's Case held that a judge could not fine or imprison the jury because he disagreed with its verdict.⁶² As Langbein has demonstrated,⁶³ *Bushell's Case*, in itself, did not free jurors from the possibility of coercion from the Crown because judges could influence jurors through other means besides threatening them with fine or imprisonment.⁶⁴ Nevertheless, Langbein concludes that "*Bushell's Case* did indeed become a landmark in expanding the province of the jury, but not for about a century after it was decided."⁶⁵ Thus, by the time the sixth amendment was adopted, the principle established in *Bushell's Case* had expanded so as to provide the jury with authority to determine facts without interference.

The jury's power to determine facts without interference was not viewed as an unmixed blessing by eighteenth-century legal scholars.

gard to homicide cases, where it was "of dangerous consequence to the lives and liberties of the people of England." 1 J. CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES* 509-10 (1849).

61 GREEN II, *supra* note 35, at 214.

62 *Bushell's Case* arose after a London jury acquitted William Penn and his co-preacher William Meade of the charge of causing an unlawful assembly and a disturbance of the peace. Dissatisfied with this verdict, the judge fined the jurors for finding contrary to the evidence and the law. Bushell, one of the jurors, was imprisoned because of his refusal to pay the fine. He sought his release by filing a writ of habeas corpus, claiming that his imprisonment was unlawful because the judge lacked power to fine jurors as a result of their verdicts. See GREEN II, *supra* note 35, at 221-26. Thus, *Bushell's Case* raised the basic issue of whether the jury could be punished for exercising its authority to acquit in the face of the evidence.

Chief Justice Vaughan's opinion in *Bushell's Case* held that jurors may not be fined or imprisoned for their verdicts. Case of the Imprisonment of Edward Bushell, 6 Howell's State Trials 999, 1010, 124 Eng. Rep. 1006, 1012 (1670). Although Penn and Meade had argued at their trial that the jury had power to reject an unjust law, see GREEN II, *supra* note 35, at 223, Vaughan's holding was justified entirely on the basis that the jurors have sole authority to determine the facts. Chief Justice Vaughan supported this position primarily on the ground that the jury's role has always been to determine the true facts and there is no reason to suppose that the judge or anyone else is in a better position to make that determination. Thus, it follows that the jury's authority to determine questions of fact precludes a judge from concluding that a jury's verdict is contrary to law. *Bushell's Case* at 1012.

63 Langbein, *Criminal Trial*, *supra* note 48, at 298.

64 For example, in the case of Ralph Leach, reported in the Old Bailey Sessions Papers (OBSP), December, 1678, the jury was directed to find the defendant guilty despite his testimony that the silk stockings he allegedly stole were secured as payment of an outstanding debt. See Langbein, *Criminal Trial*, *supra* note 48, at 286. In Stephen Arrowsmith's case, also reported in OBSP, December, 1678, the defendant was tried for the statutory rape of a nine year old girl. The jury responded to Arrowsmith's evidence by acquitting him. However, the court, clearly displeased by this verdict, instructed the jury to "reconsider" its decision. After the second deliberation, the jury convicted Arrowsmith, who was subsequently sentenced to death. Langbein, *Criminal Trial*, *supra* note 48, at 291-95.

Finally, the case of Hugh Coleman, OBSP, February, 1718, involved a charge of bigamy. It became clear to the judge during the trial that there would not be sufficient evidence to convict. He brought the proceedings to an abrupt halt and told the defendant's wives to obtain better proof, noting that Coleman would remain imprisoned in the meantime. Langbein, *Criminal Trial*, *supra* note 48, at 287, 291-95.

65 Langbein, *Criminal Trial*, *supra* note 48, at 298.

During the late eighteenth century, Cesare Beccaria's treatise, *On Crimes and Punishments*,⁶⁶ precipitated an English movement towards penal reform.⁶⁷ One of the reform movement's central tenets was that certainty of punishment was the best deterrent to crime. The English jury system—under which the jury exercised considerable discretionary authority to acquit or find the defendant guilty of a lesser offense against the evidence—decreased the likelihood that a given punishment would be imposed for a particular offense. This led some of the eighteenth-century English reformers to oppose jury mitigation in traditional felony cases.⁶⁸

William Blackstone, whose *Commentaries on the Laws of England*⁶⁹ was widely read and accepted by the drafters of the Constitution and the Bill of Rights,⁷⁰ was one of the eighteenth-century English reformers who recognized the conflict between the reform movement's penological goals and the role traditionally played by the English jury. Significantly, however, Blackstone did not advocate any major alteration of the jury's role. On the contrary, he concluded that whatever reforms were undertaken regarding sanctions for common law felonies, the jury would have to retain its traditional fact-finding power because "in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another."⁷¹ Although retaining juries would undoubtedly occasion some costs—in terms of inconsistent punishments—these costs to Blackstone were merely "inconveniences"⁷² that would have to be borne because of the importance of retaining the jury.⁷³

Thus, by the time the Bill of Rights was adopted at the end of the eighteenth century, the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established. Throughout its history, the jury determined which homicide defendants would be subject to capital

66 C. BECCARIA, *ESSAY ON CRIMES AND PUNISHMENTS* (1767).

67 On the impact of Beccaria's thinking on late eighteenth- and early-nineteenth-century England, see A.H. MANCHESTER, *A MODERN LEGAL HISTORY OF ENGLAND AND WALES, 1750-1950* 240 (1980). On his influence in America, see J. Funston & R. Funston, *Cesare Beccaria and the Founding Fathers*, 3 *ITALIAN AMERICANA* 73 (1976).

68 See GREEN II, *supra* note 35, at 290-91.

69 W. BLACKSTONE, *COMMENTARIES*.

70 Unlike the works of many legal commentators before him, Blackstone's *Commentaries* was comprehensive, relatively easy to read and required no prior legal study. Therefore, it was an instant success in the United States as well as in England. Among those who ordered copies of the domestic edition were sixteen signatories of the Declaration of Independence, six delegates to the 1787 Constitutional Convention, one future President of the United States and one future Chief Justice of the Supreme Court. Nolan, *supra* note 24, at 736-37, 743-44. See also *supra* note 24.

71 4 W. BLACKSTONE, *COMMENTARIES* *343.

72 *Id.* at *344.

73 "[T]he liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks . . . but also from all secret machinations which may sap and undermine it . . ." *Id.* at *343.

punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind.⁷⁴ By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.

3. The Libel Law Controversy

The seditious libel cases of the eighteenth century are important both because of their impact in defining the jury's fact-finding role and their probable significance to the framers of the Bill of Rights. The cases have a significant bearing on the scope of the jury's role in fact-finding because they involved a situation in which there was a serious and prolonged debate concerning the allocation of fact-finding authority between judge and jury. Moreover, in view of the framers' special concern for laws that restricted freedom of speech, this debate undoubtedly played an important part in shaping the framers' view of the jury's role in fact-finding.⁷⁵

Seditious libel was originally a common law crime.⁷⁶ Thus, its elements were not authoritatively set down but evolved over the course of time. In order to establish seditious libel in England during the eighteenth century, the prosecution apparently had to prove at least that the writing in question was seditious and that the defendant's act of publishing it was malicious.⁷⁷ The jury's role in fact-finding was extremely limited, however.⁷⁸ It was required to return "a general verdict of 'guilty' if it found that the accused intentionally published the writing and that the writing bore the meaning alleged by the prosecution."⁷⁹ In the event of

⁷⁴ For example, Judge Cardozo commented on the difficulty in determining whether a killing was premeditated:

If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypothesis of the intent. What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy.

B. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 99-100 (1931). See also C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 48-50 (1974) (difficulty in determining distinctions between different states of mind).

⁷⁵ Publicity generated by seditious libel cases in the eighteenth century served to create a new awareness among American colonists of the need for freedom of speech and of the press. Blackstone's view, that the latter guaranteed only lack of prepublication restrictions and that open criticism of the government still bore the threat of liability, fell into disfavor. Instead, the notion grew that people should decide for themselves whether certain publications were libelous. The evolution of first amendment protection and of the changing role of juries to fact-finders were both logical consequences of this gradually emerging attitude. N. ROSENBERG, *PROTECTING THE BEST MEN* (1986) [hereinafter N. ROSENBERG]. See also Nelson, *Seditious Libel in Colonial America*, 3 AM. J. LEGAL HIST. 160 (1959) (use of seditious libel as a means of governmental control over the press was largely eliminated by the Zenger trial in 1735); See *supra* note 33.

⁷⁶ See 8 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 340-46 (4th ed. 1927).

