Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry

John W. Poulos

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Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*

JOHN W. POULOS**

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I. Introduction

The two jury trial provisions in the Constitution speak of "crimes" and of "criminal prosecutions." It has long been recognized that these two provisions are complimentary: A "criminal prosecution" is a prosecution for "crime." The two provisions are thus rooted in the same concept. Yet, the Constitution contains no definition of "crime," and there have been surprisingly few cases in the two hundred year history of the right to trial by jury that explore the meaning of "crime" in either provision. Without cause to explore its meaning, we have assumed that the concept needs no definition. But three recent decisions of the United States Supreme Court have created the need to examine the meaning of "crime" for the purpose of the right to trial by jury.

First, in Duncan v. Louisiana, the Court held that the right to "trial by jury in criminal cases is fundamental to the American scheme of justice," and as such, it is applicable to the states by virtue of the due process clause of the fourteenth amendment.

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1. U.S. Const. art. III, § 2, cl. 3 provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."
2. The sixth amendment states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend IV
4. Id. at 149.
Second, in *Furman v. Georgia*,\(^5\) the Court invalidated nearly every capital sentencing statute in the nation. The terse per curiam opinion and the five separate concurring opinions\(^6\) raised more questions about the constitutionality of capital punishment than they answered. Nevertheless, two messages were unmistakably clear from these opinions. First, unfettered capital sentencing discretion violates the cruel and unusual punishment clause of the eighth amendment. Second, the death penalty is not unconstitutional per se under the eighth amendment. Capital punishment could again be employed if the components of a just capital sentencing decision could be identified and fashioned into a formula that would produce rational, fair, and reliable capital sentencing decisions.

State legislatures immediately accepted this challenge. In the four year period between *Furman* and the Supreme Court’s 1976 death penalty cases, more change occurred in the law of capital crimes than in any other period in the history of Anglo-American criminal law. The new post-*Furman* statutes amended the definition of capital crimes and a number of states adopted capital sentencing procedures that were unprecedented throughout the common law world.

These new statutes created formidable theoretical problems. One of these theoretical problems is the meaning of “crime” for the purpose of the jury trial guarantee. The problem first arose with the creation of “aggravating circumstances” in the “alternative formulation” of the Model Penal Code’s capital sentencing procedure. Under this procedure, aggravating circumstances function to create liability for a death sentence and to guide the sentencing authority in assessing punishment. Since the “alternative formulation” adopts judicial sentencing, and since the determination of the existence or nonexistence of the aggravating circumstances is made at a sentencing hearing by the court alone, this procedure denies the right to a jury trial if aggravating circumstances are a crime within the meaning of the sixth amendment guarantee. The problem created by the Model Penal Code’s “alternative formulation” remained benign until four states (Arizona, Idaho, Montana, and Nebraska) patterned their capital sentencing procedures on that provision in legislation adopted in response to *Furman*. The validity of death judgments imposed under these procedures is an issue currently pending before the Supreme Court.

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5. 408 U.S. 238 (1972).
6. *Id.* at 240-257 (Douglas, J., concurring); *id.* at 257-306 (Brennan, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring); *id.* at 314-74 (Marshall, J., concurring). None of these five Justices joined an opinion written by his brethren.
The third recent relevant decision is *Spaziano v. Florida*.\(^7\) In *Spaziano*, the Court held that there is no right to a jury trial under either the sixth or the eighth amendments in the sentencing phase of a capital trial.\(^8\) This holding was recently refined in *Hildwin v. Florida*.\(^9\) In *Hildwin*, the Court held that the sixth amendment guarantee of the right to trial by jury does not apply to a factually based sentencing factor.\(^10\) If the aggravating circumstances in the Model Penal Code's "alternative formulation" are properly classified as factually based sentencing factors, then under these cases there is no right to a jury trial of the determination of their existence or nonexistence.

This Article explores the theoretical distinction between what is meant by a "crime," as contrasted with a "sentencing factor." Since the Constitution's guarantee of the right to a jury trial is one of the principal ways the framers of the Constitution sought to prevent oppression of the people by government, this Article is necessarily concerned with the capacity of the aggravating circumstances to serve as a tool of government oppression.

Section II of this Article briefly chronicles the development of the law of capital homicide in America from colonial times to the present. The goal is to explore the meaning of "crime" when our nation was founded, to understand the conception of "crime" held by the framers of the Constitution, and the viability of that conception today. This Section will also provide an explanation for the etiology of the "aggravating circumstances," and the context in which the theoretical problems are explored. Section III will discuss the right to trial by jury guaranteed by the Constitution in general, and defines the problem which is the focal point of the remainder of this Article: the conception of "crime" within the meaning of the sixth amendment guarantee of the right to trial by jury. This Section will discuss, analyze, and criticize the use of "element analysis" to define what is meant by a "crime." Section IV concludes that despite the use of "element analysis" by all of the cases addressing this problem to date, "element analysis" provides no satisfactory solution to this problem.

Section V will return to the sixth amendment guarantee of the right to trial by jury and analyze the fundamental conception of "crime" as it was probably understood by the framers of the Constitution and how it is understood today. This Article proposes that a "crime" within the meaning of the sixth amendment guarantee of the

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8. *Id.* at 465.
10. *Id.* at 2057.
right to trial by jury is a factually based rule (or a package of rules) that creates liability for punishment. A crime either (1) creates liability for punishment for what was previously lawful conduct, or (2) it creates liability for enhanced punishment for conduct already subject to a lesser punishment. In the former situation, the crime creates original liability (as with the original homicide offense at common law); and in the latter situation, the crime creates enhanced liability (as with the distinction between murder and manslaughter at common law). This is the conception of "crime" incorporated into the jury trial guarantee of article III of the Constitution. Furthermore, this conception of crime is the common root between the article III provision and the jury trial guarantee of the sixth amendment. It is also the fundamental conception of crime we embrace today.

Section VI then proceeds to analyze the law of the sixth amendment guarantee and how it should be applied to resolve the question of whether a defendant is denied the right to trial by jury by the capital sentencing procedures in the "alternative formulation" of the Model Penal Code and in the four states that adopted capital sentencing procedures patterned upon the Code's "alternative formulation."

II. A BRIEF HISTORY OF CAPITAL HOMICIDE

A. Great Britain

The Royal Commission on Capital Punishment has succinctly summarized the law of homicide in England—from soon after the discovery of America to 1822—as follows:

By a series of statutes passed between 1496 and 1547, of which the Act of 1531 (23 Hen. VIII, c. I) was the most important, murder "of malice prepense" was largely excluded from benefit of clergy. Up to this time all homicides, unless justifiable or excusable on the ground of self-defence or misadventure, were felonies and therefore capital, but were within the benefit of clergy. Henceforward murder and what would now be called manslaughter, but had then no specific name, were clearly distinguished. Murder, which was unlawful killing with malice aforethought, was without benefit of clergy and was therefore capital unless a pardon were granted; unlawful killing without malice aforethought was within benefit of clergy, which was finally abolished in 1827, and until 1822 it could be punished only by one year's imprisonment and branding on the thumb.11

The punishment prescribed by law for murder is, and has been

from ancient times, the punishment of death. If the jury convicts an accused person of murder, the judge must, except in two special classes of cases, pronounce the sentence of death, and has no discretion to impose any less severe sentence.12

Substantive criminal law throughout the United States is largely founded upon the common law of England;13 and it is the body of law summarized by the Royal Commission on Capital Punishment that formed the foundation of the American law of homicide.14 Before briefly tracing American developments, however, it should be noted that until 1957, murder remained a unitary offense in England, punishable by a mandatory sentence of death. Then, in the Homicide Act of 1957, for the first time in the history of English law, murder was divided into a capital and noncapital crime.15 The death penalty was limited to five enumerated categories of murder16 and to offenders who committed "repeated murders."17 Nevertheless, the death penalty remained the mandatory sentence for capital murder in Great Britain until capital punishment was initially abolished in 1965 (for a five year period),18 and permanently abolished for the crime of murder19 in 1970.20

12. Id. at 5 (footnotes omitted). The two classes of cases referred to in this passage are persons under the age of 18 at the time of the offense (Criminal Justice Act, 1861) and pregnant women (Sentence of Death (Expectant Mothers) Act, 1931). Id. at 5 n.2.
16. Id. at 462.
17. Id. at § 6, p. 465.
19. The 1965 Act abolished capital punishment for the crime of murder. It did not repeal the death penalty for certain military offenses. As of 1981 the death penalty had not been invoked for a military offense for over 30 years. See Rowe, Legislation, The Death Penalty, 44 Mod. L. Rev. 696-97 (1981).
20. 12 Halsbury's Statutes of England and Wales 357 (4th ed. 1985) ("This Act was made permanent by virtue of affirmative resolutions of both Houses of Parliament on 16 and 18 December 1969.").
B. The United States

1. FROM COLONIAL LAW TO 1972

It is generally understood that the English law of homicide was well known in the American colonies, and that the framers of the Constitution were familiar with the common law as expounded by Sir William Blackstone.\(^{21}\) The First American Edition of his Commentaries, published in Philadelphia in 1772, discusses the English common law described by the Royal Commission on Capital Punishment, but in greater detail.\(^{22}\) Blackstone’s discussion of the law of murder and manslaughter, although quaintly phrased by current standards, would be familiar to contemporary students of criminal law. Indeed, Blackstone’s definitions of murder and manslaughter are found in the current California Penal Code in slightly altered form.\(^{23}\)

More importantly, “it was the policy of Great Britain to keep the laws of the Colonies in unison with those of the mother country. This principle extended not only to the regulation of property, but even to the criminal code.”\(^{24}\) For example, the royal charter to William Penn directed that the laws of Pennsylvania “respecting felonies, should be the same with those of England, until altered by the acts of the future legislature, [which is enjoined to make those acts] as near, as conveniently may be, to those of England.”\(^{25}\)

To prevent too great a departure, a duplicate of all acts was directed to be transmitted to England for the royal approbation or dissent. Despite these provisions, the first criminal code in Pennsylvania, William Penn’s code, made substantial changes in the criminal law. For instance, it abolished the death penalty for the common law felonies of robbery, burglary, arson, and rape. Instead, these crimes were punished by various terms of imprisonment, fines, and

\(^{21}\) Blackstone’s Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it. Schick v. United States, 195 U.S. 65, 69 (1904); see Bloom v. Illinois, 391 U.S. 194, 198-99 n.2 (1968); Nolan, Sir William Blackstone and the New American Republic: A Study of Intellectual Impact, 51 N.Y.U. L. REV. 731 (1976).


\(^{24}\) W. Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania 14 (1793).

\(^{25}\) Id. Bradford continues, “and in order to prevent too great a departure, a duplicate of all acts are directed to be transmitted, once in five years, for the royal approbation or dissent.” Id.
forfeitures, rather than by the common law’s mandatory sentence of death.\textsuperscript{26} The death penalty was retained only for “wilful and premeditated” murder.\textsuperscript{27} Penn’s code was ultimately sent to England for the Crown’s consideration. The Queen, in Council, repealed the entire code. The code was then immediately re-enacted in Pennsylvania, and it governed the Colony until 1718, a period of thirty-five years from its original adoption.\textsuperscript{28} In 1718, “high handed measures” forced the adoption of the “sanguinary statutes of the Mother Country.”\textsuperscript{29} Under the new acts, a mandatory sentence of death was imposed for all murder and other felonies punishable by death in England at that time.\textsuperscript{30} In essence, the criminal law discussed by Sir William Blackstone in his treatise was the statutory law of Pennsylvania until after the American revolution.

The American revolution carried with it no concomitant rejection of English criminal law.\textsuperscript{31} The law of murder remained as it was before the revolution: it was a unitary offense, defined as it was at common law, and punished by a mandatory sentence of death.\textsuperscript{32} Since manslaughter was not punishable by death in England, it was generally not a capital crime in post-revolution America.\textsuperscript{33} But reform of the criminal law did begin in 1786, when Pennsylvania repealed the death penalty as the standard punishment for sodomy, robbery, and burglary.\textsuperscript{34} Then, in 1794, Pennsylvania returned, in essence, to William Penn’s reforms of homicide law.\textsuperscript{35} The Pennsylvania Legislature divided the offense of common law murder into two distinct offenses: first degree murder and second degree murder.\textsuperscript{36} The Pennsylvania statute limited the mandatory sentence of death (the universal punishment for murder in those days) to the new crime of first degree murder. The statute punished the new crime of second degree murder with a term of imprisonment.\textsuperscript{37} The Pennsylvania Legislature adopted this new scheme for the single purpose of limiting the death penalty to the most morally depraved and the

\begin{thebibliography}{9}
\bibitem{26} Id. at 15-16; see \textit{The Earliest Printed Laws of Pennsylvania 1681-1713} 36-37 (J. Cushing ed. 1978).
\bibitem{27} Id.
\bibitem{28} Id.
\bibitem{29} Id. at 16-19.
\bibitem{30} Id. at 19-20.
\bibitem{31} See id. at 19.
\bibitem{32} Id. at 35-38.
\bibitem{33} Id. at 41-42 (commenting on the law of Pennsylvania as it stood in 1793).
\bibitem{34} Id. at 20-26.
\bibitem{35} 1794 Pa. Laws, ch. 257, §§ 1-2.
\end{thebibliography}
most deterrable of murderers.\textsuperscript{38} The Pennsylvania model\textsuperscript{39} for grading murder into at least two degrees for the purpose of assessing punishment steadily spread throughout the United States.\textsuperscript{40} By the time the United States Supreme Court decided \textit{Furman v. Georgia},\textsuperscript{41} forty-one states used the death penalty as a punishment for murder.\textsuperscript{42} The majority divided murder into a capital and noncapital offense with a statute modeled upon the 1794 Pennsylvania legislation.\textsuperscript{43} Only eleven states retained the common law pattern as it existed in America before 1794,\textsuperscript{44} and as it existed in England until 1957. In these states, murder remained a unitary offense.