⁷⁷ More specifically, the mid-eighteenth-century common law crime of seditious libel consisted of 1) the intentional, 2) publication of a, 3) written, 4) blame of any public man, or of the law, or of any institution established by law, 5) without lawful excuse or justification. Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 762 (1986). Establishing that the defendant intentionally published a statement referring to the subject in question usually was sufficient to meet all five elements. See also W. HOLDSWORTH, *supra* note 76, at 342.

⁷⁸ See GREEN II, *supra* note 35, at 319; T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 500-01 (5th ed. 1956). See also W. ODGERS, *AN OUTLINE OF THE LAW OF LIBEL* 201 (1897).

⁷⁹ *Id.* at 319.

a guilty verdict, the judge would then resolve the ultimate question of guilt or innocence by determining "as matters of law two questions that had the appearance of questions of fact: whether the act was done with criminal intent, and whether the writing was seditious or defamatory."⁸⁰

The jury's limited role in fact-finding was attacked on two fronts. Adopting the view that the jurors are ultimate judges of the law as well as facts, some commentators argued that the jury "must acquit if it is convinced that the facts charged in the indictment do not amount to a crime."⁸¹ Others took a more limited approach that focused entirely on the restrictions placed on the jury's role in fact-finding. One argued, for example, that as "judges of fact . . . the jury must consider all the 'circumstances,' (e.g., truth, intent) involved."⁸² Significantly, lawyers and scholars making this argument sometimes drew upon the jury's role in homicide cases as an appropriate analogy.⁸³ Since juries determined facts relating to the defendant's state of mind in those cases, so the argument went, there was no reason why they should be precluded from doing so in libel cases.⁸⁴

Specific cases,⁸⁵ as well as writings in legal and political journals, played a part in the emerging debate. The New York trial of John Peter Zenger,⁸⁶ which has been characterized as "the first, and the most important, step toward freedom of the press in America,"⁸⁷ was one of the most significant of these cases.⁸⁸ Zenger, the publisher of the *New York Weekly Journal*⁸⁹ was charged in an information with "printing and pub-

80 *Id.*

81 *Id.* at 323.

82 *Id.* See also *infra* notes 151 & 156 and accompanying text.

83 *Id.* See also *infra* text accompanying note 158.

84 Andrew Hamilton addressed this point in 1735 while defending John Peter Zenger at the latter's seditious libel trial:

[U]pon indictment for murder, the jury may, and almost instantly do, take upon them to judge whether the evidence will amount to murder or manslaughter, and find accordingly; and I must say I cannot see why in our case the jury have not at least as good a right to say whether our newspapers are a libel or no libel as another jury has to say whether killing of a man is murder or manslaughter.

J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 91 (S. Katz ed. 2d ed. 1972) [hereinafter J. ALEXANDER]. See also GREEN II, *supra* note 35, at 323 (documents published during this time compared fact-finding in homicide cases to fact-finding in cases of libel).

85 In *The Trial of William Owen*, 18 Howell's State Trials 1203, 1222 (1752), the jury insisted on judging the matter of law as well as of fact, despite the Solicitor's instruction that they find only whether "defendant Owen published the pamphlet. The rest follows, of course. If the fact is proved, the libel proves itself seditious." The defendant was acquitted.

In *The Trial of John Almon*, 20 Howell's State Trials 803, 834 (1770), the defendant book-seller's attorney asserted, "to constitute criminality, it is necessary there should be a wicked intention. . . . [T]he same rules that extend to a man's answering for every act of wrong, where there is an intention, certainly the same rules must acquit when there is no indeed intention." Almon was, nevertheless, convicted.

86 17 Howell's State Trials 675 (1735).

87 V. BURANELLI, *THE TRIAL OF PETER ZENGER* 53 (1957) [hereinafter V. BURANELLI].

88 Zenger's trial had an impact on English as well as on American law. Widespread reports of the trial spawned fresh criticism in England of the law of seditious libel and the jury manipulation it entailed. Following *The Trial of William Owen*, 18 Howell's State Trials 1203, several emphatically pro-jury tracts were published, demanding jury autonomy. See GREEN II, *supra* note 35, at 322-24.

89 *The Journal* was America's first party newspaper, founded and edited by James Alexander. Created specifically as an instrument of propaganda, it contained essays, spurious letters to the editor and even advertisements, all critical of the Governor of New York and his administration. The paper was published and printed at Zenger's shop. Although the *Journal* was known as "Zenger's

lishing a false, scandalous, and seditious libel in which His Excellency, the Governor of this Province, . . . is greatly and unjustly scandalized as a person that has no regard to law or justice."⁹⁰ Colonial New York's law of seditious libel was similar to English law. The jury was only to "determine the fact of publication . . . and at whom the contents were aimed, after which its function would have been fulfilled."⁹¹ Thus, in *Zenger's Case*, the only question ostensibly to be decided by the jury was whether the defendant had published the issues of the *Journal* that made derogatory statements about the Governor of New York.⁹²

At Zenger's trial, Andrew Hamilton, the defendant's famous lawyer,⁹³ admitted that Zenger had published the relevant issues of the *Journal*.⁹⁴ When the New York Attorney General then claimed that the jury "must find a verdict for the King,"⁹⁵ Hamilton argued, however, that the jury must determine the facts alleged in the information: "For the words themselves must be libelous—that is, *false, scandalous, and seditious*—or else we are not guilty."⁹⁶

Hamilton particularly argued that the jury should be entitled to decide whether the words published were truthful.⁹⁷ While Hamilton's attempt to persuade the judge that the jury must determine this question was unsuccessful, he was successful in exposing the jury to argument on this issue.⁹⁸ Thus, even though the court refused to receive defendant's evidence that the statements made in the *Journal* were true,⁹⁹ Hamilton argued to the jury that they should acquit because they were themselves "witnesses to the truth of the facts we have offered."¹⁰⁰

paper," Alexander was its driving force. Zenger's role continued to be limited to that of a printer. J. ALEXANDER, *supra* note 84, at 8-9; V. BURANELLI, *supra* note 87, at 27.

90 V. BURANELLI, *supra* note 87, at 94. The *New York Weekly Journal* exercised little restraint in its quest to ridicule Governor Cosby and his associates. Lampoons of the Governor's administration included a transparently worded advertisement for the return of a lost spaniel, clearly meant to be identified as Cosby's publicist. Cosby himself was referred to by a multitude of unflattering terms including "monkey," "overgrown criminal" and "impudent monster." These attacks were not restricted to Cosby's political maneuverings but extended to his personal life. Even his wife was the occasional target of the paper's parodies.

However, the bulk of the criticism was centered around the administration's corrupt political practices. The *Journal* accused Cosby of accepting bribes, rigging elections, illegally displacing judges and generally overstepping the boundaries of his power. *Id.* at 41-43. See also J. ALEXANDER, *supra* note 84, at 9; N. ROSENBERG, *supra* note 75, at 35.

91 V. BURANELLI, *supra* note 87, at 58.

92 *Id.* at 106-08.

93 Selecting a lawyer to defend Zenger was not an easy matter. Not only were New York attorneys scarce, but most professed loyalty to Governor Cosby. Fortunately, (from Zenger's perspective) Andrew Hamilton, a friend and professional associate of James Alexander's, eagerly agreed to take the case. Not only was the Philadelphia attorney considered to be one of the best in the country, but he also had a history of opposition to the proprietary government of Pennsylvania. The combination of his antigubernatorial sympathies and his extensive courtroom experience proved to be invaluable to the defense. J. ALEXANDER, *supra* note 84, at 21-22.

94 V. BURANELLI, *supra* note 87, at 98-99.

95 *Id.* at 99.

96 *Id.*

97 *Id.* During this period, truth was not a defense to seditious libel; on the contrary, true stories were considered to be the most harmful since they were the most likely to provoke unrest. V. BURANELLI, *supra* note 87, at 53-54.

98 *Id.* at 108.

99 *Id.*

100 *Id.* at 112.

This argument, which was also used by Justice Vaughan in *Bushell's Case*,¹⁰¹ referred to the jury's ancient function of deciding cases on the basis of its special knowledge of the facts.¹⁰² Although seventeenth- and eighteenth-century jurors were no longer selected because of their knowledge of the facts,¹⁰³ the use of this argument demonstrated that lawyers and scholars of this period were well aware of the jury's historical function and drew from that function the inference that jurors must have the authority to determine the facts relating to the offense with which the defendant was charged.

After hearing Hamilton's argument, the jury at Zenger's trial needed only a few minutes to acquit.¹⁰⁴ Following Zenger's acquittal, the report of the case was published and widely circulated in England.¹⁰⁵ Hamilton's theory as to the role of the jury in seditious libel cases thus had considerable impact in England as well as America.¹⁰⁶

In 1792, just one year after the adoption of the Bill of Rights, the campaign against the English seditious libel law culminated with the passage of Fox's Libel Act. That Act specifically provided that the jury "shall not be directed . . . to find the defendant guilty 'merely of the proof of the publication . . . and of the sense ascribed to the same . . .'"¹⁰⁷ Moreover, by giving the jury authority to determine "the whole matter put in issue," the law implicitly affirmed the jury's authority to determine the facts relating to the critical issues of the defendant's criminal intent and whether the writing was seditious.

The importance of the seditious libel cases in shaping the jury's fact-finding role can hardly be overestimated. The point of cases like *Zenger's Case* was not that the crime of libel had to include particular elements, but rather that the presence or absence of those elements—whatever they were—had to be determined by a jury. Thus, the libel law controversy went far towards establishing that a criminal defendant's right to a jury trial includes a right to have a jury determination with respect to every element of the criminal charge.

III. Supreme Court Authority

Surprisingly, the Supreme Court has seldom considered whether a criminal defendant has a constitutional right to a jury determination as to specific facts. In a line of decisions dealing with the prosecutor's consti-

101 Case of the Imprisonment of Edward Bushell, 6 Howell's State Trials 999, 1011, 124 Eng. Rep. 1006, 1012 (1670) ("Being returned of the vicinage, whence the cause of action ariseth, the law supposeth [the jurors] thence to have sufficient knowledge to try the matter in issue . . . though no evidence were given on either side in court, but to this evidence the judge is a stranger.")

102 See *supra* text accompanying notes 35-36.

103 Langbein, *Criminal Trial*, *supra* note 48, at 306.

104 V. BURANELLI, *supra* note 87, at 132.

105 *Id.* at 63.

106 See GREEN II, *supra* note 35, at 322-23.

107 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 690 (5th ed. rev. 1942). Fox's Libel Act affirmatively established that publication alone was not enough to convict a defendant of seditious libel. Instead, it was established that a jury would consider all the facts of the case and would find a defendant not guilty if he lacked criminal intent or if the publication were true. *Id.* at 691.

tutional obligation to prove facts beyond a reasonable doubt,¹⁰⁸ the Court has suggested—though not held—that the defendant will have a right to jury trial as to facts that are an element of a criminal offense. On the other hand, as I have already indicated,¹⁰⁹ *McMillan v. Pennsylvania*¹¹⁰ established that in certain situations the judge will be permitted to make factual determinations that lead to enhanced sentencing, and *Spaziano v. Florida*¹¹¹ held that a capital defendant does not have the constitutional right to a jury determination as to sentencing. These authorities establish the parameters of a criminal defendant's constitutional right to a jury determination as to specific facts:

The cases defining the prosecutor's obligation to prove facts beyond a reasonable doubt begin with *In re Winship*.¹¹² In *Winship* the Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."¹¹³ In subsequent cases, including *Mullaney v. Wilbur*¹¹⁴ and *Patterson v. New York*,¹¹⁵ the Court has elaborated as to what is a "fact necessary to constitute the crime" within the meaning of *Winship*.¹¹⁶ For example, in *McMillan v. Pennsylvania*¹¹⁷ the Court indicated that the defendant's right to a jury trial will extend only to those facts and no further.¹¹⁸

In *Mullaney v. Wilbur*¹¹⁹ the Court considered the constitutionality of a Maine murder conviction. Maine's homicide statute required a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce a homicide charge from mur-

108 See, e.g., *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). See generally Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979) [hereinafter Jeffries & Stephan].

109 See *supra* text accompanying notes 8-9.

110 477 U.S. 79 (1986).

111 468 U.S. 447 (1984).

112 397 U.S. 358 (1970).

113 *Id.* at 364.

114 421 U.S. 684 (1975).

115 432 U.S. 197 (1977).

116 For later cases dealing with this question, see *Martin v. Ohio*, 480 U.S. 228 (1987) (states may constitutionally require a defendant to affirmatively establish self-defense by a preponderance of the evidence as long as the government is required to prove all the elements of murder beyond a reasonable doubt); *Francis v. Franklin*, 471 U.S. 307 (1985) (the fourteenth amendment's requirement that the state prove every element of a crime beyond a reasonable doubt is violated by use of a jury instruction creating a mandatory presumption of criminal intent). See generally Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665 (1987).

117 477 U.S. 79 (1986).

118 In *McMillan*, the Court summarily rejected the defendants' argument that Pennsylvania's sentencing statute deprived them of their sixth amendment right to a jury trial with respect to facts leading to an enhanced sentence: "Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.* at 93.

This language clearly indicates that defendants will not have a right to jury trial as to facts that are not elements of an offense within the meaning of *Winship*. Although the Court did not address the question, its terse analysis of the issue suggested that the converse would also be the case. In other words, a defendant will be entitled to a jury trial only as to facts that are elements of the offense within the meaning of *Winship*.

119 421 U.S. 684 (1975).

der to manslaughter.¹²⁰ At the defendant's trial, the judge instructed the jury that malice aforethought—the mental element required for a murder conviction—was to be “conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation.”¹²¹

Although the Court accepted the Maine Supreme Court's determination that murder and manslaughter are punishment categories of the single offense of felonious homicide,¹²² it nevertheless held that Maine's statute was in violation of the rule established in *Winship*. In reaching this conclusion, the Court rejected the government's argument that the *Winship* requirement should only apply to facts that must be proved to establish the defendant's liability for a criminal offense: “This analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability.”¹²³ The Court added that the element of provocation was important not only because of its historical role in assessing the defendant's blameworthiness¹²⁴ but also because of its significance in terms of penal consequences. It emphasized that, to the defendant, the difference between a finding of provocation or non-provocation “may be of greater importance than the difference between guilt or innocence for many lesser crimes.”¹²⁵

In *Patterson v. New York*¹²⁶ the Court limited the scope of its holding in *Mullaney*. In *Patterson*, the defendant was convicted of murder in New York. New York's homicide statute defined manslaughter as the intentional killing of another while acting under extreme emotional disturbance.¹²⁷ The statute required the defendant to bear the burden of proving the affirmative defense of extreme emotional disturbance.¹²⁸ Based on this statute, the judge instructed the jury that the defendant had the burden of proving emotional disturbance.

In upholding the constitutionality of the New York statute, the Court limited *Mullaney* to a situation in which the fact at issue is defined as an element of the offense.¹²⁹ Maine law had specified “malice” as an essential ingredient of murder. “Malice” denoted both the mental state required to establish murder and the absence of sudden heat of passion based on adequate provocation. Therefore, as the Court explained in *Patterson*, requiring the defendant to prove provocation violated his due process rights by relieving the prosecution of its obligation to prove every element of the crime charged beyond a reasonable doubt.¹³⁰ In

120 *Id.*

121 *Id.* at 686.

122 *Id.* at 691.

123 *Id.* at 697-98.

124 *Id.* at 696 (“[T]he fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide.”).

125 *Id.* at 698.

126 432 U.S. 197 (1977).

127 *Id.* at 198.

128 *Id.*

129 *Id.* at 215.

130 *Id.*

contrast, New York's homicide statute avoided the term "malice." Thus, *Patterson* was distinguished on the basis that "this law did not formally identify the absence of extreme emotional disturbance as part of its definition of murder" ¹³¹

While the Court acknowledged that this line of analysis might "seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," ¹³² it stated, without significant elaboration, that "there are obviously constitutional limits beyond which the States may not go in this regard." ¹³³

Assuming that the defendant does have a right to jury trial as to "every fact necessary to constitute the crime . . . charged," ¹³⁴ *Mullaney*, as limited by *Patterson*, indicates that the defendant will at least have a right to jury trial as to facts that are specified in the criminal statute as elements of the offense. Moreover, *Patterson* indicates that the state's constitutional power to characterize facts that trigger enhanced criminal liability as something other than elements of the offense is limited.