Although the Pennsylvania formula narrowed the murder offense punishable by death to first degree murder, it did not alter the mandatory character of the sanction. In the states adhering to the common law's use of a single crime of murder, all murder was punished by a mandatory sentence of death.\textsuperscript{45} An automatic death sentence thus remained the only punishment for capital murder throughout the United States until nearly the middle of the eighteenth century.\textsuperscript{46}

The seeds of change, however, were sown by Tennessee in 1838. In that year, the Tennessee Legislature abolished mandatory capital punishment for first degree murder and inaugurated absolute capital sentencing discretion.\textsuperscript{47} The sentencing authority, whether judge or jury, was given unfettered discretion to choose between the penalty of

\textsuperscript{38} See Keedy, supra note 36, at 769-73.
\textsuperscript{39} The Pennsylvania model is frequently referred to as the “Pennsylvania formula.”
\textsuperscript{40} See infra note 43.
\textsuperscript{41} 408 U.S. 238 (1972).
\textsuperscript{42} By the time \textit{Furman} was decided, only nine states did not use the death penalty as a punishment for murder. \textit{Id.} at 372 app. I (Marshall, J., concurring); \textit{id.} at 385 n.7 (Burger, C.J., dissenting). By the time \textit{Furman} was decided, capital punishment had been judicially abolished in California. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); see also \textit{Furman}, 408 U.S. at 411 (Blackmun, J., dissenting); Poulos, \textit{The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment}, 28 \textit{Ariz. L. Rev.} 143, 144 (1986). Thus, on the day the Court decided \textit{Furman}, 40 states punished murder with a possible death sentence. \textit{Id.} at 144-46.
\textsuperscript{43} Nearly 75% of the capital-punishment states did this. Poulos, \textit{supra} note 42, at 148 n.56.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} See \textit{supra} text accompanying note 32.
\textsuperscript{46} In other words, in the states that divided murder into a capital and noncapital offense along the lines of the Pennsylvania formula, first degree murder, the death penalty remained the automatic punishment for everyone convicted of that offense. In the states that adhered to the common law model which did not divide murder into a capital and noncapital offense, all murder was punished by a mandatory punishment of death.
\textsuperscript{47} Act of January 10, 1838, Ch. 29, 1837-38 Tenn. Pub. Acts 55.
death and life imprisonment.\(^{48}\) By the end of the nineteenth century, twenty-three states had adopted the Tennessee method for imposing a sentence of death for capital murder.\(^{49}\) By the fateful summer of 1972, the summer the United States Supreme Court decided *Furman*, sentencing authorities throughout the United States\(^{50}\) were given unfettered discretion to assess the punishment for murder at death or a term of imprisonment, with but one exception.\(^{51}\) No rules cabined or guided this sentencing discretion, and the decision to impose the sentence of death was not reviewable by higher judicial authority.\(^{52}\)

The adoption of capital sentencing discretion made an important theoretical change in the law: A distinction was drawn between liability for the death penalty and the imposition of the death penalty. Before capital sentencing discretion was adopted, the law defining the substantive offense governed both liability for the death penalty and the imposition of the capital sanction. After the adoption of unfettered capital sentencing discretion, the law defining the substantive offense still controlled liability for a death sentence, but not the question of whether the death sentence would be imposed, which was removed from the law’s realm and committed to the grace of the sentencing authority.

## 2. THE MODEL PENAL CODE

The adoption of capital sentencing discretion was the last major innovation in the law of capital murder in the United States until state legislatures responded to *Furman*.\(^{53}\) Nonetheless, there was widespread dissatisfaction with the use of purely discretionary capital sentencing by the time the drafters of the Model Penal Code began to contemplate a “model” capital sentencing procedure.\(^{54}\) When the Model Penal Code was finally promulgated, it took no position on whether capital punishment should be retained or abolished for the

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48. *Id.* For a discussion of the reasons behind the Tennessee Legislature’s adoption of unfettered sentencing discretion, see Poulos, *supra* note 42, at 148-55.


51. In all 41 states that punished murder with a sentence of death, either the highest degree of murder (in states that divided murder into a capital and noncapital offense) or the general murder offense were punished with a discretionary death sentence. *See Poulos, supra* note 42, at 152-53. Delaware was the only exception. In Delaware, the general murder offense remained punished by a mandatory death sentence. *Act of Mar. 29, 1974, Ch. 284, § 4209, 59 Del. Laws (1973).*


54. *See e.g., id. at 155-60; see also Michael & Wechsler, A Rationale of the Law of Homicide II, 37 COLUM. L. REV. 1261, 1308-13 (1937).*
crime of murder. Rather, the Code specified a capital sentencing procedure that could be used as a "model" for states wishing to use the capital sanction.

First, after criticizing the workings of the Pennsylvania formula in the majority of American jurisdictions, the drafters of the Code formally rejected the division of the crime of murder into a capital and noncapital crime. Instead, the Code defined murder in essentially the same way it had been defined for centuries at common law, albeit with the use of different terminology. A conviction of murder under the Code would invoke the capital sentencing procedures of Section 210.6.

In sum, Section 210.6 provides for an entirely new system of individualized capital sentencing. Once the trial judge makes a preliminary determination that the death penalty is not precluded, a separate sentencing hearing must be held to determine whether the defendant should receive a sentence for a felony of the first degree or a death sentence. The Code takes no position on jury participation in the sentencing process when a jury trial determines guilt. An "alternative formulation" of the capital sentencing provisions was thus included in the Code for use by states wishing to adopt judicial sentencing. It is this alternative formulation that concerns us here. Under the alternative formulation, the trial court is the sole sentencing authority. The death penalty can be imposed only if the court finds one of the enumerated aggravating circumstances, and also finds that there are no mitigating circumstances "sufficiently substantial to call for leniency." Beyond this, the court's discretion is guided by the requirement that it must consider the aggravating and mitigating circumstances "and any other facts it deems relevant." The sentencing decision is thus guided by the aggravating and mitigating circumstances.

Although the Code formally refused to divide the crime of murder into capital and noncapital offenses, Section 210.6 achieves essentially this same result by the use of what the Code calls "aggravating
circumstances.” Since a death penalty cannot be imposed unless there is “proof of at least one of the enumerated aggravations to justify a capital sentence,” the aggravating circumstances function to create liability for the death penalty. Indeed, the commentary acknowledges that the list of aggravating circumstances could be used to define “a class of capital murder.” This approach was rejected because the drafters of the Code wanted to ensure that the aggravating circumstances found to exist are weighed against the mitigating circumstances found to exist in assessing the punishment. And for some unexplained reason, it was thought that this goal could be best accomplished by contemporaneous adjudications of the existence or nonexistence of the aggravating and mitigating circumstances. This is the sole rationale for failing to use the aggravating circumstances to subdivide murder into a capital and noncapital crime.

The Model Penal Code's use of the aggravating circumstances in the penalty phase of the trial, rather than in the guilt phase, produces a critical change in the law. The aggravating circumstances create liability for the death penalty and operate as vital factors affecting the imposition of a death sentence. Yet, the aggravating circumstances are litigated only in the sentencing phase of the capital trial. This is the first time in the history of Anglo-American criminal law that a rule that functions to create liability for punishment has been removed from the guilt determination process (the guilt phase) and allocated to a separate sentencing hearing (the penalty phase). At common law, and in states that used the Pennsylvania formula, rules defining the capital offense governed both liability for the death pen-

65. Id. § 210.6(3).
66. Id. § 210.6(3) comment 5, at 135.
67. The Commentary explains this decision as follows:

The discussion in the Advisory Committee reflected a strong sentiment in favor of tighter controls on the discretionary judgment, the proposal having the most support calling for proof of at least one of the enumerated aggravations to justify a capital sentence. This might be achieved by constructing a class of capital murder, subject to a discretionary death sentence, which lists the aggravating factors in Section 210.6(3) as part of the definition of the offense. Such an approach has the disadvantage, however, of according disproportionate significance to the enumeration of aggravating circumstances when what is rationally necessary is the balancing of any aggravation against any mitigation that appear. The object sought is better attained by requiring a finding that an aggravating circumstance is established and a finding that there is no substantial mitigating circumstance. Put in this way, the exclusion of cases where there is no aggravating circumstance is accomplished but the concept of a final judgment based upon a balancing of aggravations and of mitigations is maintained.

Id.
68. Id.
69. See id.
ally and the *imposition* of a death sentence. Furthermore, they were litigated in a unitary trial. With the adoption of the Tennessee system of capital sentencing, liability for the death penalty remained the province of the substantive criminal law, but the imposition of the death penalty was committed to the unfettered discretion of the sentencing authority. In the few states that had separate sentencing phases in the capital trial, the liability rules were litigated in the guilt phase, whereas the life or death decision was made in the sentencing phase of the trial at the sentencing authority's unfettered discretion. Since the Model Penal Code's aggravating circumstances both (1) create liability for the death penalty, and (2) guide the sentencing authority's discretion, allocating their litigation to the sentencing phase of the trial was unprecedented.

As we have seen, the sole reason for litigating the aggravating circumstances at the sentencing phase is to facilitate "the balancing of any aggravation against any mitigation that might appear." Yet, there is no indication in the Code's commentary to indicate that the Institute recognized or considered what impact allocating the litigation of the aggravating circumstances to the sentencing phase would have on the defendant's common law right to trial by jury. If the aggravating circumstances were litigated in the guilt phase of the trial, then their existence or nonexistence would be determined by the jury as part of the capital offense. On the other hand, if the right to a trial by jury attaches to the adjudication of the existence or nonexistence of the aggravating circumstances, then the defendant's right to trial by jury is abridged when the fact-finding decision on aggravating circumstances is allocated to the trial court in the "alternative formulation."

The probable explanation for the Code's failure to consider this jury trial issue (even in the context of the common law or statutory right to a jury trial) is that the drafters of the Code focused exclusively on fettering the discretion of the Tennessee system with the new

70. See *infra* text accompanying notes 11, 44.
71. See *infra* text accompanying notes 47, 52.

In *McGautha v. California*, 402 U.S. 183 (1971), the Court rejected a claim that a separate sentencing hearing is constitutionally required.

73. MODEL PENAL CODE § 210.6(3) comment 5, at 135; see *infra* text accompanying notes 65-68.
individualized sentencing procedure. The impact on the jury trial right was apparently not a consideration because the Code took no position on jury participation in the capital sentencing decision, and because the sixth amendment jury trial guarantee was not applicable to the states at the time the Code was promulgated. The drafters simply failed to take this jury trial issue into account when they drafted the alternative formulation of the Code's capital sentencing procedure. In any event, one cannot fairly read the Code as striking a balance between the facilitation of the capital sentencing process and the defendant's right to trial by jury. Whether the Code's alternative formulation violates the defendant's sixth amendment right to trial by jury is the focus of the remainder of this Article. The issue depends upon whether an aggravating circumstance is a "crime" within the meaning of the sixth amendment guarantee. The issue arises because the Code's alternative formulation was used as a model for the capital sentencing procedures adopted in response to Furman in four states.

3. FURMAN

Although Section 210.6 offered an alternative to the use of unfettered discretion in capital sentencing, and despite the growing criticism of unfettered discretion as a lawless method for deciding who dies, the Model Penal Code's capital sentencing procedures were not adopted in any state by the summer of 1972. Unfettered discretion remained the American way of imposing the penalty of death. Thus, as the lawyers argued the constitutionality of capital punishment under the cruel and unusual punishment clause of the eighth amendment, and as the Justices pondered the fate of capital punishment in the process of deciding Furman, their efforts were focused on the purely discretionary imposition of capital punishment.

A bare majority of the Court decided Furman on June 19, 1972, in a cryptic per curiam opinion. Though there were five votes sup-

74. Duncan v. Louisiana was not decided until six years after the Model Penal Code was promulgated. The Official Draft of the Model Penal Code was adopted at the 1962 annual meeting of the American Law Institute, which was held in Washington, D.C., on May 24, 1962. Model Penal Code, at title page. Duncan was decided on May 20, 1968. Duncan v. Louisiana, 391 U.S. 145 (1968).

75. One year before Furman, the Final Report of the National Commission on Reform of Federal Criminal Laws did adopt a capital sentencing procedure derived from the Model Penal Code provision. National Commission on Reform of Federal Criminal Laws, Final Report §§ 3602-3604 (1971). Unlike the Model Penal Code, the Final Report recommended jury participation in the capital sentencing decision. Id. § 3602. These provisions, however, were never enacted into law.

76. See supra text accompanying notes 47-52.

77. The dispositive portion of the opinion reads as follows:
porting the per curiam opinion, there was neither a majority nor a plurality opinion supporting the majority’s action. Instead, each of the five Justices in the majority wrote separately, and none joined the opinion of his brethren. Moreover, each opinion offered a different rationale for concluding that unfettered capital sentencing discretion violated the cruel and unusual punishment clause of the eighth amendment as made applicable to the states by the fourteenth amendment. Though the dissenters also wrote separately, three of the four dissenting opinions were joined by the other dissenting Justices. A careful review of these opinions revealed that a majority of the Furman Court agreed on two points: (1) unguided discretion to impose capital punishment upon conviction of a capital offense violated the eighth amendment’s cruel and unusual punishment clause; (2) under the Constitution, capital punishment was not per se invalid. Capital punishment could thus be restored so long as the sentencing authority was not given unfettered discretion to choose between life and death. What was unresolved, however, was whether any discretion could be conferred on the sentencing authority after Furman.

4. THE LEGISLATIVE RESPONSE TO FURMAN

Essentially, two different interpretations of Furman emerged. The first interpretation emphasized the fact that the discretion conferred in the pre-Furman death penalty legislation was unfettered.

The court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.


78. See id. at 238.

79. These were the separate concurring opinions of Justices Douglas, id. at 240, Brennan, id. at 257, Stewart, id. at 306, White, id. at 310, and Marshall, id. at 314.

80. See concurring opinions cited supra note 79.

81. These were the separate dissenting opinions of Chief Justice Burger, id. at 375-405, and of Justices Blackmun, id. at 405, Powell, id. at 414, and Rehnquist (now Chief Justice), id. at 465.

82. See dissenting opinions cited supra note 81.

83. The concurring opinions of Justices Brennan, id. at 257, and Marshall, id. at 314, concluded that capital punishment was per se unconstitutional under the cruel and unusual punishment clause. The three remaining opinions supporting the Court’s terse per curiam opinion reached different conclusions. See id. at 240 (Douglas, J., concurring); id. at 306 (Stewart, J., concurring); id. at 310 (White, J., concurring). The four dissenting Justices, of course, believed that even unfettered capital sentencing discretion did not violate the eighth amendment.

84. See Poulos, supra note 42, at 172-80.
According to this view, it was the unguided nature of the discretion that produced the constitutional flaw in the statutes invalidated by Furman. Since individualized capital sentencing demands a measure of discretion, a state could retain individualized capital sentencing so long as a way could be found to guide the sentencing authority's discretion by appropriate legal standards.\(^5\) Although there was no precedent for this approach in Anglo-American law, the Model Penal Code had created a guided-discretion capital sentencing procedure in Section 210.6 of the Code ten years before Furman.\(^6\) Section 210.6 became the focal point for the guided-discretion interpretation of Furman. Between June 29, 1972, the day Furman was announced, and July 2, 1976, the day the United States Supreme Court first addressed the constitutionality of the death penalty legislation enacted in response to Furman, twelve states enacted legislation patterned on Section 210.6.\(^7\) Two of these twelve states (Arizona and Nebraska) patterned their guided-discretion capital sentencing procedures on the "alternative formulation" of Section 210.6.\(^8\) In these two states, the jury does not participate in the capital sentencing process.