Spaziano and *McMillan* both deal with situations in which the judge is authorized to find facts that relate to sentencing. *Spaziano* specifically involved the constitutionality of Florida's capital sentencing scheme which provides that, after hearing evidence and argument relating to aggravating and mitigating circumstances, the jury recommends a sentence; then, after considering the jury's recommendation, the judge imposes a sentence on the basis of her independent assessment of the aggravating and mitigating circumstances. ¹³⁵ In *Spaziano*'s case, after weighing the evidence presented at the penalty trial, the jury recommended a sentence of life imprisonment. The trial judge concluded, however, that "notwithstanding the recommendation of the jury[,] . . . sufficient aggravating circumstances existed to justify and authorize a death sentence[,] . . . [and] the mitigating circumstances were insufficient to outweigh such aggravating circumstances. . . ." ¹³⁶ Specifically, the judge determined that two aggravating circumstances—that the homicide was especially heinous and atrocious and that the defendant had been previously convicted of a felony—were present ¹³⁷ and that there were no mitigating circumstances "except, perhaps, the age [28] of the defendant." ¹³⁸

131 Jeffries & Stephan, *supra* note 108, at 1342 (citing 432 U.S. at 206-07, 216).

132 432 U.S. at 210.

133 *Id.* The Court did state that legislation allowing for a presumption of guilt based solely on the identification of the accused or the finding of an indictment would be unconstitutional. *Id.*

134 *McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986).

135 FLA. STAT. § 921.141(3) (1983). At the time of *Spaziano*'s trial, the sentencing judge was directed to impose sentence based on a weighing of statutorily defined aggravating and mitigating circumstances. The statute was amended in 1979 (three years after *Spaziano*'s trial) so that the judge imposes sentence based on a determination of whether statutory aggravating circumstances are outweighed by *any* relevant mitigating evidence. 468 U.S. 447, 451 n.4 (1984) (emphasis added).

136 468 U.S. at 452.

137 *Id.*

138 *Id.* On appeal, the Supreme Court of Florida affirmed the conviction but reversed the death sentence because, in considering the sentence, the trial judge relied on a confidential presentence investigation report that had not been disclosed to the defense. *See Gardner v. Florida*, 430 U.S. 349 (1977). On remand, the death penalty was imposed a second time and the Supreme Court of Florida affirmed. *Id.* at 452-53.

In deciding the issue in *Spaziano*, the Court did not focus on these particular circumstances but instead considered the broad question of whether "the capital sentencing decision is one that, in all cases, should be made by a jury."¹³⁹ After considering the general characteristics of capital sentencing,¹⁴⁰ the Court held that a capital defendant does not have a constitutional right to jury trial at the penalty phase of a capital trial.¹⁴¹ Its basis for this holding was that the judge, as well as a jury, is able to fulfill the constitutional obligation of "evaluat[ing] the unique circumstances of the individual defendant"¹⁴² so as to impose sentence.

In supporting this position, the Court focused on the difference between sentencing and adjudicating guilt. Citing *Williams v. New York*,¹⁴³ a capital case decided in 1949, it emphasized that "despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual."¹⁴⁴ Thus, the Court's refusal to add the right to jury trial to the procedural protections afforded a capital defendant¹⁴⁵ seemed to be based on the notion that the kind of determination that takes place at the penalty stage under Florida's capital sentencing scheme is fundamentally different from the type of determination that takes place at the guilt stage of a criminal trial.¹⁴⁶ Although the Florida sentencing judge is not permitted to impose a death sentence without making certain factual determinations,¹⁴⁷ the Court did not focus on this aspect of Florida's sentencing procedure.¹⁴⁸ Instead, it treated the case as one in which the judge determined whether a death sentence would be imposed primarily on the basis of his assessment of the individual characteristics of the particular offender.

In *Hildwin v. Florida*,¹⁴⁹ a *per curiam* decision decided without briefing, argument, or plenary consideration, the Court seemed to read *Spaziano* broadly by stating that "the existence of an aggravating factor [under Florida's capital sentencing statute] . . . is not an element of the offense but instead is 'a sentencing factor that comes into play only after the de-

139 468 U.S. at 458. The brief filed on behalf of *Spaziano* argued that "a trial judge's override of a jury's factually based decision against the death penalty must, in all cases, violate the Fifth, Sixth, Eighth and Fourteenth Amendments." Brief for Petitioner at 20. Thus, the parties did not direct the Court to the question of whether the defendant had the right to a jury trial as to the presence or absence of one or more of the statutorily defined aggravating circumstances.

140 468 U.S. at 458-65. In rendering its decision, the Court did not refer either to the specific provisions of the Florida statute or the particular facts in the case before it. Instead, it focused entirely on the general characteristics of capital sentencing.

141 *Id.* at 465.

142 *Id.* at 459 (citing *Arizona v. Rumsey*, 467 U.S. 203 (1984)).

143 337 U.S. 241 (1949) (cited at 468 U.S. at 459).

144 468 U.S. at 459.

145 *Id.* at 458-59. Prior to *Spaziano*, the Court had decided a series of cases holding that procedural protections at the guilt stage are also applicable at the penalty stage. See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981) (privilege against self-incrimination and right to counsel under *Massiah*); *Bullington v. Missouri*, 451 U.S. 430 (1981) (double jeopardy); *Gardner v. Florida*, 430 U.S. 349 (1977) (right to confront and rebut government evidence). See generally Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 338 [hereinafter Weisberg].

146 468 U.S. at 459.

147 *Id.* at 466. FLA. STAT. § 921.141(3) (1983).

148 See *supra* text accompanying notes 130-133.

149 109 S. Ct. 2055 (1989).

fendant has been found guilty.'"¹⁵⁰ In *Hildwin*, the issue before the Court was whether the Florida capital sentencing scheme "violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment."¹⁵¹ In that case, the jury returned an advisory verdict of death and the judge imposed a death sentence after specifically finding four aggravating circumstances, including two that related exclusively to the character of the defendant rather than the circumstances of the offense.¹⁵² The Court in *Hildwin* did not purport to go beyond *Spaziano*.¹⁵³ Moreover, the Court in *Hildwin* could not address the issue that is the subject of this Article. In *Hildwin* the jury recommended death. Under the Florida statute, the jury could not have recommended death unless it found one or more statutory aggravating circumstances sufficient to call for the death penalty. Therefore, *Hildwin* could not address the issue of the constitutionality of a death sentence without a jury finding of the aggravating circumstance that made the defendant eligible for the death penalty.

McMillan v. Pennsylvania,¹⁵⁴ on the other hand, involved a situation in which an enhanced sentence was triggered entirely by a specific finding of fact. In *McMillan* the defendants each had been convicted of an enumerated felony under Pennsylvania's Mandatory Minimum Sentencing Act which carried a maximum sentence of twenty years in prison. The Commonwealth sought to have the defendants sentenced under the Act, which provides that anyone convicted of a felony will be given a mandatory minimum of five years imprisonment if the judge finds by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of the offense.¹⁵⁵ The defendants claimed that "visible possession of a firearm" was an element of the offense, requiring both a jury trial and proof beyond a reasonable doubt. The Pennsylvania Supreme Court found the Act constitutional and overturned the trial courts, which had found otherwise and sentenced defendants to less than the mandatory minimum penalty.

The Court held that the case was controlled by *Patterson*. It focused first on the specific provisions of the Pennsylvania statute: "[T]he Pennsylvania Legislature has expressly provided that visible possession of a

150 *Id.* at 2057 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986)).

151 *Id.* at 2056.

152 *Id.* (The four aggravating circumstances found to exist were as follows: "[T]he [defendant] had previous convictions for violent felonies, he was under a sentence of imprisonment at the time of the murder, the killing was committed for pecuniary gain, and the killing was especially heinous, atrocious, and cruel.").

153 The Court's *per curiam* opinion itself recognized the narrowness of the issue presented. It held:

If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, . . . it follows that it does not forbid the judge from making the written findings that authorize imposition of a death sentence *when the jury unanimously recommends a death sentence.*

Id. at 2056 (emphasis added). This language says explicitly that the *Hildwin* jury's death verdict makes *Hildwin* follow *a fortiori* from *Spaziano*.

154 477 U.S. 79 (1986).

155 42 PA. CONS. STAT. § 9712 (1982).

firearm is not an element of the crimes enumerated in the mandatory sentencing statute, . . . but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt."¹⁵⁶ Acknowledging that *Patterson* does impose some constitutional limit on the government's power to base an increased sentence on factors that could have been defined as elements of a criminal offense, the Court concluded that this limit was not transgressed in *McMillan*.

The Court justified this conclusion primarily on the basis of two factors. First, it emphasized that in contrast to the situation in *Specht v. Patterson*¹⁵⁷ or *Mullaney v. Wilbur*,¹⁵⁸ the stakes for the defendant were quite minimal: "[The Pennsylvania statute] neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."¹⁵⁹ In addition, the Court observed that "the specter . . . of States restructuring existing crimes in order to 'evade' the commands of *Winship* just does not appear in this case" because, in passing its Mandatory Minimum Sentencing Act, "[t]he Pennsylvania Legislature did not change the definition of any existing offense."¹⁶⁰

¹⁵⁶ 477 U.S. at 85-86.