Under the second interpretation of Furman, the cruel and unusual punishment clause precluded all discretion in capital sentencing. Since individualized sentencing is dependent upon a measure of discretion, individualized sentencing for capital murder would have to be abandoned.\(^8\) Twenty-two states followed this interpretation of Furman.\(^9\) Looking back at the model provided by the common law as it developed in England and in America, the new capital statutes in these states provided for a mandatory sentence of death for everyone convicted of a capital offense.\(^9\)

\(^5\) Id. at 180-200.

\(^6\) MODEL PENAL CODE § 210.6 (1980).

\(^7\) See Poulos, supra note 42, at 199. These states were Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Nebraska, Ohio, Pennsylvania, and Utah. Id. at 238-41 table 1. A thirteenth state, Texas, adopted an idiosyncratic approach to capital sentencing. CRIM. PROC. CODE Act of June 14, 1973, ch. 426, 1973 Tex. Gen. Laws 1122. Texas adopted neither mandatory capital punishment nor a capital sentencing scheme directly patterned on Section 210.6 of the Model Penal Code. Nevertheless, since the Texas statute adopted individualized capital sentencing in a sentencing phase of a capital trial, the Texas statute is more similar to the Model Penal Code provision than it is to the second widely accepted interpretation of Furman. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Jurek v. Texas, 428 U.S. 262 (1976). The Texas statute has been followed in only one other state—Oregon. OR. REV. STAT. §§ 163.105, 163.150 (1989).

\(^8\) Poulos, supra note 42, at 198; see ARIZ. REV. STAT. ANN. § 13-703 (1989); NEB. REV. STAT. §§ 29-2519 to -2523 (1989); infra Section VII (Appendix).

\(^9\) See supra text accompany note 85.

\(^9\) Poulos, supra note 42, at 199.
In 1976, the Supreme Court decided the first death penalty cases since *Furman*. The Court reviewed Georgia, Florida, and Texas sentences that were imposed under post-*Furman* statutes patterned (in varying degrees) on the guided-discretion model contained in Model Penal Code Section 210.6. The Court also reviewed North Carolina and Louisiana sentences that were imposed under post-*Furman* mandatory capital punishment statutes. The Court upheld the guided-discretion statutes and invalidated the mandatory death penalty statutes. Subsequently, two of the states that had enacted invalid mandatory death penalty statutes (Idaho and Montana) responded to the Court's 1976 decisions by adopting guided-discretion statutes patterned upon the Model Penal Code's "alternative formulation.

Thus, only four states with post-*Furman* death penalty statutes (Arizona, Idaho, Nebraska, and Montana) have patterned their laws on the "alternative formulation" of Model Penal Code Section 210.6. Like Section 210.6, each of these states uses aggravating circumstances both to create liability for the death penalty and to guide the sentencing authority's decision. In each state, the determination of the existence or nonexistence of aggravating circumstances is made in the sentencing phase of the capital trial by the trial court alone. Although the wisdom of this practice was questionable at the time the Model Penal Code was promulgated, the Supreme Court's decision in

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94. *Jurek*, 428 U.S. at 276; *Proffitt*, 428 U.S. at 259-60; *Gregg*, 428 U.S. at 206-07.
97. *IDAHO CODE §§ 19-2515 to 2516 (1987); MONT. CODE ANN. §§ 46-18-301 to 46-
18-306 (1989); see infra Section VII (Appendix). Nevada, one of the original mandatory death penalty states, subsequently adopted a guided-discretion statute that provides for jury participation in capital sentencing. Judicial sentencing occurs only when the original sentencing jury cannot reach a verdict. *NEV. REV. STAT. §§ 175.552, 175.556 (1985).*
98. The Oregon death penalty initiative, which was adopted in 1978, also failed to provide for jury participation in the capital sentencing process. Act of Dec. 7, 1978, ch. 2, § 3, 1979 Or. Laws 4-5, *repealed by Act of Aug. 21, 1981, ch. 873, § 9, 1981 Or. Laws 1319*. This statute was modeled on the Texas statute upheld in *Jurek*. The only significant difference between the Oregon and Texas statutes was that the Oregon statute made the trial court the sole sentencing authority. *Id.* Since liability for the death penalty under this statute depended upon a factual finding made at the sentencing hearing, the Oregon Supreme Court held that the Oregon capital sentencing procedure violated the right to a jury trial secured by the Oregon Constitution. State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981); see infra text accompanying notes 220-32. The statute was then amended to make the jury the sentencing authority in capital cases. *OR. REV. STAT. § 163.150 (1987).*
99. For a discussion of these statutes, see infra Section VII (Appendix).
Duncan v. Louisiana intervened between the promulgation of the Code and the adoption of these capital sentencing statutes. In Duncan, the Court held that the sixth amendment right to a trial by jury was applicable to the states by virtue of the due process clause of the fourteenth amendment. These are the first four states in the history of the Anglo-American criminal law to allocate the determination of rules that create liability for capital punishment to the trial court in a sentencing phase (or post-trial hearing) in a capital case. The remaining question is whether this procedure violates the right to trial by jury guaranteed by the sixth amendment as it is made applicable to the states by the fourteenth amendment.

III. THE MEANING OF "CRIME" AND THE SIXTH AMENDMENT GUARANTEE OF A JURY TRIAL

A. Duncan v. Louisiana and the Right to a Jury Trial

Gary Duncan was charged with "simple battery," a misdemeanor punishable by a maximum of two years' imprisonment and a $300 fine in a lower court in Louisiana. The court denied Duncan's request for a jury trial on the ground that the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed. He was tried, convicted, and sentenced to serve sixty days in the parish prison and to pay a fine of $150. The Louisiana Supreme Court denied discretionary review, and Duncan appealed his conviction to the United States Supreme Court on the ground that he was denied the right to trial by jury guaranteed by the sixth and fourteenth amendments of the United States Constitution. The Court noted probable jurisdiction on October 9, 1967, and on May 20, 1968, the Court issued its landmark opinion in Duncan v. Louisiana. With only two Justices dissenting, the United States Supreme Court reversed Duncan's

101. Id. at 156. For a discussion of Duncan, see infra text accompanying notes 103-15.
102. Although these four states patterned their capital sentencing procedures on the alternative formulation of Section 210.6, these were the first and only states to do so.
103. Duncan, 391 U.S. at 146.
104. Id.
105. State v. Duncan, 250 La. 253, 195 So. 2d 142 (1967). The entire opinion consists of three sentences: "In re: Gary Duncan applying for writ of certiorari. The application is denied. No error of law in the ruling complained of." Id.
106. Duncan, 391 U.S. at 147.
109. Justice Harlan, joined by Justice Stewart, dissented. Id. at 171.
conviction.\textsuperscript{110}

Justice White's opinion for the Court found that the right to a jury trial in criminal cases is "fundamental to our system of justice," and thus applicable to the states under the due process clause of the fourteenth amendment. There were two rationales for this holding. First, the history of the right to trial by jury in colonial and revolutionary America, coupled with the inclusion of the jury trial guarantee in both Article III and the sixth amendment, "is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice."\textsuperscript{111} The second reason is the purpose served by the right:

A right to jury trial is granted to criminal defendants in order to prevent oppression by the government. Those who wrote our Constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. Providing an 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. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.\textsuperscript{112}

In other words, the right to a jury trial removes from the government's arsenal the awesome power to directly impose the criminal sanction on any citizen. In Blackstone's words, the right to a jury trial is a "barrier . . . between the liberties of the people, and the prerogative of the crown."\textsuperscript{113} This barrier withdraws the power to impose the criminal sanction from the general government and allocates it to an ad hoc body of citizens who are bound only to the law and to the search for truth.

Consequently, the Court held "that trial by jury in criminal cases is fundamental to the American scheme of justice," and "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."\textsuperscript{114} Finding that a crime punishable by two years imprisonment was an offense triable by a jury under the sixth amendment, Duncan's conviction was reversed.\textsuperscript{115}

\textsuperscript{110} Id. at 162.
\textsuperscript{111} Id. at 151-53.
\textsuperscript{112} Id. at 155-56.
\textsuperscript{113} 4 W. BLACKSTONE, supra note 22, at *343.
\textsuperscript{114} 391 U.S. at 149.
\textsuperscript{115} Id. at 160-62.
Since May 20, 1968, *Duncan* has guaranteed the right to trial by jury on the issue of guilt or innocence in every state criminal prosecution, unless it is for a "petty offense."

B. Spaziano v. Florida and the Distinction Between the Guilt and Sentencing Proceedings

In August 1973, slightly over seven years after Gary Duncan allegedly committed the simple battery against Herman Landry in Plaquemines Parish, Louisiana,116 "Crazy Joe" Spaziano117 allegedly tortured, mutilated, and then killed two young women, depositing their bodies in the Altamonte, Florida refuse dump.118 Eventually, the corpse of one of the victims was found, and Spaziano was indicted for first degree murder.119 The State sought the death penalty.

The statutory scheme in *Spaziano* was adopted in response to the Supreme Court's opinion in *Furman*.120 It provides for a trifurcated proceeding. First, there is a guilt phase at which the issue of the defendant's guilt or innocence of a capital offense is determined.121 This trial is conducted in virtually the same way as in any other criminal trial in Florida. Florida law provides for trial by jury at the guilt phase of a capital trial.122 If the defendant is found guilty of a capital offense by the jury at the guilt phase, then there is a second "advisory sentence" phase of the trial.123 In this phase, the jury hears evidence relevant to the sentencing issue and renders an "advisory sentence" based upon its determination of whether (a) sufficient aggravating circumstances exist as enumerated in the statute, (b) sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist, and (c) based on these considerations, whether the

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118. *Id.* at 510.

119. *Id.*


122. *Id.* § 913.10.

123. *Id.* § 921.141(1) - (2).
defendant should be sentenced to life imprisonment or death.\textsuperscript{124} After the jury renders its “advisory sentence,” the trial proceeds to the sentencing phase. In this phase of the capital trial, the trial judge conducts another sentencing hearing and imposes the actual sentence.\textsuperscript{125} The judge is not bound by the jury’s advisory sentence and may impose a sentence of death even though the jury recommends a life term.\textsuperscript{126} The Florida trifurcated capital sentencing procedure was upheld in \textit{Proffitt v. Florida},\textsuperscript{127} one of the 1976 cases.

At the guilt phase of Spaziano’s trial, a jury found him guilty of murder in the first degree, a capital offense in Florida.\textsuperscript{128} At the close of the advisory sentence phase, the jury recommended a life sentence.\textsuperscript{129} Despite this recommendation, the trial judge sentenced Spaziano to death.\textsuperscript{130} On his first automatic appeal, the Florida Supreme Court affirmed his conviction, but vacated his death sentence.\textsuperscript{131}

On remand, the trial judge held a second sentencing hearing. At the close of that hearing, the court reimposed the death sentence.\textsuperscript{132} A second automatic appeal to the Florida Supreme Court followed, and the Florida Supreme Court affirmed the judgment of death.\textsuperscript{133} Spaziano filed a timely petition for certiorari in the United States Supreme Court, and the writ was granted on January 9, 1984.\textsuperscript{134} Although he raised a number of issues before the Court, only two are relevant to the current inquiry.

First, Spaziano argued that the sixth amendment should be read as guaranteeing the right to have a jury determine the sentence in a capital trial.\textsuperscript{135} Second, he argued that the eighth amendment’s proscription on “cruel and unusual punishment” also required a jury determination in capital cases.\textsuperscript{136} Each of these arguments relied

\begin{itemize}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.} § 921.141(3).
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} 428 U.S. 242 (1976); see also Spaziano, 468 U.S. at 451 n.4. Though there were intervening statutory amendments between \textit{Proffitt} and \textit{Spaziano}, these amendments neither changed the basic structure of Florida’s capital sentencing procedure nor did they affect the analysis of the \textit{Spaziano} opinion. \textit{Id.}
\item \textsuperscript{128} Spaziano, 468 U.S. at 451.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.} at 451-52.
\item \textsuperscript{131} \textit{Id.} at 452-53.
\item \textsuperscript{132} \textit{Id.} at 453.
\item \textsuperscript{133} Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983).
\item \textsuperscript{134} Spaziano v. Florida, 464 U.S. 1038 (1984).
\item \textsuperscript{135} \textit{Spaziano}, 468 U.S. at 458.
\item \textsuperscript{136} \textit{Id.} at 457-58.
\end{itemize}
upon the undisputed notion that if one has a right to a trial by jury, the jury’s determination in favor of the accused may not be set aside.

On July 2, 1984, Justice Blackmun announced the opinion of the Court in Spaziano v. Florida. The Court rejected each of Spaziano’s arguments in an opinion in which six of the Justices joined. Noting that Spaziano 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,” the Court emphasized that “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.” The Court then rejected the sixth amendment argument, holding that “[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.”

Canvassing the Court’s death penalty decisions since Furman, the Court found no principle which compelled jury sentencing in capital cases under the cruel and unusual punishment clause of the eighth amendment. The fact that the cases consistently have recognized the qualitative difference of the death penalty provided no support for the argument. Furthermore, the twin objectives of “measured, consistent application and fairness to the accused” found in those cases did not require jury sentencing. Spaziano also argued that the principal purpose that supported capital punishment was retribution—the expression of community outrage—and that “[s]ince the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community’s response must be death.”

Although Justice Blackmun’s opinion

138. Justice Blackmun delivered the opinion of the Court. The opinion was joined by Chief Justice Burger and by Justices Powell and O’Connor. Id. at 449. Justice White joined the Court’s opinion and judgment, except for a dictum statement on an issue that is of no concern to us here (the requirement that the jury be instructed on all lesser included offenses under Beck v. Alabama, 447 U.S. 625 (1980)). Id. at 467. Justice Rehnquist (now Chief Justice) joined Justice White’s opinion. Id. Justice Stevens, joined by Justices Brennan and Marshall, dissented on the question of “whether the Constitution of the United States permits petitioner’s execution when the prosecution has been unable to persuade a jury of his peers that the death penalty is the appropriate punishment for his crime.” Id.
139. Id. at 458.
140. Id. at 459.
141. Id.
142. Id. at 459-60.
143. Id. at 461-64.
144. Id. at 459.
145. Id. at 459-60.
146. Id. at 460.
147. Id. at 461.
acknowledged that the "argument obviously has some appeal," it was rejected for two reasons. First, the distinctions between capital and noncapital sentences are not constitutionally significant, for deterrence and retribution also fuel noncapital punishments. Second, accepting petitioner's premise that the retributive purpose behind the death penalty is the element that sets the penalty apart, it does not follow that the sentence must be imposed by a jury. In the Court's words, "[t]he community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined."