¹⁵⁷ 386 U.S. 605 (1967). *Specht* held that when conviction under an indecent liberties statute invoked sentencing under a separate sex offenders act, a new charge was created, entitling the defendant to procedural safeguards, including the opportunity to cross-examine witnesses and present evidence.

¹⁵⁸ 421 U.S. 684 (1975).

¹⁵⁹ 477 U.S. at 87-88.

¹⁶⁰ *Id.* at 89. This part of the Court's analysis suggests that the constitutionality of a sentencing statute may depend on the statute's legislative history. If the sentencing statute to be applied by a judge includes factors that were formerly elements of an offense to be determined by a jury, then the purpose of the restructuring may be called into question. *Cf.* *Field v. Sheriff of Wake County*, 654 F. Supp. 1367, 1374 (D. N.C. 1986) (distinguishing *McMillan* from sentencing provision of North Carolina's driving while impaired statute in part on the ground that the North Carolina sentencing provisions did not previously exist in essentially their present form long prior to the statute's enactment).

Based on this analysis, the Arizona capital sentencing statute may be suspect. Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), Arizona, like every other state, vested sentencing power in capital cases exclusively with the jury. *See* ARIZ. REV. STAT. ANN. §§ 13-451 to 13-456 (1956). *See generally* *McGautha v. California*, 402 U.S. 183, 200 n.11 (1971). Aggravating circumstances (in Arizona and elsewhere) were a legislative response to *Furman's* requirement that capital sentencing discretion be channeled; they perform the channeling function by narrowing the class of death-eligible offenders through the requirement that certain facts be found as the precondition of a death sentence. Indeed, since *Zant v. Stephens*, 462 U.S. 862 (1983), the constitutional process of imposing a death sentence has been recognized as having two stages: the "definitional stage" of determining the defendant's eligibility for a death sentence and the individualized sentencing stage which is reached only if the defendant is found death-eligible. At the definitional stage, which, as in Arizona, is generally predicated on the finding of one or more aggravating circumstances, there must be a meaningful "narrowing" of the class of offenders to a smaller subclass to be considered for a possible death sentence. *See* *Maynard v. Cartwright*, 108 S. Ct. 1853, 1859 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). *See generally* *Weisberg*, *supra* note 145, at 347-54. That stage thus involves a determination whose purpose and effect are closely akin to the historic purpose and effect of determining whether a defendant is guilty of first-degree murder or of a lesser degree of homicide; and the findings of "aggravating circumstances" have the same purpose and effect as the traditional findings of the elements of first-degree murder. It is only at the subsequent stage—the stage of the individualized sentencing determination—that the jury (or a judge) embarks on the very different kind of process that the Court in *Spaziano* described as making "a determination of the appropriate punishment to be

After stating that these differences between the present case and *Mullaney* and *Specht* were "controlling," the Court observed that its "inability to lay down any 'bright line' test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results."¹⁶¹

Based on the Court's analysis in these cases, it would appear that a criminal defendant does have a right to jury trial as to facts that are elements of a criminal offense. Moreover, *Spaziano* holds that a capital defendant has no right to a jury trial as to his sentence but does not determine the circumstances under which a defendant will have a right to jury trial as to facts that lead to an enhanced sentence.

McMillan, which deals with the latter question, holds that a defendant has no absolute right to a jury trial as to facts that trigger a minimum mandatory sentence but takes pains to limit its holding to the particular facts in that case. Based on *McMillan*'s analysis, the scope of a defendant's constitutional right to jury trial as to facts that trigger an enhanced sentence appears to depend on various factors, including the magnitude of the sentence enhancement and the sentencing provision's legislative history.

IV. A Capital Defendant's Right to Jury Fact-finding

A. A Proposed Test

In constructing a constitutional role for the jury, the established boundaries—supported by history as well as current Supreme Court authority—are that the defendant has a right to jury trial as to facts that are elements of a criminal offense but not as to sentencing. Nevertheless, as *McMillan* implies, some limits must be placed on the legislature's authority to redefine elements of an offense as factors to be considered only at sentencing. Otherwise, by restructuring crimes so that facts that traditionally lead to enhanced criminal liability are changed to sentencing factors, the legislature could eliminate the defendant's right to a jury determination as to any facts beyond the minimum necessary to establish criminal liability. The crime of homicide, for example, could be redefined as unlawfully killing another, with the mental elements, such as malice or recklessness, that are traditionally necessary to establish murder or voluntary manslaughter changed into sentencing factors to be determined by the judge.

If the constitutional right to jury trial is to be interpreted with a regard for the historical concerns that gave rise to its adoption, then the legislature's authority to define facts as sentencing factors rather than elements of an offense should be affected by the historical evolution of the eighteenth-century jury's role in fact-finding. On the one hand, the allocation of fact-finding responsibility between the Crown and jury in

imposed on an individual." 468 U.S. 447, 459 (1984). In view of this legislative history, there is a solid basis for viewing all aggravating circumstances in capital sentencing statutes as elements of a new offense.

161 477 U.S. at 91.

eighteenth-century English homicide cases may be considered the constitutional norm; on the other hand, the jury's limited fact-finding role in eighteenth-century seditious libel cases—which was repudiated well before the passage of the Bill of Rights¹⁶²—should be viewed as unconstitutional.

In the seditious libel cases, the jury's responsibility was limited to determining whether the defendant intentionally published the writing and whether it bore the meaning alleged by the prosecution. The critical questions of whether the writing was published with criminal intent and whether it was seditious or defamatory were left to the judge.¹⁶³ If this allocation of fact-finding authority is viewed as the paradigm of unconstitutionality, how far does the principle established by this example extend? In other words, which aspects of the jury's role in seditious libel cases should be viewed as not constitutionally permissible?

Eighteenth-century commentators attacked the jury's limited role in seditious libel cases on two grounds: First, the jury's traditional role was usurped because they were not permitted to determine all of the facts alleged in the indictment or information;¹⁶⁴ second, this allocation of fact-finding responsibility was improper because it removed from the jury the question of the defendant's criminal intent or *mens rea*, a fact which was an important element of the crime.¹⁶⁵

To some extent, these two attacks are interconnected. The obvious basis for concluding that the defendant's criminal intent was an important element of the crime of seditious libel was that the intent was alleged in the indictment or information.¹⁶⁶ Nevertheless, it is important to determine whether the commentators' second objection transcends their

162 See *supra* text accompanying notes 75-105. The views expressed in support of Fox's Libel Act were essentially a recapitulation of views that had come to be accepted over the previous half century. See generally GREEN II, *supra* note 35, at 319-31; 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 673 (5th ed. rev. 1942).

163 See *supra* text accompanying note 72.

164 As Lord Erskine said in 1784,

[W]hen a bill of indictment is found, or an information filed, charging any crime or misdemeanor known to the law of England, and the party accused puts himself upon the country by pleading the general issue,—Not Guilty; the jury are generally charged with his deliverance from that *crime*, and not *especially* from the *fact or facts*, in the commission of which the indictment or information charges the crime to consist; much less from any single fact, to the exclusion of others charged upon the same record.

The Dean of St. Asaph's Case, 21 Howell's State Trials 847, 972 (1784).

165 In his same speech, Lord Erskine said,

[N]o act, which the law in its general theory holds to be criminal, constitutes in itself a crime, abstracted from the mischievous intention of the actor; and that the intention, even when it becomes a simple inference of legal reason from a fact or facts established, may and ought to be collected by the jury, with the judge's assistance; because the act charged though established as a fact in a trial on the *general issue*, does not necessarily and unavoidably establish the criminal intention by any ABSTRACT conclusion of law.

Id.

166 The Trial of Mr. John Stockdale, 22 Howell's State Trials 237 (1789), provides an illustration of this point. Stockdale was a bookseller charged with "unlawfully, wickedly and maliciously . . . intending to . . . vilify the Commons of Great Britain." *Id.* at 254. Lord Erskine insisted that the charge, as worded, meant that if the jury were "firmly persuaded of the singleness and purity of the author's intentions," they must acquit. *Id.* at 281. The opposing view was, of course, that publication alone, regardless of intent, was the criminal act and that the language of the information was only retained as an "ancient form[] of . . . legal proceedings . . ." *Id.* at 298. The argument continued that "it hath, in all times, been the duty of judges, when they come to the proof, to sepa-

first. If the only objection to the jury's role in seditious libel cases was that the jury was not required to find facts alleged in the indictment or information, then a capital defendant's right to a jury determination of facts would depend on the nature of a state's charging process. If in capital cases the state's indictment or information were required to set out all of the facts that must be proved to establish the defendant's eligibility for a capital sentence,¹⁶⁷ then the defendant would have the right to a jury trial as to all those facts. On the other hand, if the state's charging process were structured so that the indictment or information only set out the facts to be proved at the guilt phase of a capital case, with no new pleadings required at the penalty phase, then the defendant would have no right to jury trial as to facts that the prosecution was required to prove at the penalty phase.¹⁶⁸

In fact, the eighteenth-century commentators' attack on the jury's role in libel cases focused more on the nature of the facts at issue than they did on the facts' inclusion in the libel indictments or informations. Lord Camden, for example, maintained throughout his professional life that "in all crimes the criminal intent, the *mens rea*, was of the essence of the crime, and must be left to and found by the jury as a matter of fact."¹⁶⁹ Similarly, Lord Erskine argued that "no act, which the law in its general theory holds to be criminal, constitutes in itself a crime, abstracted from the mischievous intention of the actor."¹⁷⁰ These statements indicate that the defendant's criminal intent would be considered an element of the crime of libel without regard to the common law pleading requirements.

rate the substance of the crime from the formality with which it is attended . . . and to confine the proof to the substance." *Id.*

167 Apparently, no state requires this. In general, the indictment or information need only allege the facts necessary to establish the highest crime with which the defendant is charged. Thus, if an Arizona defendant is charged with the capital crime of first-degree murder, see ARIZ. REV. STAT. ANN. § 13-1105 (1978), the indictment need only allege the facts necessary to establish the crime of first-degree murder. If the defendant is convicted of first-degree murder, the case then proceeds to the penalty stage at which additional evidence not alleged in the charging document may be presented.

168 See *supra* note 155.

169 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 681 (7th ed. rev. 1956). Holdsworth cites several examples to illustrate Lord Camden's consistency. In 1752, during the trial of William Owen, Camden (appearing for the defense as Charles Pratt) argued that, as in homicide, intent was an integral part of the crime of seditious libel. He maintained that if a man kills "and the intention is not proved, that is, if it is not proved that he killed premeditatedly and of forethought, it is but manslaughter. Therefore, in the case before us, if that part of the information is not proved, that he published maliciously . . . you must acquit him." 18 Howell's State Trials 1203, 1227 (1752).

Similarly, Camden took issue with Lord Mansfield's jury instructions in *The Trial of John Miller*, 20 Howell's State Trials 870, 893 (1769) and *The Case of H. S. Woodfall*, 20 Howell's State Trials 895, 901 (1770), challenging the judge to answer an extensive set of interrogatories on the subject.

More than two decades later, when Camden was near the end of his tenure in the House of Lords, he took part in the debate over Fox's Libel Bill, saying,

What was the ruling principle? The intention of the party. Who were judges of the intention of the party; the judge? No; the jury. So that the jury were allowed to judge of the intention upon an indictment for murder, and not to judge of the intention of the party upon libel. This, indeed, was so much out of all principle of justice and common sense, that it could not be supported for a single moment.

10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 674-81 (7th ed. rev. 1956).

170 *Id.* at 681.

Interpreted narrowly, the statements by Camden and Erskine could mean that a jury determination as to *mens rea* (or criminal intention) was required in libel cases only because a finding of only *mens rea* was necessary to establish the defendant's guilt as to any criminal offense. But, as I have already indicated,¹⁷¹ their attack on the jury's role was premised on the broader argument that the jury's fact-finding authority should be the same in libel cases as it was in homicide cases. Camden and others argued that, just as the jury must be permitted to determine the defendant's intention in murder cases, they must also be permitted "to judge of the intention of the party upon libel."¹⁷² Under this view, the jury's fact-finding authority extends not merely to determining whether the defendant has the minimum mental state necessary to constitute any criminal offense but also to whether he has the mental state required to establish the particular offense with which he is charged.

Adopting this perspective provides a useful framework of analysis; it does not, of course, delineate the scope of the jury's fact-finding authority. Assuming the jury's limited role in seditious libel cases was rejected on the basis stated above, at least two additional questions will be relevant in defining the constitutional fact-finding authority of the modern criminal jury. First, what types of factual determinations should be placed in the same category as the determination of a criminal defendant's mental state? Second, when do findings of fact lead to the conviction of a new offense as opposed to mere sentence enhancement?

The eighteenth-century commentators' emphasis on criminal defendants' right to have a jury determination as to their mental state did not imply that defendants did not have a right to a jury determination as to the other elements of the crime. On the contrary, Camden and Erskine were commenting on situations in which it was established beyond question that the jury would determine whether the defendant did the acts necessary to establish the criminal offense. In libel cases, the jury did decide whether the defendant published the words in question and whether they bore the meaning alleged by the prosecution.¹⁷³ Similarly, in murder cases, the jury did determine whether the defendant killed the victim. The commentators' central point was that the jury must be allowed to determine whether a criminal defendant has the requisite mental state *as well as* whether he committed the acts necessary to constitute the offense.

Thus, one principle that may be extracted from the libel law only controversy is that in criminal cases the jury's fact-finding authority must extend to all facts that constitute elements of the criminal offense. Establishing that the jury must be allowed to find these facts still leaves open the question of how to determine which facts are elements of a criminal offense, however. As I have indicated,¹⁷⁴ the historical antecedents of the right to jury trial suggest that the offense should not be defined solely

171 See *supra* text accompanying note 83.

172 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 681 (7th ed. rev. 1956).

173 See *supra* text accompanying note 79.

174 See *supra* text accompanying notes 160-66.

on the basis of the facts required to be alleged in the charging document. If this view is accepted, then the structure of the statute defining the crime will not in itself be decisive. In at least some cases, whether a fact will constitute an element of an offense will have to be made on some other basis.

One approach would be to hold that facts relating to the circumstances of the offense that lead to an enhanced sentence are by definition elements of a new offense.¹⁷⁵ If, for example, a finding that a defendant convicted of robbery used a gun in the commission of the robbery leads to an enhanced sentence, then the fact that the defendant used a gun in the commission of a robbery would be an element of the new offense of committing robbery with a gun. The Court rejected this approach in *McMillan*, however. In that case, the finding that the defendant "visibly possessed a firearm" during the commission of the offense did lead to an enhanced sentence.¹⁷⁶ The Court nevertheless held that no jury determination as to the facts precipitating the sentence enhancement was required. *McMillan's* holding can be reconciled with the jury's authority to determine the facts that constitute a criminal offense only if the crime of committing a felony with the visible possession of a weapon is not viewed as a new offense.

Another approach, which I favor, is to hold that facts that lead to an enhanced sentence but need not be alleged in the charging instrument¹⁷⁷ are nevertheless elements of a new offense if two conditions are met: first, the facts relate to the circumstances of the crime rather than the character of the offender; second, proof of the facts leads to a significantly enhanced sentence, when measured either by the actual punishment imposed or the stigma that attaches to the enhanced sentence.

This approach seems consistent with the framers' probable view of the jury's fact-finding role. In eighteenth-century jury trials, the norm was for the jury to determine the facts relating to the circumstances of the offense that had a bearing on the defendant's criminal liability, including any facts that would magnify the degree of the offense. In practice, however, facts that magnified the degree of the offense did lead to a significantly enhanced sentence, when measured by either the actual punishment imposed or the stigma that attached to the conviction. In homicide cases, for example, the jury would decide whether the defendant was guilty of manslaughter or murder, two offenses that carried both significantly different punishments¹⁷⁸ and markedly different stigmas.¹⁷⁹

175 Prior to *McMillan*, a number of lower courts adopted this approach. See, e.g., *State v. Wedge*, 293 Or. 598, 652 P.2d 773 (1982); *State v. Nass*, 456 P.2d 347 (Wash. 1969).

176 477 U.S. 79, 81 (1986). See also text accompanying note 154.

177 Based on the Court's analysis in *Patterson*, it seems clear that facts that must be alleged in the charging instrument are by definition elements of the offense. See *Patterson v. New York*, 432 U.S. 197, 210 (1977). See also *supra* text accompanying note 132.