Finally, Justice Blackmun's opinion acknowledged that thirty out of thirty-seven jurisdictions with capital-sentencing statutes allocate the life-or-death decision to the jury. Though only three of the seven nonjury states allow the judge to override a jury recommendation of life, that fact "does not establish that contemporary standards of decency [the standard used by the Court to give meaning to the ban on cruel and unusual punishment] are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." Since the demands of fairness and reliability in capital cases do not require jury sentencing, and "neither the nature of, nor the purpose behind, the death penalty requires jury sentencing," the Court found that the Florida capital sentencing procedure did not violate the eighth amendment.

C. The Problem When Aggravating Circumstances Create Liability and Function as Sentencing Factors

In the October term of 1988, the Supreme Court reaffirmed Spaziano's holding that there is no right to trial by jury in a capital sentencing proceeding under the sixth amendment in Hildwin v. Florida. In Hildwin, the Court also held that the sixth amendment does not require trial by jury of "a sentencing factor that comes into play

148. Id.
149. Id. at 461-62.
150. Id. at 462.
151. Id.
152. Id. at 463-64.
153. Id. at 464. As we have seen above, the four states that do not permit jury participation in the capital sentencing decision are the four that patterned their capital sentencing procedures on the "alternative formulation" of Section 210.6 of the Model Penal Code. These four states are Arizona, Idaho, Montana, and Nebraska. See supra text accompanying notes 98-102.
154. Id. at 464-65.
only after the defendant has been found guilty, . . . even where the sentence turns on specific findings of fact."  

At first glance, the law governing the federal right to a trial by jury in a capital case seems clear enough. The sixth amendment guarantees the right to a trial by jury at the guilt determination stage of a capital trial under Duncan v. Louisiana.157 But neither the sixth nor the eighth amendment requires jury sentencing under Spaziano v. Florida158 or Hildwin v. Florida.159 Nor does the sixth amendment require jury determination of factually based sentencing factors.160 Nevertheless, if we return to our analysis of the alternative provision of the capital sentencing procedures in the Model Penal Code (that is the section that provides for capital sentencing by the trial court without any jury participation), a serious problem becomes apparent.161 As we have seen, the aggravating circumstances in this provision function in two ways: First, they create liability for the death penalty, and second, they function as factually based sentencing factors.162 Although Hildwin clearly holds that factually based sentencing factors need not be determined by a jury, a question is raised whether Duncan requires that the factually based aggravating circumstances be determined by a jury under the sixth amendment insofar as they create liability for the death penalty?  

The Model Penal Code's use of the aggravating circumstances in the penalty phase of the trial to assess liability for the death penalty was an important break with hundreds of years of precedent. When that unique facet of the Model Penal Code's procedure is coupled, in the alternative provision, with the trial court's determination of the existence or nonexistence of the aggravating circumstance, the impact on the common law right to trial by jury is unprecedented in the history of the Anglo-American criminal law. Does it also violate the sixth amendment right to a jury trial under Duncan? To put the question in slightly different terms, what is the constitutional line that distinguishes the sixth amendment right to trial by jury from the Spaziano-Hildwin rule that neither jury sentencing nor jury determination of factually based special circumstances is required by the sixth amendment?163

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156. Id. at 2057 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986)).
160. Id. at 2057.
161. See supra text accompanying notes 69-74.
162. See supra text accompanying notes 65-68.
163. Throughout this Article I refer to the sixth amendment right to trial by jury.
1. LEGISLATIVE NOMENCLATURE

Because the principal purpose of the sixth amendment's guarantee of the right to a trial by jury is to prevent government oppression, it should be beyond argument that we cannot defer to the line drawn by a legislative body.\textsuperscript{164} Duncan establishes that this is so. Finding no substantial evidence that the framers intended to depart from the established practice of exempting "petty offenses" from the common law right to trial by jury, the Court in Duncan held that the sixth amendment guarantee does not extend to the trial of "petty offenses."\textsuperscript{165} But what is a "petty offense" for this purpose? Justice White wrote for the Court:

In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions.\textsuperscript{166}

This means that the nomenclature used by the legislature is not determinative of a constitutional right.\textsuperscript{167} Thus, a legislative body's designation of a particular crime as a "petty offense" does not control the sixth amendment right to a jury trial.\textsuperscript{168} Rather, the task is to find and apply objective criteria that substantively further the goals of the sixth amendment guarantee.\textsuperscript{169}

The Court thus draws a line between serious and petty offenses based upon "the seriousness with which society regards the
offense." This is determined by looking to the maximum punishment provided by the legislative body for the crime charged. The distinction between allowing a legislature to control the attachment of the jury guarantee by defining the punishment available for the crime, as opposed to allowing a legislature to control the jury guarantee by characterizing the offense as petty or serious, is the distinction between a substantive designation that furthers the goal of the sixth amendment right on the one hand, and a purely formal rule that is unrelated to that goal on the other hand. The goal of the sixth amendment right to trial by jury is to prevent serious government oppression. That goal can be furthered best by a rule that measures the maximum possible consequences of a conviction. A formal rule, a rule deferring to legislative nomenclature, would permit the government to oppress the people by any measure the legislative body selected.

Thus, the fact that the common law rules defining the crime of murder (or the aggravating or special circumstances in the mandatory death penalty statutes) are generally referred to as the elements of the crime or as creating categories of crime, whereas the aggravating circumstances in the Model Penal Code are called "circumstances of aggravation and mitigation" and "aggravating factors," should have no relevance in deciding whether the sixth amendment guarantee attaches. To hold otherwise empowers a court or a legislature to dispense with constitutional rights by affixing labels to legal rules regardless of how the legal rules actually function. The Constitution restrains governmental power, not simply governmental words.

2. THE ALLOCATION TO THE SENTENCING PHASE

The fact that the Model Penal Code allocated the litigation of aggravating circumstances to the sentencing hearing, rather than to the guilt determination process, likewise cannot be dispositive of the sixth amendment jury trial right. The sixth amendment right attaches to the guilt-innocence determination in a state capital case under Duncan v. Louisiana. But there is no right to a jury in a capital case in a state capital case under Duncan v. Louisiana.

170. Blanton, 109 S. Ct. at 1292; Baldwin, 399 U.S. at 68.
171. Blanton, 109 S. Ct. at 1292, Baldwin, 399 U.S. at 68.
173. See, e.g., Rockwell v. Superior Court, 18 Cal. 3d 420, 429, 556 P.2d 1101, 1105, 134 Cal. Rptr. 650, 654 (1976) (referring to the special circumstances in the California mandatory death penalty statute as creating "categories of first degree murder").
175. Id. at 136; see infra text accompanying notes 191-93.
RIGHT TO JURY TRIAL

sentencing proceeding under Spaziano. Thus, unless there is a substantive restraint on legislative power, a legislative body could avoid the jury trial requirement by allocating the determination of the existence of an aggravating circumstance to the sentencing hearing. But the sixth amendment right to a jury trial serves as a restraint on legislative power. Quite obviously, the sixth amendment would fail to cabin legislative choices if a legislature could control the jury trial right by simply designating that the court rather than a jury try a particular issue. There is no reason to permit a legislature to achieve this same result by allocating the litigation of an issue to a portion of the capital trial in which a jury is not required. A rule permitting such a result would wholly fail to serve the purpose for including the right to trial by jury in the sixth amendment.

Finally, a line cannot be drawn on the basis of the distinction between the fact-finding process and the sentencing process: "The purpose of trial by jury, as noted in Duncan, is to prevent government oppression by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' The sixth amendment achieves this goal by interposing the common sense judgment of a group of laymen between the accused and his accuser, and by invoking the community participation and shared responsibility that results from that group's determination that the defendant is liable for punishment at the hands of government. The government oppression restrained by the right to a jury trial is the oppression of unwarranted punishment.

The sixth amendment creates this barrier to government oppression primarily by assigning the "truth-finding task . . . solely to juries in criminal cases." Thus, the "common sense judgment" so critical

178. For example, in Burch v. Louisiana, 441 U.S. 130, 134 (1979), the Court held that a provision of the Louisiana Constitution and Code of Criminal Procedure that provided for a jury trial of six persons, five of whom must concur to render a verdict, in criminal cases punishable by imprisonment in excess of six months violated the sixth amendment right to a jury trial.
180. For example, a legislature would not be permitted to define a capital crime of homicide and then allocate to the trial court at the sentencing hearing all questions concerning the defendant's culpable mental state and all forms of justification and excuse, thereby making liability for all punishment dependent upon the trial court's findings on these issues at the sentencing hearing. This would permit government oppression of anyone the jury finds committed a homicide by using a judge who is "too responsive to the voice of higher authority." Duncan, 391 U.S. at 156.
182. See id.
183. Carella v. California, 109 S. Ct. 2419, 2420 (1989); accord id. at 2422; Sandstrom v.
to the central purpose of the right to trial by jury is the exclusive power to determine the facts, which in turn invoke the law governing the defendant's liability for punishment. Simply put, under the sixth amendment "the function of the jury is to find facts." But once the jury finds the facts that invoke the law that, in turn, holds the defendant liable for punishment, the purpose of the sixth amendment is fulfilled. Since sentencing factors can be factually based, however, and since Hildwin permits the trial court to determine factually based sentencing factors, identifying a decision as part of the fact-finding process does not distinguish between the province of the jury under the sixth amendment and the Spaziano-Hildwin rule (that neither jury participation in capital sentencing nor jury findings on factually based sentencing factors are required by the sixth or eighth amendment).

3. A SUMMARY OF THE PROBLEM

If neither the nomenclature used by the legislature, the allocation of aggravating circumstances to the sentencing phase of the trial, nor the fact-finding process can distinguish the sixth amendment right to a jury trial from the Spaziano-Hildwin rule, how are the limits of the sixth amendment guarantee to be determined? The inquiry begins with the wording of the Constitution. Article III, Section 2, of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." The sixth amendment states

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184. The fact-finding function is assigned solely to the jury in a criminal case. Carella v. California, 109 S. Ct. at 2422.

A defendant may assuredly insist upon observance of this guarantee [of the right to trial by jury] even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the state. Id.; see supra note 112.


186. McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (White, J., concurring). The full quote is as follows:

Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge. Nevertheless, the consequences of criminal guilt are so severe that the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice.

Id.

187. The restraint on warranted but oppressive punishment was not the concern of the sixth amendment. The framers articulated the restraints on punishment in the cruel and unusual punishment clause of the eighth amendment.
that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." These two expressions are complementary: A "criminal prosecution" is the trial of a "crime."\textsuperscript{188} The question can now be recast: Is an "aggravating circumstance" in the Model Penal Code a "crime" within the meaning of the sixth amendment?

IV. ELEMENT ANALYSIS

The use of an aggravating circumstance to determine liability for a death sentence at the sentencing phase of a capital proceeding first appeared in the alternative provisions of the Model Penal Code's capital sentencing procedure.\textsuperscript{189} Since the entire history of Anglo-American criminal law contained no precedent for the use of factually based rules creating liability for the death penalty in a sentencing hearing, there was no need to analyze this question until Arizona, Idaho, Montana, and Nebraska adopted statutes based on the Code's alternative provisions in response to the Supreme Court's death penalty cases.\textsuperscript{190}

All courts have addressed the question of whether these Model-Penal-Code-type aggravating circumstances are "crimes" for the purpose of the sixth amendment guarantee with essentially the same analysis. At best, this analysis attempts to define a "crime" by describing its various component parts. Thus, a legal provision is a "crime" rather than a sentencing factor, if it is an element of the offense.\textsuperscript{191} If it is an element of the offense, then the sixth amendment right attaches.\textsuperscript{192} If it is a sentencing factor, then, under \textit{Hildwin}, the court can make the factual and legal determinations in a separate sentencing hearing without participation by the jury.\textsuperscript{193} Since most of the

\textsuperscript{189} See supra text accompanying notes 69-72.
\textsuperscript{190} See supra text accompanying notes 69-74.
\textsuperscript{191} This analysis is implied in the following passage from \textit{McMillan}: "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." \textit{McMillan v. Pennsylvania}, 477 U.S. 79, 93 (1986); see also infra notes 88, 96-102 and accompanying text.
\textsuperscript{192} Adamson v. Ricketts, 865 F.2d 1011, 1023-30 (9th Cir. 1988) ("Adamson also contends that the Arizona statutory scheme for imposing the death penalty erroneously lists elements of the offense as factors to be determined by the sentencing judge, thus depriving him of his right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments."); State v. Quinn, 290 Or. 383, 399-407, 623 P.2d 630, 639-44 (1981) ("Obviously, the right of one accused of a crime to a trial by jury . . . extends to all the facts which constitute that crime, including the mental element.").
aggravating circumstances clearly do not define "whole crimes" under element analysis, the point of the analysis is to determine whether the "aggravating circumstance" at issue in a given case "aggravates" the underlying crime into a capital offense. The theory is that the aggravating circumstance enhances the crime of murder into capital-murder in precisely the same way as the "elements" of first degree murder under the Pennsylvania formula enhance the crime of murder into a capital crime.\(^{194}\) Applying this analysis to the Model Penal Code, the underlying offense that qualifies a defendant for a capital sentencing proceeding is the unitary offense of murder.\(^{195}\) If an aggravating circumstance is an "element" of an offense, the capital offense becomes the crime of "aggravated murder." In this way, element analysis seeks to define a "crime" within the meaning of the sixth amendment.

The idea that crimes are composed of various "elements" is not deeply rooted in Anglo-American legal history. Under contemporary element analysis, the components of an offense are placed into two mutually exclusive categories: the actus reus (the physical component of the crime) and the mens rea (the mental part of the crime). Yet the term actus reus was not used in the older classical treatises (including Blackstone) or in the works of Stephen, Holmes, or Bishop.\(^{196}\) According to Professor Hall, the expression was introduced in the twentieth century by Professor Kenny.\(^{197}\) Since the adoption of element analysis by the Model Penal Code in 1962,\(^{198}\) it has become the most fashionable method for analyzing the criminal law.\(^{199}\) Although element analysis is widely accepted today, there is no evidence that the framers of the sixth amendment intended the right to trial by jury to attach only to the elements of an offense as we understand those elements today.

There are, however, more fundamental objections to the use of element analysis to determine the scope of the sixth amendment guarantee than the complaint that it has no foundation in history. Ele-

\(^{194}\) See supra text accompanying notes 65-72.


\(^{196}\) J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 222 (2d ed. 1960).

\(^{197}\) Id. at 222 & n.24.

\(^{198}\) MODEL PENAL CODE § 2.02.

ment analysis has as its central purpose the identification of the components of the substantive criminal law and the analysis of their interrelationship. It is a helpful method for deciding precisely what mental state (mens rea) is necessary for each component of the physical part (actus reus) of the crime.\textsuperscript{200} It also offers an explanation of the relationship between the components of the crime and apparently unrelated bodies of substantive criminal law, such as the law of mistake and accident.\textsuperscript{201} But element analysis does not police the boundaries of the substantive criminal law. It is not designed to draw lines between the substantive criminal law and another body of law, such as the law of sentencing. It focuses only on the law placed within the boundaries of the substantive criminal law by legislative bodies.