178 By the eighteenth century, murder, the intentional killing with malice aforethought, was no longer protected by the benefit of clergy. Instead, it was punishable by death. Manslaughter, however, remained within that protection. If convicted, a defendant was not put to death, but had his hand branded, ensuring that he would be permanently identified as a criminal. See 4 W. BLACKSTONE, COMMENTARIES *191-93.

179 A person convicted of murder almost invariably forfeited his land and chattels to the King. A person convicted of manslaughter would not ordinarily suffer this penalty unless special circum-

The focus upon whether the facts related to the circumstances of the offense rather than the character of the offender also corresponds with the jury's historical role. The first jurors were selected because of their special knowledge of crimes committed.¹⁸⁰ Thus, these jurors' fact-finding authority naturally extended to all of the circumstances of the crime. Moreover, in felony cases it soon became established that, whereas juries would determine the facts pertaining to the crime, judges would decide whether the defendant was eligible for benefit of clergy, a decision requiring a factual determination relating to the defendant's personal characteristics.¹⁸¹ Thus, the dichotomy between facts relating to the offense and those relating to the offender was established long before the jury's authority to determine the former type of facts developed in the course of the controversy surrounding the seditious libel cases.¹⁸²

The proposed test is also consistent with modern Supreme Court authority. In *Specht v. Patterson*,¹⁸³ the Court held that a defendant is entitled to constitutional safeguards at sentencing when enhanced sentencing (in that case an increase of the maximum sentence from ten years to life imprisonment) is based on "a new finding of fact . . . that was not an ingredient of the offense charged."¹⁸⁴ In *Specht*, the right to jury trial was not included within these constitutional safeguards because the Court had not yet held that the right to jury trial applies to the states through the Due Process Clause of the Fourteenth Amendment. *Specht*, together with *Duncan v. Louisiana*,¹⁸⁵ seems to establish that the defendant has a right to jury trial at sentencing as to facts that are an element of a new offense.

In *McMillan*, the Court held that the defendant does not have the right to jury trial as to all facts relating to the circumstances of the offense that lead to enhanced sentencing.¹⁸⁶ In so holding, the Court emphasized that the enhanced sentence resulting from the finding of fact in that case was relatively insignificant¹⁸⁷ in comparison to the sentence enhancements involved in the cases of *Specht* or *Mullaney v. Wilbur*.¹⁸⁸ Thus, the Court left open the question of whether a defendant will have the right to a jury determination as to a fact relating to the circumstances of the offense that leads to a substantial sentence enhancement.

The Court's decision in *Spaziano* suggests that the jury's role in fact-finding will also be affected by whether the fact to be decided relates to the circumstances of the offense as opposed to the character of the of-

stances were present. See 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 465-66 (2d ed. 1898).

180 See *supra* text accompanying notes 76-108.

181 See *supra* note 54.

182 See *supra* text accompanying notes 76-108.

183 386 U.S. 605 (1967).

184 *Id.* at 608.

185 391 U.S. 145 (1968).

186 See 477 U.S. 79, 84 (1986).

187 *Id.* at 87-88, 89.

188 421 U.S. 684 (1975). The sentence differential was between mandatory life imprisonment for conviction of murder (ME REV. STAT. ANN. tit. 17, § 2651 (1964)) and a variable range of penalties, from a nominal fine up to a maximum of twenty years imprisonment, for conviction of manslaughter (ME. REV. STAT. ANN. tit. 17, § 2551 (1964)). 421 U.S. at 686 n.3, 700.

fender. In *Spaziano*, the Court's decision that jury sentencing was not required at the Florida penalty stage was based on its conclusion that this sentencing proceeding "involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual."¹⁸⁹ Although Florida's sentencing statute does require the sentencing judge to make findings on aggravating and mitigating circumstances,¹⁹⁰ the Court did not appear to regard this aspect of the Florida sentencing procedure as part of the issue before it.¹⁹¹ Moreover, the death penalty before the Court in *Spaziano* could have been predicated on a finding that pertained to the characteristics of the defendant rather than the circumstances of the offense.¹⁹² Thus, the Court's holding that a capital defendant is not constitutionally entitled to jury sentencing seemed to be premised on the conclusion that capital sentencing essentially involves a "largely moral judgment of the defendant's desert"¹⁹³ rather than a determination of facts that pertain to the circumstances of the offense.

B. *Applying the Test to the Adamson Case*

Applying the test to the situation presented in *Adamson* indicates that the Ninth Circuit's holding was correct. Since Adamson's eligibility for the death penalty was determined on the basis of factual determinations relating to his mental state at the time he committed the offense, the first prong of the test is met. Under the Arizona statute, the defendant could not be sentenced to death unless at least one aggravating circumstance was found to exist.¹⁹⁴ In Adamson's case, the two aggravating circumstances that were found to exist related to his motive for committing the murder¹⁹⁵ and his mental state at the time he committed it.¹⁹⁶ Just as earlier capital defendants became eligible for capital punishment because it was determined that they killed with malice (i.e., killing intentionally without provocation)¹⁹⁷ or with premeditation,¹⁹⁸ Adamson became eli-

189 468 U.S. 447, 459 (1984).

190 FLA. STAT. §§ 921.141(2)(b), 921.141(3)(b) (1983), 477 U.S. at 451 n.4.

191 In fact, the Court observed that the defendant did not "urge that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in *Duncan v. Louisiana*." 468 U.S. at 458.

192 The first of the two aggravating circumstances found to exist in *Spaziano*—that the defendant had prior felony convictions—related to the character of the offender rather than the circumstances of the offense. Based on the Court's decision in *Barclay v. Florida*, 463 U.S. 939 (1983), a Florida death penalty will be constitutional if the sentencer determines that at least one valid aggravating circumstance is present even though one of the other aggravating circumstances weighed against the mitigating circumstances is invalid. See generally Weisberg, *supra* note 145, at 354-58. Therefore, in *Spaziano* it would be unnecessary to determine whether the second aggravating circumstance—relating to whether the crime was heinous or atrocious—was invalid because it was determined to exist by a judge rather than a jury; under *Barclay*, the death penalty could stand on the basis of the aggravating circumstance that related only to the character of the offender and therefore, under my proposed test, could be found to exist by a judge.

193 *Caldwell v. Mississippi*, 472 U.S. 320, 341 n.7 (1984).

194 ARIZ. REV. STAT. ANN. § 13-703(e) (1978).

195 See *supra* text accompanying note 4.

196 See *supra* text accompanying note 5.

197 "[T]he killing must be committed with malice aforethought to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing." 4 W. BLACKSTONE, COMMENTARIES *198-99.

gible for capital punishment because it was determined either that he killed with a motive of "pecuniary gain" or that he killed in an "especially heinous, cruel or depraved" manner.

The second prong of the test is also easily met. A finding that one of the aggravating circumstances exists enhances the defendant's potential sentence from twenty-five years to execution.¹⁹⁹ In view of the Court's repeated statements that the sentence of death is qualitatively different from a sentence of any term of imprisonment,²⁰⁰ it is scarcely necessary to argue that this increase constitutes a significantly enhanced sentence. As a punishment, death is immeasurably more serious than any lesser punishment.

V. Conclusion

In addition to being consistent with both the modern Supreme Court cases and the historical concerns that give meaning to the right to jury trial, the proposed test has at least two practical advantages. First, while maintaining the criminal defendant's core right to jury fact-finding, it provides the state and federal governments with substantial freedom to minimize the jury's role in sentencing. Moreover, as the test's application to *Adamson* illustrates, the test will be likely to yield predictable results at least in capital cases.

Under the proposed test, legislators may eliminate the jury's role in sentencing by simply altering the nature of the facts that lead to enhanced sentencing. The Federal Dangerous Special Offender statute²⁰¹ provides an apt example. Under that statute, a defendant convicted of a federal felony²⁰² may be sentenced as a dangerous special offender if the judge finds that the defendant is both a "special offender" within the meaning of section 3575(e)(1) and "dangerous" within the meaning of section 3575(f). The former finding depends upon whether the defendant has previously been convicted of other felonies²⁰³ and the latter upon whether the judge determines that "a period of confinement longer than that provided for [the defendant's current felony conviction] is required for the protection of the public from further criminal conduct by the defendant."²⁰⁴ Although these findings could lead to significantly en-

198 "Express malice is when one, with a sedate deliberate mind and formed design, doth kill another . . ." *Id.* at 198. See generally 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 314 (5th ed. rev. 1942); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 468-69 (2d ed. 1898).

199 ARIZ. REV. STAT. ANN. § 13-703(E) (1978).

200 See, e.g., *Solem v. Helm*, 463 U.S. 277, 294 (1982) ("[T]he death penalty is different from other punishments in kind rather than degree."); *Gardner v. Florida*, 430 U.S. 349, 357 (1976) ("[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1975) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

201 18 U.S.C. § 3575 (1982).