Consequently, it is not surprising that debates which resolve the attachment of the sixth amendment guarantee by the use of element analysis usually have all of the charm and sophistication of a school yard argument. The defendant insists that the aggravating circumstance is an element of the offense, and the state insists that it is not, because the legislative body has not placed the aggravating circumstance within the boundaries of the substantive criminal law. Typically, this "yes it is/no it isn't" argument is resolved in an opinion that agrees with the state without ever satisfactorily explaining why it has done so.\textsuperscript{202} Since traditional element analysis is not equipped to provide a solution to this issue and applies only to the law placed within the realm of the substantive criminal law, such a case "correctly" rejects the defendant's argument that the aggravating circumstance is an element of the crime to which the right to a trial by jury attaches. Meanwhile, the court ignores the defendant's rejoinder that the right to a jury trial cannot depend upon an allocation made by the legislature.

A. Element Analysis as a Substantive Limit

Although it has never protected the borders of the substantive criminal law, should element analysis be expanded to include a policing function? In other words, should we create a new aspect of element analysis designed to draw the boundaries between the substantive criminal law and the law of sentencing? There is a certain surface appeal to this suggestion. The elements of the substantive offenses as they are defined by the legislative body virtually always

\textsuperscript{200} Model Penal Code §§ 1.13, 2.01, 2.02; Robinson & Grall, supra note 199, at 694-704.
\textsuperscript{201} Robinson & Grall, supra note 199, at 704.
\textsuperscript{202} Each of the cases cited supra note 193 are decided in precisely this manner.
function to create liability for punishment. The elements of the crime of murder at common law and the elements of the capital offenses in contemporary American law function in this way. Since the right to a trial by jury attaches to the determination of the elements of a crime, alteration of traditional element analysis offers a possible solution to the problem of identifying what is and what is not a crime for sixth amendment purposes.

All of the elements of the various crimes and categories of justification, excuse, and mitigation typically found in the substantive criminal law have as their primary focus an event that occurs in the objective world. This event (or series of events) invokes our analysis of crime and organizes our thinking about the elements summoned by the event. The event is fixed in time and space. Our approach to the elements is similarly circumscribed. A crime is committed once it is complete, and it is complete at a given point in time. Under this view, a defendant's pre-crime and post-crime conduct cannot be an element of a crime. Pre-crime and post-crime conduct may be relevant as proof of the crime, and it may influence the defendant's punishment. This perspective is so ingrained in the criminal law that post-crime conduct or other rules that do not relate to the traditional conception of criminal liability as being established when the crime is committed are typically regarded as sentencing factors, rather than elements of an offense. The capital sentencing statutes of Texas and Oregon provide a ready example. These statutes establish a bifur-

203. See, e.g., J. Hall, supra note 196, at 222-25. There may be a series of events that must have occurred for a crime to have been committed. Nevertheless, the last event necessary to incur criminal liability is generally the initial focus of the analysis.

204. Of course, we have (or at least the legislative body has) control over when the crime is found to be complete. It is a question of how the crime is defined. For interesting discussions of the temporal aspect of crime, see Hoeber, The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation, 74 Calif. L. Rev. 377 (1986); Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591 (1981).

205. See, e.g., G. Fletcher, Rethinking Criminal Law 462 (1978).

206. For example, Professors Perkins and Boyce write: "If the crime has once been committed, it cannot be wiped out by a return of the property stolen, or restitution in any other form. 'Ample authority exists that restitution does not nullify prior criminal activity and allow the guilty party to escape prosecution.'" R. Perkins & R. Boyce, Criminal Law 335 (3d ed. 1982) (quoting Olassey v. Ramada Inn, 5 Kan. App. 2d 121, 124, 612 P.2d 1261, 1264 (1980)). With respect to condonation by the injured party, they write:

But the general rule is that a private individual has no power to ratify, settle or condone a public wrong even if it was a wrong which injured his person or harmed his property; and if he is able to do so it is only because of some exception to the general rule and in the exact manner provided. Id. at 1090-91. For an interesting discussion of restitution and condonation as liability rules, see Hoeber, supra note 204, at 422-26.

207. G. Fletcher, supra note 205, at 459-66.
cated procedure. If a defendant is convicted of a capital offense, then eligibility for a death sentence is determined in a separate sentencing hearing. Only if the sentencing jury makes certain specified findings in a special sentencing verdict may a defendant be sentenced to death. Both statutes define one of the required findings in the following terms: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Under traditional element analysis, future dangerousness is a relevant sentencing factor, but it would not be classified as an element of the offense because future dangerousness concerns the prediction of post-crime conduct. Thus, if the sixth amendment right to a jury trial attaches only to elements of an offense, there is no right to a jury determination of this factually based issue.

Nonetheless, the Texas and Oregon Legislatures have defined this particular feature so that it creates liability for capital punishment in the sentencing phase of the trial. The prosecution must prove future dangerousness beyond a reasonable doubt, and a defendant can receive a death sentence only if the jury answers this question affirmatively. Fortunately, the Texas statute and the current Ore-

208. OR. REV. STAT. § 163.150 (1989); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon's Supp. 1989).
209. OR. REV. STAT. § 163.150(1)(b)(B); TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1). The Oregon statute adds the following provision to this question:

In determining this issue, the court shall instruct the jury to consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.

OR. REV. STAT. § 163.150(1)(b)(B).


212. See supra note 209. In the Texas statute, the other two questions are the following: "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;" and "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." TEX. CODE CRIM. PROC. ANN., art. 37.071(b)(1), (3) (emphasis added). Except for the omission of the emphasized "the" in the Texas provision and the identification of the
gon statute preserve the defendant’s sixth amendment right to a jury determination of this question.\textsuperscript{213} The use of conventional element analysis, however, indicates that the right to a jury trial would not attach to this determination.\textsuperscript{214} Since under conventional element analysis the sixth amendment right to a jury trial attaches only to “elements” of the offense, this would mean that the right to a jury trial of this issue in Texas and Oregon is a matter of legislative policy. Legislative policy can be changed in accordance with the legislative will without violating the sixth amendment guarantee. Can element analysis be modified to define the line between the right to a jury trial and the \textit{Spaziano-Hildwin} rule with complete accuracy? In other words, can element analysis be modified to take into account “elements” that rely upon what had previously been considered pre-crime or post-crime conduct? Probably.

Yet, even though element analysis is probably capable of being altered in this manner, there is no good reason for insisting that the right to a jury trial attaches only to an “element” identifiable by element analysis. On the other hand, there are a number of reasons for rejecting element analysis as determinative of the sixth amendment right. Element analysis is already complex, and it would necessarily become more complicated and ponderous if it were detached from its current focal point—the actus reus (physical component) of the crime.\textsuperscript{215} The expansion of element analysis to police the border between substantive criminal law and sentencing law might confuse its use in analyzing the relationships between various components of the substantive criminal law. The expansion of element analysis to accommodate this new role might also lead to the creation of an entire new body of law that in turn might unduly restrict legislative choices. Once the new element analysis determines the right to a jury trial, it may be argued that the sixth amendment requires that crimes be defined in a particular way.\textsuperscript{216} Finally, there is the practical problem of creating the new body of law that will serve both this policing function as well as the goal of the sixth amendment right to a jury trial.

\textsuperscript{213} OR. REV. STAT. § 163.150(b)(A), (B).
\textsuperscript{215} See supra text accompanying notes 195-99.
\textsuperscript{216} For a similar argument, see Comment, \textit{Mens Rea and the Right to Trial by Jury}, 76 CALIF. L. REV. 391 (1988).
B. Element Analysis in Practice: Doctrine Stretched to the Breaking Point

As we have seen, in most of the cases in which it is argued that the right to a jury trial attaches to a particular feature of state law because that feature constitutes an element of the offense, the court has rejected the defendant's argument. In nearly every case, the court reached its conclusion by simply agreeing with the state's assertion that the particular feature was not an element of the offense. In other words, the court did not attempt to alter the rules of element analysis in these opinions. Instead, they ruled by judicial fiat. Conversely, the Supreme Court of Oregon, the United States Court of Appeals for the Ninth Circuit, and Amici Curiae in Walton v. Arizona have attempted to alter element analysis to perform the policing function.

1. THE QUINN TEST (THE FIRST PRONG OF AMICI'S TEST IN WALTON V. ARIZONA)

In State v. Quinn, the Oregon Supreme Court invalidated the State's 1978 capital sentencing procedure on the ground that the statute violated the defendant's right to trial by jury guaranteed by the Oregon Constitution. The statute created a separate sentencing hearing. The death penalty could be imposed only if the prosecution proved certain enumerated factors beyond a reasonable doubt. The trial court, at the separate sentencing hearing, was to make the determination of the existence of each of the required factors. At issue in Quinn was the following factor: "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result."

The court found that this provision creates "an additional element of murder for which a greater penalty, death, may be

217. See supra note 193.
218. Id.
221. Id. at 407, 623 P.2d at 644.
223. Id.
224. Id. The current death penalty law of Oregon uses the same three factors that were enumerated in the 1978 initiative measure. See supra notes 208-13 and accompanying text.
225. Though all three factors had to be found to exist before a death sentence could be imposed, the court focused on this factor alone. Quinn, 290 Or. at 399-407, 623 P.2d at 639-44.
The court then held that since the trial court was to determine this element at the sentencing hearing, the statute violated the defendant's right to a jury trial guaranteed by the Oregon Constitution.227

The Quinn court offered the following distinction between an element of an offense (which a jury must determine) and a sentencing factor (which a court may determine):

The difference . . . is found in the simple principle that the facts which constitute the crime are for the jury and those which characterize the defendant are for the sentencing court.

. . . Deliberation in the act of homicide is part of an act declared by the legislature to be criminal. Because the extent of punishment is to be determined according to the existence of that proscribed fact, it must be proved at trial.

. . . The contrast is clear: Deliberate homicide is not a status; it is an offense. If a defendant is to be punished for it, he is entitled to require the state to prove it to a jury.228

The court then illustrated this distinction by contrasting the (deliberate murder factor which was at issue in the case),229 with the second factor enumerated in the 1978 statute, the future dangerousness factor: "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."230

Under the court's analysis, the findings required by the future dangerousness subsection characterize the defendant. They are consequently findings "of the kind that may be properly considered by the court 'for the purpose of determining the kind and character of a man upon whom sentence is to be imposed.'"231 The critical distinction thus turns on the subject matter of the factual finding. If the factual findings relate to the crime, then they are an element of the crime,

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226. Quinn, 290 Or. at 403, 623 P.2d at 642.
227. Because ORS 163.116 authorizes an enhanced penalty to be imposed based upon a determination by the court of the existence of the requisite culpable mental state with which the crime was committed, a mental state different and greater than that found by the jury, imposition of a greater penalty under the statute denies to the defendant his right to trial by jury embodied in Oregon Constitution Article I, section 11 of all the facts constituting the crime for which he is in jeopardy. Id. at 407, 623 P.2d at 644.
228. Id. at 405-06, 623 P.2d at 643.
229. For a reproduction of this factor, see supra text accompanying note 212.
231. Quinn, 290 Or. at 406, 623 P.2d at 644 (quoting State v. Hicks, 213 Or. 619, 630, 325 P.2d 794 (1958)).
which a jury must determine. If they characterize the defendant, then they are sentencing factors, which the court alone may determine.

The Quinn test is seriously flawed. Since it appears as the first prong of the test offered in an Amici Curiae Brief filed in support of the petitioner in Walton v. Arizona,\(^{232}\) repetition can be avoided by discussing the Quinn test and the test offered by Amici in Walton at the same time. A writ of certiorari was granted in Walton on October 3, 1989.\(^{233}\) Question one in the petition is as follows: "Does Arizona's death penalty statute violate the Sixth Amendment by denying jury trial on factual elements of capital murder specified by state law?"\(^{234}\) Since Walton presents the Supreme Court with the first opportunity to resolve this sixth amendment issue, and since the Amici's argument is one of the best attempts to use element analysis to resolve this issue, this Section will analyze Amici's argument in some detail. Amici offer the following 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.

... [F]acts pertaining to the actus reus and mens rea of the offense must be treated as elements of the offense to be determined by the jury.

In situations where a factual determination leads to conviction of a greater offense (or enhanced sentencing) as opposed to the mere conviction of an offense, when should that determination be treated as an element of the offense as opposed to a factor to be considered at sentencing? Based on decisions of this Court, as well as the historical concerns that underlie the right to jury trial, Amici submit that the following test is appropriate: Facts that lead to an enhanced sentence must be viewed as elements of an offense for which a jury determination is required 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 makes possible a significantly enhanced sentence.\(^{235}\)

When the elements of the offense define basic criminal conduct, what Amici in Walton call "the mere conviction of an offense," Amici apparently believe that no test is necessary for determining the elements of the offense. Apparently, any facts "pertaining to the actus


\(^{234}\) Id. at 49.

reus and mens rea” are elements of this offense. When the crime is what Amici have called a “greater offense,” or when the facts lead to enhanced sentencing, Amici find it necessary to propose a two part test for determining whether the facts giving rise to the legal rule constitute an element of the offense for which a jury determination is required.

The first requirement is that the facts must “relate to the circumstances of the crime rather than the character of the offender.”236 As we have seen, this is the test used by the Oregon Supreme Court in Quinn.237 There are a number of important reasons to object to the Quinn test.

a. The Definitional Imprecision

Aside from the labels a legislature might give them, there is no readily apparent distinction between facts that relate to the circumstance of the crime and facts that relate to the character of the offender. It is not uncommon for a crime to be defined in terms of the status of the offender at the time the offense is committed.238 For example, persons who have been convicted of specified felonies are sometimes prohibited from possessing certain property, though others can legally possess that property. Thus, felons cannot own or possess firearms capable of being concealed on the person, whereas others may lawfully own and possess these weapons.239 Does the conviction of the first felony constitute a circumstance of the possession-ownership crime or does it relate to the character of the offender? The important point here is that both Amici and the Quinn court offer no method for distinguishing between the circumstances of the crime and character of the offender. There is no distinction in traditional element analysis doctrine, because element analysis was not used to police the boundaries between the substantive criminal law and sentencing factors. Instead, traditional element analysis accepts the designation set forth in the legislation.240 If the facts form part of the definition of the offense, they are an element of the offense, even though they relate to the character of the offender. This explains why

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236. Id. at 19.
237. See supra notes 227-32 and accompanying text.
238. The Quinn court placed considerable emphasis on the distinction between an “offense” and a “status,” but the court offered no reason why a legislature could not make the status of the defendant an element of a crime. See supra text accompanying note 228.
239. For example, it is an offense in California for any person who has been convicted of a felony or who is addicted to the use of any narcotic drug to own or possess a concealable firearm, though it is not a crime for others to do so. Cal. Penal Code §§ 12, 21 (West 1989).
240. See supra text accompanying note 201.
most courts have resolved this issue by accepting the label affixed to
the feature by the legislature, rather than by ruling on the basis of a
substantive definition between the two sets of facts.\(^{241}\)

Let us assume, however, that we can fashion a rule that ade-
quately distinguishes between facts relating to the offender's character
and facts relating to all other aspects of the crime defined in the legis-
lation. Under Amici's argument, facts that relate to the character of
the offender (even though they are included in the definition of the
crime) are not elements of the offense. In the example of the crime of
possession or ownership of a concealable firearm by a convicted felon,
the defendant's prior conviction of the specified felony would not be
an element of the crime. Of course, this would be true even though
the crime were punishable only by a mandatory prison term. And
though the defendant's conviction of the prior felony is a critical fac-
tor in determining the defendant's guilt, the fact of the prior felony
conviction is not an element of the crime under this subject matter
definition. This definition conflicts with traditional element analysis
document. The defendant's prior conviction of the specified felony is an
element of the offense under traditional element analysis.\(^{242}\) The
adoption of the subject matter definition would alter, rather than
extend, existing doctrine. The suggested test retains the traditional
concept of actus reus as being bound by time and space, but it appar-
etly seeks to alter our understanding of the components of the actus
reus and the mens rea in some undefined way. More importantly,
neither theory nor policy is offered as the rationale for adopting this
specific test.

b. The Definitional Arbitrariness

It is not apparent why the facts must relate to the "circumstance
of the crime" rather than the "character of the offender" to constitute
an element of a "greater offense" but not for "the mere conviction of
an offense."\(^{243}\) Let us suppose that it is a crime for any psychothera-
pist to have sexual intercourse with a patient. The offense is classified
as a misdemeanor punishable by nine months imprisonment. Let us
also suppose that it is not a crime for any other person to do so. Since
it is a unitary offense and no other person is prohibited from engaging
in this conduct, it can be assumed that this is a crime that falls into
Amici's "mere conviction of an offense" category. In this situation
the defendant's status as a psychotherapist is an element of the

\(^{241}\) See supra text accompanying note 193.

\(^{242}\) E.g., People v. Hall, 28 Cal. 3d 143, 616 P.2d 826, 167 Cal. Rptr. 844 (1980).

\(^{243}\) See supra text accompanying note 235.
offense, for it relates to the actus reus of the crime. In a trial for this offense, the jury must make the factual determination that the defendant was a psychotherapist when the prohibited intercourse occurred.

Now let us suppose that the legislature adds a new law to the penal code. This new offense prohibits psychotherapists from having sexual intercourse with patients, if the psychotherapist is more than ten years older than the patient and the patient is under the age of twenty-one. The new offense is a felony punishable by a maximum of five years imprisonment. The Amici would presumably classify this felony as a "greater offense" with enhanced sentencing. According to Amici's suggestion, in this situation, the factual determinations concerning the status and the age of the psychotherapist would not be an element of the offense if it relates to the character of the offender. Why this would be so for the "greater offense," but not for the misdemeanor offense needs justification. Yet Amici offer none.

c. The Questionable Use of History

There is no relationship between the first prong of the Amici's suggested test (the Quinn test) and the purpose for the right to a jury trial. We are told only that the first prong's requirement is "consistent with the framers' probable view of the jury's fact-finding role," and that "[t]he 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." Although these asser-

244. See supra text accompanying note 196.
245. See supra text accompanying note 235. This discussion assumes that we can devise a workable definition between these two sets of facts.
247. Amici offer the following argument: 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. In the Middle Ages, jurors were selected because of their special knowledge of the crimes committed. Thus, these jurors' fact-finding authority naturally extended to all of the circumstances of the crime. By contrast, judges would decide whether the defendant was eligible for benefit of clergy, a determination largely dependent on an appraisal of the defendant's personal characteristics. Id.

The assumption that the jury did not determine the facts supporting a claim of benefit of clergy because they were largely dependent on an appraisal of the defendant's personal characteristics relies on a misconception of the purpose of the doctrine of benefit of clergy. The doctrine began as a method for allocating jurisdiction between the ecclesiastical courts and the common law courts. Gabel, Benefit Of Clergy In England In The Later Middle Ages, XIV Smith College Stud. Hist. 1, 7 (1929). Since the facts supporting the plea of benefit of clergy related to the jurisdiction of the court, the determination of those facts was properly for
tions are not beyond dispute, it can be assumed that they accurately reflect our experience with trial by jury.

This particular aspect of the Amici's argument focuses on the type of fact-finding juries typically did at the time the sixth amendment was adopted, rather than on the purpose of the sixth amendment guarantee.248 Surely a legislature is not bound to define crimes purely in terms of the kinds of facts found by juries when the amendment was adopted. But the inevitable conclusion from this argument is that the right to a jury trial attaches to fact-finding that is historically part of the jury's role at the time of the adoption of the sixth amendment. Even if we assume that no jury in the entire history of the common law ever determined a factual matter relating to the defendant's character as part of its determination of the defendant's liability for punishment, it is not reasonable to conclude that the framers intended the sixth amendment jury trial right to be limited to a historically based conception of the subject matter of the fact-finding process as it then existed.249 A subject matter requirement for the attachment of the constitutional right to a jury trial simply does not further the sixth amendment's purpose of guarding against government oppression.

d. The Quinn Test as a Threat to Sixth Amendment Protection

Finally, the first prong of the Amici's suggested test (the Quinn test) is both a rule of inclusion and a rule of exclusion. If the facts relate to the circumstances of the crime, and if the second prong is also met, then the factual determination is an element of the offense for which a jury determination is required. If the facts relate to the "character of the offender," then even if the second prong of the test is met, this factual finding is not an element of the offense. This type of factual finding is thus triable by the court alone under the sixth amendment and not the jury. That the court determined these jurisdictional facts teaches little, if anything, about the jury's historical role over the determination of facts relating to the defendant's personal characteristics in connection with the crime charged.

248. Though I have not looked at the evidence with respect to jury practices in Colonial America, there is an Anglo-American tradition of defining offenses to include the defendant's status. From at least the middle of the Fourteenth Century, the English Parliament used the personal status of the defendant to define certain crimes. A good example is found in the early English laws making vagrancy a crime. See Comment, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality, 37 N.Y.U. L. Rev. 102, 104-07 (1962). This practice was brought to Colonial America. See 5 Tucker's Blackstone, Commentaries 168-69 (1969). Although the crimes may not have been triable by jury because they were petty offenses, there is little basis in history supporting an argument that facts relating to the character of the defendant are not or should not be within the scope of the jury's historical fact-finding role.

249. See infra text accompanying notes 347-52.
amendment. This would permit a legislature to base liability for enhanced punishment upon a factual finding that relates to the “character of the offender,” and allocate the determination of the existence of that factually based liability rule to the trial court. Indeed, this is exactly what the Quinn court suggested in its dictum statement concerning the future dangerousness finding in the 1978 Oregon statute.250

Again, this first prong of the Amici’s test (the Quinn test) does not further the sixth amendment’s purpose of guarding against government oppression. A factual finding relating to the defendant’s character that creates liability for punishment is as capable of being used as a tool for government oppression as is a factual finding relating to “the circumstances of the crime.” The current Oregon death penalty statute makes the death penalty dependent upon an identical finding of future dangerousness.251 Fortunately, defendants accused of capital murder in Oregon need not challenge the Quinn dictum, for the Oregon Legislature has protected the right to a jury trial by statute.252

e. Summary

The first prong of the test suggested by the Amici in Walton (the Quinn test) should be rejected as a method for drawing the constitutional line between the right to a trial by jury and the Spaziano-Hildwin rule that factually based sentencing factors can be determined by the trial court. The Quinn test offers no meaningful way of distinguishing an element of an offense from a sentencing factor. It does damage to existing element analysis doctrine and does not further the goal of the sixth amendment jury trial right. Finally, it is underprotective of the sixth amendment guarantee.

2. THE SECOND PRONG OF THE AMICI’S TEST

The second prong of the Amici’s suggested test does not appear in the Oregon Supreme Court’s element analysis in State v. Quinn. This prong is formulated as follows: “proof of the facts makes possible a significantly enhanced sentence.”253 Since the Amici neither discuss nor explain this prong of their suggested test, we cannot be sure of precisely what they intend by this requirement.254 Let us assume the

250. See supra text accompanying notes 228-31.
251. See supra note 209 and accompanying text.
252. See supra note 213 and accompanying text.
254. This prong is mentioned only twice in the Walton Amici Curiae Brief. First, when it is initially proposed, id. at 19; and second, when it is applied, id. at 23. In applying this prong,
following interpretation: If the proof of given facts creates liability for a significantly enhanced sentence, then the factual finding constitutes an element of the offense when the first prong of the test is also met. Since the feature in question is an element of the offense if both prongs of the test are met, the sixth amendment right to a jury trial attaches and a jury determination is required.

As so construed, there is a similarity between this second prong of the test suggested by the Amici and the liability-rule analysis theory of the attachment of the sixth amendment right. There are, however, significant differences in the two approaches. The similarities and the differences between the second prong of the Amici's proposed test and liability-rule analysis will be considered later in this Article.

C. Adamson v. Ricketts

The final example of an attempt to mold traditional element analysis into doctrine that defines the line between the sixth amendment right to a jury trial and the Spaziano-Hildwin rule is found in Adamson v. Ricketts. In Adamson, the United States Court of Appeals for the Ninth Circuit, held that the Arizona capital sentencing procedure violated the defendant's sixth amendment right to a jury trial. Arizona's petition for a writ of certiorari is currently pending in the Supreme Court.

The Arizona statute, which is based upon the alternative formulation of Model Penal Code Section 210.6, enumerates a list of aggravating circumstances that are determined by the trial court at the sentencing hearing. Adamson was convicted of first degree murder by a jury. At the subsequent sentencing hearing, the trial court found two aggravating circumstances and ultimately sentenced Adamson to death. Claiming that the aggravating circumstances are elements of the crime of capital murder, Adamson argued that the judicial determination of the existence of the two aggravating circumstances vio-

Amici write: "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."

255. See infra notes 360-65 and accompanying text.
256. See infra text beginning with note 268.
257. 865 F.2d 1011 (9th Cir. 1988) (en banc).
258. Id. at 1023.
259. Arizona's petition was filed on March 20, 1989. Ricketts v. Adamson, 865 F.2d 1011 (9th Cir. 1988), cert. filed, 57 U.S.L.W. 3655 (Apr. 4, 1989). The Supreme Court has not ruled on the petition. The Court appears to be waiting for its decision in Walton v. Arizona before ruling on the Adamson petition.
260. For a discussion of the Arizona statute, see infra Section VII(A).
lated his sixth amendment right to a jury trial. Agreeing that the key to the jury trial right lay in element analysis, the majority found that the crucial issue was whether "the Arizona statutory aggravating circumstances are actually elements of a distinct crime." In assessing Adamson's claim, the court employed the following analysis:

[W]e examine (1) the legislative history of Arizona's death penalty statutes; (2) the actual role played by aggravating circumstances under Arizona's revised statute § 13-703; and (3) the application of McMillan v. Pennsylvania, the Supreme Court's most recent pronouncement on the distinction between elements and sentencing factors, to this case.

1. THE LEGISLATIVE HISTORY

Without announcing the purpose for including legislative history as a component of element analysis, the court began by tracing the evolution of Arizona capital homicide law from 1901 to the statutes currently in force. However, the court's "abbreviated legislative history" was used only to provide context for the remainder of the analysis and to serve as a basis for distinguishing several aspects of the Supreme Court's holding in McMillan v. Pennsylvania. In addition to providing the court with the historical context in which the challenged provision appears (which would be applicable to any case), the court's implied goal for analyzing the legislative history of a state's death penalty scheme was to assure that the legislature had not changed the relevant statutes for the purpose of evading the constitutional rights of the accused. Apparently satisfied that the Arizona Legislature had a legitimate purpose in mind, the court proceeded to the next component of its element analysis.

261. Adamson, 865 F.2d at 1024.
262. Id.
263. Id. at 1024-25.
264. Id. at 1025. In dissent, Judge Brunetti wrote: "The history of Arizona's death penalty, and the changes it has gone through are irrelevant so long as the statute applied here meets constitutional standards." Id. at 1053.
265. Id. at 1027.
266. This is implied from the court's quotation of the following passage from McMillan: "Thus, the [McMillan] Court concluded that 'the specter raised by petitioners of States restructuring existing crimes in order to 'evade' the commands of Winship just does not appear in this case.'" Id. (citing McMillan v. Pennsylvania, 477 U.S. 79, 89 (1986)).
267. The majority opinion is not entirely clear on this point. Near the end of the portion of the opinion devoted to the legislative history the court makes the following observation:

If this were the end of the analysis, however, Adamson's argument would fail. Simply because Arizona previously assigned this decisionmaking responsibility to a jury does not mean, of course, that the State must continue to do so. However, the Supreme Court has not hesitated to invalidate sentencing procedures when the process violates constitutional rights.
2. THE ROLE OF THE AGGRAVATING CIRCUMSTANCES

The critical component of the Adamson court's element analysis focuses on the role of the aggravating circumstances in the Arizona capital sentencing scheme. Four facets of that role were analyzed.

a. The Formal Role

The majority looked first at the formal scheme created by the legislation. The nomenclature used to identify the aggravating circumstances and the fact that the legislature allocated the determination of their existence to the trial court at the sentencing hearing indicate that the legislature did not intend for aggravating circumstances to be elements of an offense. Thus, from the face of the statute, aggravating circumstances appear to be "mere factors guiding the judge in his or her determination of the appropriate penalty." If the majority had employed traditional element analysis, then it would have concluded at this point that the aggravating circumstances were not elements of an offense. But tacitly recognizing that the sixth amendment right is a substantive restraint on legislative choices, the majority looked beyond the "labels such as 'determinations of guilt' and 'sentencing' " used in the statute to the functions actually performed by the aggravating circumstances. In other words, the constitutionality of the statute turns neither on what the Arizona Legislature said, nor on what it intended to do. The court's critical

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268. Adamson, 865 F.2d at 1025-26.
269. Id. at 1026.
270. Judge Brunetti employed the traditional element analysis and concluded that the aggravating circumstances are sentencing factors. Id. at 1053-54 (Brunetti, J., joined by Alarcon, Beezer, and Thompson, JJ., concurring and dissenting).
271. Adamson, 865 F.2d at 1025-26.
inquiry was to determine what the Arizona Legislature actually did, and the impact of that on the defendant’s right to a jury trial.