202 *Id.* at § 3575(b).

203 A defendant may be determined to be a dangerous special offender if she has previously been convicted of two or more separate felonies punishable by death or imprisonment for more than one year, and if fewer than five years have elapsed between the commission of the present felony and commission of or release from prison for a previous conviction. *Id.* at § 3575(e)(1).

204 *Id.* at § 3575(f).

hanced punishment,²⁰⁵ under the proposed test, the defendant would not have a right to a jury determination of the pertinent facts because those facts do not pertain to the circumstances of the defendant's current offense.²⁰⁶

Applying the test in capital cases will generally be easy. In all of the states that provide for judicial sentencing at the penalty trial, the judge may not impose a death sentence unless she finds that one or more statutorily specified aggravating circumstances exist.²⁰⁷ Since the consequences of the death penalty are clearly more significant than any lesser penalty,²⁰⁸ the defendant's right to jury trial depends on whether the particular aggravating circumstance that justifies the death penalty relates to the circumstances of the offense rather than the character of the offender.²⁰⁹ In most instances, distinguishing between aggravating circumstances that relate to the former as opposed to the latter is not difficult. A finding that the murder was perpetrated by torture,²¹⁰ for example, must be made by the jury because it relates to the circumstances of the crime; a determination that the defendant was previously convicted of a felony,²¹¹ on the other hand, may be made by the judge because it relates exclusively to the character of the offender.

Although the test may yield predictable results, in a certain sense it seems arbitrary to have a capital defendant's right to a jury turn on the nature of the fact to be decided. Why should the defendant have the right to a jury trial when his eligibility for the death penalty depends on whether the crime was particularly heinous, for example, but not have that right when his eligibility depends on whether he will be a future danger to society? Both of these determinations involve difficult subjective judgments that relate to the sentencer's assessment of the defendant and each determination will lead to the same consequences.

Moreover, the context in which the capital sentencing decision is made compounds the sense that the distinction being drawn is somewhat

205 If the defendant is shown by a preponderance of the evidence to be a dangerous special offender, the court can impose a sentence of up to twenty-five years imprisonment. *Id.* at § 3575(b). The statute does not prevent the additional imposition of the death sentence, life imprisonment or a term exceeding twenty-five years if any of those are applicable. *Id.* at § 3575(c).

206 The lower courts that have considered the issue are generally in accord with this result. *See, e.g.,* United States v. Schell, 692 F.2d 672, 677 (10th Cir. 1982); United States v. Bowdach, 561 F.2d 1160, 1172 (5th Cir. 1977); United States v. Stewart, 531 F.2d 326, 332 (6th Cir. 1976); United States v. Williamson, 567 F.2d 610, 615 (4th Cir. 1977). *But see* United States v. Duardi, 384 F. Supp. 874, 883 (W.D. Mo., 1974). *See generally* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975).

207 *See, e.g.,* MONT. CODE ANN. § 46-18-305 (1987) (The court "shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency."); NEB. REV. STAT. § 29-2522(1) (1985) ("[T]he judge . . . shall fix the sentence at either death or life imprisonment, but such determination shall be based upon . . . [w]hether sufficient aggravating circumstances exist to justify imposition of a sentence of death . . .").

208 *See supra* note 197.

209 *See supra* text accompanying note 162.

210 *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1978) ("[c]ommitted in an especially heinous, cruel or depraved manner").

211 *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-703(F)(1) ("convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable [sic].").

tenuous. As I have noted,²¹² all aggravating circumstances—whether they relate to the circumstances of the offense or the character of the offender—may properly be viewed as elements of a new offense in the sense that they have the purpose and effect of narrowing the class of death-eligible defendants. Moreover, from a functional perspective, the content of the specific aggravating circumstances enumerated in a sentencing statute is not critical. Regardless of the specific aggravating and mitigating circumstances to be determined, the sentencer is required to make an essentially moral judgment as to whether the defendant should live or die.²¹³ Thus, it may be argued that the capital defendant's right to jury trial should not vary depending on the particular aggravating circumstances to be determined.

Accepting this argument would lead to the conclusion that a capital defendant should either have a right to jury trial at the penalty trial in all cases or no right to jury trial at all. At present, however, *Spaziano* precludes the former conclusion; the latter one should be rejected because it would eliminate an aspect of the jury's fact-finding power that has historically been an integral part of the right to jury trial.

Historically, one of the jury's most basic functions has been to determine whether a homicide defendant has committed an offense that is subject to the death penalty. Over the centuries, the definition of a capital offense has changed, but the jury's role in determining whether the defendant has committed that offense has remained relatively constant. In the middle ages, when most intentional killings not committed in self-defense were capital, the jury decided whether the defendant intentionally killed the victim and whether he was acting in self-defense.²¹⁴ Later, when the definition of capital homicide depended on whether the defendant acted in the heat of passion or with premeditation, the jury again was responsible for determining whether those elements were present.²¹⁵ Thus, a homicide defendant's eligibility for capital punishment has historically depended on whether the jury determined that he acted with some particular mental state at the time of the killing.²¹⁶

The jury's authority to determine these facts has always been integrally connected to its basic role of safeguarding a criminal defendant from government oppression. By finding facts so as to mitigate the harshness of the medieval law of homicide, the jury was able to bring the application of capital punishment for homicide more nearly in line with community perceptions relating to just deserts.²¹⁷ Later, it became ac-

²¹² See *supra* note 155.

²¹³ Weisberg, *supra* note 145, at 306: "[t]he penalty trial . . . is a curious new legal form in which the state prosecutes a convicted murderer for the enhanced crime, or moral condition, of deserving the death penalty." [Footnote omitted.]

²¹⁴ See *supra* text accompanying notes 32-36.

²¹⁵ See *supra* text accompanying notes 47-51.

²¹⁶ Moreover, at least in the early homicide cases, the judge's determination as to whether a defendant eligible for benefit of clergy would be granted benefit of clergy was analogous to the "individualized sentencing" determination, which, under the modern system of capital punishment, occurs only after one or more aggravating circumstances have been found to exist. In both situations, the judge or jury decides whether an individual who is eligible for capital punishment will in fact be sentenced to death.

²¹⁷ See *supra* text accompanying notes 37-40.

cepted that in homicide cases the jury would exercise its nullification power when it believed that the defendants—although they might be technically guilty of the capital offense—did not deserve to die.²¹⁸ Thus, in this context, the jury's fact-finding power has historically been used to temper the application of capital punishment so that it will mirror the community's perception as to when that punishment is appropriate.

Under the present system of capital punishment, a homicide defendant's eligibility for capital punishment still often depends on whether the defendant did the killing with a particular mental state. Instead of asking whether the killing was in the heat of passion or premeditated, the current statutes ask such questions as whether it was especially heinous or cruel²¹⁹ or whether it was done for pecuniary gain.²²⁰ If the jury's fact-finding authority includes the power to determine whether a homicide defendant has committed an offense that is subject to capital punishment, then a defendant charged under the current system of capital punishment should have the right to a jury determination as to these facts.

Indeed, the justification for interpreting the defendant's right to jury trial in this way is even stronger now than it was when the constitutional right to jury trial was adopted. Although the jury's fact-finding power has historically been used to mitigate the law's harshness with respect to the application of capital punishment for homicide offenses, until recently this aspect of the jury's fact-finding authority has not necessarily been considered desirable.²²¹ In the modern era of capital punishment, however, the Court has explicitly recognized that in determining whether a capital defendant will be sentenced to death the jury must "express the conscience of the community on the ultimate question of life or death."²²² In other words, the jury should adjudicate capital cases in a way that is consistent with the community's perception as to when the death penalty should be applied. Thus, consistent with both the historic concerns that led to the adoption of the right to jury trial and the modern concerns relating to the jury's role in the administration of capital punishment, a capital defendant's right to jury trial must include at least the right to have the jury determine whether the defendant did the killing with the mental state necessary to be eligible for capital punishment.

218 See *supra* text accompanying note 53.

219 ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1978).

220 *Id.* at § 13-703(F)(5).

221 For example, in *Rex v. Windham*, 84 Eng. Rep. 113 (1667), it was reported that, "when a petty jury, contrary to directions of the Court, will find a murder manslaughter, albeit it lie properly before them, yet the Court will fine them . . ."

222 *Woodson v. North Carolina*, 428 U.S. 280, 301 n.36 (1975) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1967)).