b. The Procedural Functions and the Method of Litigation

According to the majority, aggravating circumstances perform the following procedural functions or are litigated in the following way: (1) “[A]n aggravating circumstance . . . informs the prosecutor what facts must be proven to obtain a conviction”;272 (2) “[t]he circumstance must be proven beyond a reasonable doubt”; (3) “[t]he hearing is adversarial, with oral argument and the prosecution’s presentation of evidence governed by the usual rules of evidence”; (4) “[t]he presiding trial judge must make findings on the existence or nonexistence of each of the statutory aggravating and mitigating circumstances”; (5) and “[i]f the judge finds an aggravating circumstance, the burden then shifts to the defendant who must put on sufficient evidence of mitigation” to avoid imposition of the death penalty.273 Since the elements of an offense have the same attributes, and since they are litigated in the same way, these similarities indicated to the Adamson court that the aggravating circumstances function as elements of the crime of capital murder.274

c. The Mens Rea of the Aggravating Circumstances

Both of the aggravating circumstances at issue in Adamson have mens rea requirements.275 Partially relying on the Oregon Supreme Court’s opinion in State v. Quinn,276 the court found it significant that “[t]hese assessments directly measure a defendant’s ‘moral guilt’ and overall culpability—traditionally the jury’s domain of decision.”277 In a footnote, the Court observed that “[t]hese inquiries are identical in essence to those required under the formal (statutory) distinctions Arizona makes among homicides. The distinctions turn almost

272. Id. at 1026 (emphasis added). The court’s analysis was not assisted by the inclusion of the emphasized language. This language assumes the answer the court is seeking.
273. Id.
274. Id. at 1026-27.
275. The two aggravating circumstances were the pecuniary-gain and the heinous-cruel-or-depraved aggravating circumstances. Id. These two special circumstances read as follows: “The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;” and “[t]he defendant committed the offense in an especially heinous, cruel or depraved manner.” Ariz. Rev. Stat. Ann. § 13-703(F)(5), (6) (1989).
276. See supra text accompanying notes 220-33.
277. Adamson, 865 F.2d at 1027.
entirely on differences in the defendant’s mental state, as this provides a measure of culpability.”

In other words, the aggravating circumstances at issue in Adamson function to determine the defendant’s culpability in precisely the same way that the mental elements of a crime determine the defendant’s culpability.

d. The Liability Function

The court gave equal importance to the fact that the aggravating circumstances perform the same liability function as do the elements of the crime: “If the prosecution is unable to prove the existence of a single aggravating circumstance, like not proving an essential element, the defendant cannot be put to death.”

At the close of this portion of its analysis, the Adamson court concluded by holding that “Arizona’s aggravating circumstances function as elements of the crime of capital murder requiring a jury’s determination.”


The Adamson court found further support for its holding in McMillan v. Pennsylvania. Before examining why the Adamson court took comfort in McMillan, we should have McMillan firmly in mind.

The Pennsylvania Mandatory Minimum Sentence Act increases the minimum sentence a judge can impose after a finding (made by the judge by a preponderance of the evidence at a sentencing hearing) that the defendant “visibly possessed a firearm” during the commission of one of the offenses enumerated in the Act. The Act does not alter the maximum sentence specified for the underlying offense. McMillan was convicted in a jury trial of an offense specified in the Act—aggravated assault (McMillan shot his victim during an argument over a debt). Nevertheless, the sentencing hearing provided by the Act was not held because the trial court found the Act unconstitutional. The trial court then imposed a lesser sentence than that required by the Act, and the state appealed.

McMillan made two arguments that were relevant to the Adamson court’s analysis. First, he argued that visible possession of a fire-

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278. Id. at 1027 n.28.
279. Id. at 1026.
280. Id. at 1027.
282. Id. at 81-82.
283. Id. at 82.
arm is an element of the crime for which he had been sentenced; thus, that element had to be proved beyond a reasonable doubt under the due process clause of the fourteenth amendment.284 Second, McMillan argued that the Act denied him his sixth amendment right to a trial by jury because an element of the offense (visible possession of the firearm) was determinable by the court alone at the sentencing hearing.285 The trial court apparently held the statute unconstitutional on the first ground.286 The Pennsylvania Supreme Court disagreed and reversed the trial court’s ruling. The Pennsylvania Supreme Court did not address the second argument (the violation of the right to a jury trial).287 Certiorari was granted and the United States Supreme Court affirmed.288

The Act at issue in McMillan expressly provided that visible possession “shall not be an element of the crime.”289 The Pennsylvania Supreme Court agreed. The visible possession requirement was a sentencing factor, not an element of the crime.290 Relying on Patterson v. New York,291 rather than on Mullaney v. Wilbur,292 the Supreme Court permitted “the State [to pursue] its chosen course in the area of defining crimes and prescribing penalties.”293 Although the Court recognized that the due process clause imposes limits on the State’s power to do both, it held that Pennsylvania had not exceeded those limits in this instance. In so holding, the Court found it significant that the Act:

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. . . . Petitioner’s claim that visible possession under the Pennsylvania statute is “really” an element of the offenses for which they are being punished . . . would have at least more superficial appeal if a finding of visible posses-

284. Id. at 83.
285. Id. at 93.
286. See Commonwealth v. Wright, 508 Pa. 25, 31, 494 A.2d 354, 357 (1985). Four cases involving the Pennsylvania Act were appealed to the Pennsylvania Supreme Court. McMillan’s appeal was consolidated with the other three. Sandra L. Wright’s appeal became the lead case. The opinion in Wright disposed of all four cases. Id. at 25-28 nn.1 & 2, 494 A.2d 355-56, n.1 & 2.
287. See id. at 25, 494 A.2d at 354.
289. Id. at 81 n.1.
290. Wright, 508 Pa. at 31-33, 494 A.2d at 357-59.
293. McMillan, 477 U.S. at 86.
sion exposed them to greater or additional punishment, . . . but it does not.294

In the next paragraph of its opinion, the McMillan Court distinguished Specht v. Patterson295 on similar grounds. Under the Colorado statute at issue in Specht (the Sexual Offenders Act), conviction of a sexual offense otherwise carrying a maximum penalty of ten years exposed the defendant to an indeterminate term from one day to life imprisonment if the sentencing judge made a post-trial finding that the defendant posed "a threat of bodily harm to members of the public, or [was] an habitual offender and mentally ill."296 The statute provided that this factual determination was to be made by the judge without a hearing, based solely on a psychiatric examination and the resulting presentence psychiatric report.297 At the time set for sentencing, without holding a hearing of any kind, the trial court made the necessary finding (based upon a psychiatric report), and sentenced Specht under the Sexual Offenders Act.298 Ultimately, the United States Supreme Court unanimously held299 that the Colorado scheme violated the due process clause.300 In McMillan, the Court distinguished Specht on the ground that the finding provided by the Colorado statute presented the defendant with "a radically different situation" from the usual sentencing proceeding.301 But because the finding of visible possession of a firearm only raises the minimum sentence that the trial court may impose, Specht was clearly distinguishable.302 Accordingly, the Court rejected McMillan's due process claim that the visible possession finding in the Act was an element of the offense that the prosecution must prove beyond a reasonable doubt.303

The Court did not mention the fact that the Supreme Court of Pennsylvania failed to rule on McMillan's second argument.304 Nonetheless, the McMillan Court did dispose of McMillan's claim that judicial determination of the visible possession requirement violated

294. Id. at 87-88.
296. Id. at 607.
297. Id. at 607-08.
298. Id. at 608.
299. Mr. Justice Douglas wrote the opinion for the Court. It was joined by every member of the Court, except Justice Harlan. Id. at 606, 611. Mr. Justice Harlan agreed "with the conclusions reached by the Court, but upon the premises set forth in his opinion concurring in the result in Pointer v. Texas, 380 U.S. 400, 408 (1965)." Specht, 386 U.S. at 611.
300. Specht, 386 U.S. at 611.
301. 477 U.S. at 89.
302. Id.
303. Id. at 91.
304. See supra note 287 and accompanying text.
his sixth amendment right to a jury trial. This ruling required only two sentences: "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."\textsuperscript{305}

We now turn to the Adamson court's reading of McMillan. McMillan supported the court's holding because, according to the Adamson court, the Supreme Court "stated in McMillan that its result could be different 'if a finding of visible possession exposed [defendants] to greater or additional punishment.'\textsuperscript{306} Implying that this language created a constitutional rule, the Adamson court found that the Arizona capital sentencing statute violated it:

Although first degree murder in Arizona is punishable by life imprisonment or death, a defendant cannot, under any circumstances, be sentenced to death unless at least one aggravating circumstance is found to exist. Consequently, the finding of aggravating circumstances "exposes [defendants] to greater or additional punishment." Further, because proof of at least one "aggravating circumstance" is required, capital murder becomes a distinct offense calling for a separate punishment not otherwise available—the penalty of death.\textsuperscript{307}

The court then distinguished Spaziano and held that "Arizona has impermissibly identified elements of the crime of capital murder as sentencing factors for determination by a judge, thereby removing their consideration from a jury, in violation of the Sixth Amendment."\textsuperscript{308}

4. A CRITIQUE OF ADAMSON

At the outset, we may set aside the first prong of the Adamson court's element analysis—the assessment of the legislative history of the challenged capital sentencing procedure. The court's review of

\textsuperscript{305} McMillan, 477 U.S. at 93 (citing Spaziano v. Florida, 468 U.S. 447, 459 (1984)).

\textsuperscript{306} Adamson, 865 F.2d at 1027 (quoting McMillan, 477 U.S. at 89). The Adamson opinion continued as follows:

\textquote{The Court placed great emphasis on the fact that 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.} Id. at 1027-28. The Adamson court did not quote the next sentence. It is quoted above. See supra text accompanying note 294.

\textsuperscript{307} Adamson, 865 F.2d at 1028 (footnotes and citations omitted).

\textsuperscript{308} Id. at 1029.
the statute's history uncovered no evidence that the Arizona Legislature was attempting to subvert or evade the sixth amendment right to a jury trial when, in response to Furman, it adopted the capital sentencing procedure based on the alternative formulation of Model Penal Code Section 210.6. To the contrary, the evidence indicates that Arizona was attempting to reenact a death penalty procedure that conformed to the requirements of the Constitution. Whether Arizona was successful in its labors, of course, is an entirely different matter.

The central core of the court’s element analysis is found in its second prong. The Adamson court compared the functions of the aggravating circumstances and the way they are litigated with the corresponding attributes of the elements of a crime. Since this comparison yielded no grounds for distinguishing the aggravating circumstances from the elements of a crime, the court concluded that the aggravating circumstances were elements of a new crime of “capital murder.” This portion of the court’s analysis can be separated into four sub-categories: (1) the formal role played by the aggravating circumstances;\(^{309}\) (2) the procedural functions performed by aggravating circumstances and the method of their litigation;\(^{310}\) (3) the mens rea of the aggravating circumstances; \(^{311}\) and (4) the liability function of the aggravating circumstances.\(^{312}\)

First, the Adamson court’s analysis of the formal role played by the aggravating circumstances in the Arizona capital sentencing procedure is unexceptional. A court must defer to legislative choices, unless they impair constitutional rights. The nomenclature used in a statute and the legislature’s definition of the role played by a particular feature of state law is dispositive, so long as the statute is within constitutional bounds. But when a statute is challenged under the federal Constitution, the court must look beyond the labels used in the statute to the functions actually performed by the challenged feature and its impact on the claimant’s constitutional rights.\(^{313}\)

Second, the Adamson court next turned to an analysis of the procedural functions of the aggravating circumstances and the method used to determine their existence. Importance is given to the following features of either the aggravating circumstances or how they are litigated: they inform counsel of what facts must be proved for an

\(^{309}\) See supra text accompanying notes 268-71.

\(^{310}\) See supra text accompanying notes 272-74.

\(^{311}\) See supra text accompanying notes 275-78.

\(^{312}\) See supra text accompanying notes 279-80.

\(^{313}\) See supra text accompanying notes 268-71.
affirmative finding, the standard of proof for criminal cases is required, the hearing is adversarial with oral argument and the usual rules of evidence governing the prosecutor’s case, the judge makes findings of fact, and once the judge finds the existence of an aggravating circumstance, the burden shifts to the defendant to prove mitigation. Since the elements of a crime have these same attributes, the court is persuaded that the aggravating circumstances are elements of a newly defined crime. It is here that the Adamson court erred.

Although the court is correct that these attributes and methods are identical to the attributes of elements of a crime and the methods used to prove them, that in itself establishes nothing. Other features of state law that are clearly not elements of a crime might have the same attributes and methods. For example, a legislature could assign all of these same functions to a factually based sentencing factor and provide for the same method for litigating its existence, and yet, that would not convert the sentencing factor into an element of a crime. Thus, California uses aggravating circumstances as factually based sentencing factors. The jury is the sentencing authority in California when the right to trial by jury is exercised, and the sentencing hearing is actually a phase of the capital trial that closely resembles the portions of the trial that precede it. Although the legislative body in California has not required that the prosecution shoulder the burden of proof beyond a reasonable doubt for most of the aggravating circumstances, at least one of these sentencing factors so requires. Consequently, the only “elemental” feature emphasized by the Adamson court which is lacking in the California scheme is the requirement that the trier-of-fact make specific findings on the existence of the aggravating circumstances. But seldom is this required

314. See supra text accompanying notes 272-74.
315. See supra text accompanying note 274.
316. This follows from the Supreme Court’s holding in Hildwin, which is discussed below. See infra text accompanying notes 321-24.
317. CAL. PENAL CODE § 190.3 (West 1988).
319. E.g., People v. Rodriguez, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986) (when an uncharged crime is used as an aggravating circumstance it must be proved by the prosecution beyond a reasonable doubt); People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982).
320. CAL. PENAL CODE § 190.3. The burden shifting function is a feature of the uncharged-crime aggravating circumstance in California: See the cases cited supra note 319. Not all of the California aggravating circumstances function in this way, but that cannot be a critical factor. See Patterson v. New York, 432 U.S. 197 (1977). The affirmative defense of extreme emotional disturbance at issue in Patterson is not an element of the crime, but it functions to shift the burden to the prosecution if the defendant’s claim is to be defeated in the same way that an aggravating circumstance in Arizona shifts the burden to the defendant. For
even for an element of an offense. Normally, the jury can return a general verdict in criminal cases.

Furthermore, the attribute identity aspect of the Adamson court's element analysis is inconsistent with Hildwin v. Florida. In Hildwin, the United States Supreme Court held that the aggravating circumstances in the Florida capital sentencing statute are not elements of an offense. Rather, they are sentencing factors to which the right to a trial by jury does not attach. The Court emphasized that "[i]ke the visible possession of a firearm in McMillan, the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" Although the aggravating circumstances in the Florida statute function in materially different ways than do the aggravating circumstances in the Arizona scheme, they cannot be distinguished on the grounds that this portion of the Adamson court's analysis equates the Arizona aggravating circumstances with the elements of a crime. Of course, since Hildwin was decided after Adamson, we cannot fault the court for failing to consider that case. Nevertheless, Hildwin demonstrates that this portion of the Adamson court's analysis is wrong. The attributes of the aggravating circumstances the Adamson court relied upon and the methods for

discussion of the critical difference between the California aggravating circumstance as a sentencing factor, and the Arizona aggravating circumstance as "crime" under liability-rule analysis, see infra note 468 and accompanying text.

322. Id. at 2057 (citing McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986)).
323. See Fla. Stat. Ann. § 921.141 (1985). At issue in Adamson were the motive-of-pecuniary-gain and the especially-heinous-cruel-or-depraved aggravating circumstances. 865 F.2d at 1023. They are defined as follows: "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." Ariz. Rev. Stat. Ann. § 13-703(F)(5) 1989. "The defendant committed the offense in an especially heinous, cruel or depraved manner." Id. Two of the four aggravating circumstances at issue in Hildwin were substantially similar to the Adamson aggravating circumstances. These were the pecuniary-gain and the especially-heinous-atrocious-and-cruel aggravating circumstances. They are defined in the Florida statute as follows: "The capital felony was committed for pecuniary gain." Fla. Stat. § 921.141(5)(f). "The capital felony was especially heinous, atrocious, or cruel." Id. § 921.141(5)(h). Although there is a difference in the wording between the Arizona and Florida provisions, they apply essentially the same conduct. The aggravating circumstances in both Arizona, see infra Section VII(A), at 456, and Florida must be proven by the prosecution beyond a reasonable doubt. See, e.g., Eutzy v. State, 458 So. 2d 755 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). There is also no effective way of distinguishing the method of litigating the existence or nonexistence of the aggravating circumstances or their procedural function in the two states. There are, however, important differences between the functioning of the aggravating circumstances in the two states that are not relevant to the current discussion.

324. Adamson was decided on December 22, 1988, see Adamson, 865 F.2d at 1011, whereas Hildwin was decided on May 30, 1989, see Hildwin, 109 S.Ct. at 2055. This part of the Adamson court's analysis is also inconsistent with McMillan.
their determination are not the exclusive properties of elements of a crime. Worse yet, elements of a crime and factually based sentencing factors commonly share these attributes and methods. Thus, an attempt to distinguish the elements of a crime from a sentencing factor on these grounds is impossible.

(3) The mens rea of the aggravating circumstances:

Third, the court's reliance on the fact that the aggravating circumstances at issue in Adamson function to determine a defendant's culpability in precisely the way that the mental elements of a crime determine a defendant's culpability is subject to exactly the same criticism. This is also a common feature of sentencing factors. For example, the California capital sentencing statute defines one of the sentencing factors as follows: "whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct." This sentencing factor is obviously aimed at assessing the defendant's moral culpability in essentially the same manner as the Arizona aggravating circumstances. Thus, where it attempts to establish that the aggravating circumstances are elements and not sentencing factors because they function to assess the defendant's moral culpability, the court's analysis in Adamson is fatally flawed.

Fourth, although the Adamson court did not emphasize the importance of the liability function of the aggravating circumstance in this part of its analysis, the liability function truly is the critical factor. The method of adjudicating the aggravating circumstances in the Arizona statute does violate Adamson's sixth amendment right to a jury trial, but not because they are elements of a new offense of capital murder. The Arizona method violates the sixth amendment because these aggravating circumstances are liability rules that must be triable by a jury. In other words, the Adamson court reaches the correct result for the wrong reason. The court's analysis is faulty

325. See supra text accompanying notes 275-78.
326. CAL. PENAL CODE § 190.3(f) (West 1988).
327. A similar sentencing factor appears in the Florida statute: "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." FLA. STAT. ANN. § 921.141(5)(f) (1989).
328. The Adamson court's partial reliance on the Oregon Supreme Court's opinion in State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981), is flawed for the reason set forth in the discussion of that case. See supra text accompanying notes 220-56. For a discussion of the critical difference between the California aggravating circumstance as a sentencing factor, and the Arizona aggravating circumstance as a "crime" under liability-rule analysis, see infra note 456 and accompanying text.
329. See infra text accompanying notes 332-36.
330. See infra text accompanying notes 431-33.
because it employs element analysis to define the distinction between the right to a jury trial and the Spaziano-Hildwin rule that factually
based sentencing factors may be determined by the court alone. In
this respect, the Adamson court’s analysis is subject to the same criti-
cism as is the second prong of the test suggested by the Amici in
Walton. Although in different terms, the second prong of the Amici’s
test suggests that a liability rule is an element of a new offense created
by the Arizona capital sentencing scheme. The Adamson court uses
its analysis of the liability function of the Arizona aggravating cir-

cumstance to achieve precisely the same result.331

D. A Summary of the Element Analysis Critique

Traditional element analysis cannot distinguish between the “ele-
ments” of a crime and the components of a sentencing factor because
it was never designed to perform that type of policing function. The
three attempts to alter traditional element analysis to perform that
function (Quinn, Amici in Walton, and Adamson), have not been suc-
cessful. But both the Amici in Walton and the Adamson court
included a variant of liability rule analysis as a component of their
definition of the elements of a crime. For all of the reasons discussed
above, however, liability rule analysis should not be used to identify
“elements” of a crime. Element analysis should be abandoned as a
test for the attachment of the sixth amendment guarantee. As we
shall see in the following discussion, liability rule analysis promises a
simple solution to this problem. The evidence also suggests that the
framers of the Constitution probably intended liability analysis to set
the boundaries of the sixth amendment right to trial by jury.

V. THE CONSTITUTIONAL MEANING OF “CRIME,” MODERN
CRIMINAL LAW, AND THE RIGHT TO TRIAL BY JURY

A. The Fundamental Meaning of “Crime” and Its Modern
Variants

The two jury trial provisions in the Constitution are complemen-
tary:332 A “criminal prosecution”333 is the trial of a “crime.”334 The
Constitution, of course, contains no definition of “crime”; and the

331. See supra text accompanying notes 279-80; infra text accompanying notes 332-66.
332. E.g., Callan v. Wilson, 127 U.S. 540, 549 (1888) (Harlan, J., for a unanimous Court);
see supra text accompanying notes 1-3.
333. The sixth amendment states that “[i]n all criminal prosecutions, the accused shall
enjoy the right to a speedy and public trial, by an impartial jury . . . .” U.S. CONST. amend VI.
334. Article III, § 2, cl. 3 of the Constitution provides that “[t]he Trial of all Crimes, except
in Cases of Impeachment, shall be by Jury . . . .” U.S. CONST. art. III, § 2, cl. 3.
evolution of the wording of the Article III jury trial provision in the Federal Convention provides no evidence that the framers had a peculiar understanding of that term. The draft prepared by the Committee on Detail provided that “[t]he trial of all criminal offences (except in cases of impeachments) shall be in the state where they shall be committed, and shall be by jury.” On August 28, 1787, this provision was amended to provide that “[t]he trial of all crimes (except in cases of impeachment) shall be by jury. . . .” A stylistic change appeared in the draft prepared by the Committee on Style reported on September 12, 1787; “[t]he trial of all crimes, except in cases of impeachment, shall be by jury . . .” An amendment guaranteeing a jury trial in civil cases was proposed and defeated on September 15, 1787, and later that day the Constitution was adopted. There is no evidence that the meaning of the word “crime” was ever debated in the Convention or in the proceedings leading up to the ratification of the Constitution.

The inference is compelling that the framers had such a clear conception of “crime” in mind that the word needed neither debate nor definition. We can be certain that their concept of crime was based on the common law. Colonial criminal law was (at least in Pennsylvania at the time of the Convention) the criminal law of England. Moreover, the first penal statute enacted by Congress did not define the crimes prohibited by the act. Instead, Congress relied on the traditional understanding of the common law crimes set forth in the act. Thus, murder and manslaughter were made punishable by the statute, but the definition of those felonies was left to the common law. The penal statutes enacted in the states after the revolution

335. 1 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 229 (1888); 5 J. ELLIOT, supra, at 381; 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 187 (1911). The notes from the records of the Committee On Detail show that one version used the phrase “criml. offences,” 2 M. FARRAND, supra at 144, and the notes for what appears to be a later version uses the phrase “Crimes shall be tried . . . .” Id. at 173. On the other hand, the draft reported by the Committee uses “Criminal offences . . . .” Id. at 187.

336. 1 J. ELLIOT, supra note 335, at 270; 2 M. FARRAND, supra note 335, at 438, 576.

337. 1 J. ELLIOT, supra note 335, at 304; 2 M. FARRAND, supra note 335, at 601.

338. 1 J. ELLIOT, supra note 335, at 317.


340. Punishment of Crimes Act, ch. 9, 1 Stat. 112 (1790).

341. Id. §§ 3 & 7. For example, Sections 3 and 7 of the act reads, in pertinent part, as follows:

And be it [further] enacted, That if any person or persons shall . . . commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death. . . .

And be it [further] enacted, That if any person or persons shall . . . commit the crime of manslaughter, and shall be thereof convicted, such person or persons
were likewise based on the common law of England.\textsuperscript{342} Finally, the
Supreme Court has consistently looked to the common law to inter-
pret the meaning of the jury trial provisions.\textsuperscript{343} This practice has been
succinctly described by Justice Story:

[I]t can hardly be doubted, that the constitution and laws of the
United States are predicated upon the existence of the common
law. This has not, as I recollect, been denied by any person, who
has maturely weighed the subject, and will abundantly appear on
the slightest examination. The constitution of the United States,
for instance, provides that “the trial of all crimes, except in cases of
impeachment, shall be by jury.” I suppose that no person can
doubt, that for the explanation of these terms, and for the mode of
conducting trials by jury, recourse must be had to the common
law.

... In criminal cases, the right of trial by jury is preserved, but
the proceedings are not specifically regulated. The ... definition
and extent of the crime ... are left unprovided for. Upon what
ground then do the courts apply in such cases the rules of the com-
mon law? I can perceive no correct ground, unless it be, that the
legislature have constantly had in view the rules of the common
law, and deemed their application in casibus omissis peremptory
upon the courts.\textsuperscript{344}

As we have seen, at one point in the history of the common law,
there was a single homicide offense punished by a mandatory sentence
of death. Then, by a series of ancient statutes that withdrew benefit of
clergy,\textsuperscript{345} the basic crime was divided into a greater and lesser offense:

shall be imprisoned not exceeding three years, and fined not exceeding one
thousand dollars.

Id. §§ 3 & 7.

\textsuperscript{342} See supra text accompanying notes 31-38.

\textsuperscript{343} E.g., Blanton v. City of North Las Vegas, Nev., 109 S. Ct. 1289, 1291-92 (1989);
does not mean, of course, that the Court has always adopted the common law construction
once it has looked at the common law. See, e.g., Codispoti v. Pennsylvania, 418 U.S. 506
(1974) (sixth amendment right to jury trial applies to post-verdict criminal contempt
proceedings if the sentences aggregate more than six months); Bloom v. Illinois, 391 U.S. 194
(1968) (sixth amendment right to trial by jury attaches to the trial of serious criminal
contempts despite the fact that no jury was required at common law—seriousness is
determined by the sentence actually imposed in absence of legislative specification of the
penalty); Burch v. Louisiana, 441 U.S. 130 (1979) (six person juries must be unanimous);
Apodaca v. Oregon, 406 U.S. 404 (1972) twelve person juries need not be unanimous);
juries in all but capital cases).

\textsuperscript{344} United States v. Coolidge, 25 F. Cas. 619, 621 (1813) (No. 14,857), rev’d. on other
grounds, 14 U.S. (1 Wheat.) 415 (1816).

\textsuperscript{345} These statutes are ancient enough to be considered part of the common law of
England.
murder and manslaughter. Since both colonial criminal law and American criminal law distinguished between murder and manslaughter in accordance with the common law, the framers undoubtedly understood that these two crimes were greater and lesser offenses created from what was once a single crime. For those not learned in the common law of crimes, the slightest curiosity would have led them to Blackstone, who tells the story at some length. It is also reasonable to infer that the framers knew of the division of murder into a capital and noncapital crime in William Penn’s penal code and of the Pennsylvania colony’s struggle to maintain its own criminal laws. Since reform of the criminal law in Pennsylvania began the year before the Federal Convention, it is also reasonable to infer that these events were known to the framers as well.

The framers thus undoubtedly understood that “crimes” perform two basic functions. First, a crime creates liability for punishment when no liability existed before the law was enacted (as when a law makes unlawful that which was lawful before). This is the basic concept of a crime. Second, an existing crime can be divided into a greater and lesser offense, for the purpose of limiting the punishment prescribed for the existing offense to the new “greater” offense. Indeed, this is the history of capital crimes at common law. The original homicide offense was divided into murder and manslaughter, for the purpose of limiting capital punishment to the greater offense of murder. William Penn’s Code further divided the crime of murder into a capital and noncapital crime for precisely the same reason.

This history undoubtedly taught the framers, as it teaches us now, that definitions of “crime” change, and that legislatures must be fettered only by fundamental conceptions as new formulas are sought to protect the people from the tyranny of crime. Emerging from this history and from the framers’ purpose to restrain government oppression by the guarantee of the right to trial by jury is the fundamental

346. See supra text accompanying note 11.
347. See supra note 22 and accompanying text. The debate in the Pennsylvania ratifying convention demonstrates that Blackstone’s Commentaries were a source of authority in the Pennsylvania convention. James Wilson was a lawyer, a delegate to the Federal Convention, and a delegate to the Pennsylvania Ratifying Convention. In a debate between James Wilson and another delegate, which took place on the floor of the Pennsylvania convention, Blackstone’s Commentaries was read as precedent for the point under discussion. See 1 J. McMastet & F. Stone, Pennsylvania and the Federal Constitution 1787-1788 360-61 (1888). Wilson was later appointed as a Justice of the United States Supreme Court by President Washington in 1789. He was widely reputed to be “a profound thinker, and thoroughly learned in the law.” 2 J. McMastet & F. Stone, supra, at 758.
348. See supra text accompanying notes 25-38.
349. See supra text accompanying notes 34-37.
RIGHT TO JURY TRIAL

conception of crime: A "crime" is a factually based legal rule (or series of legal rules) that either creates liability for punishment when none existed before, or creates liability for enhanced punishment. In other words, a "crime" identifies a package of factually based legal rules that make punishment or enhanced punishment possible, if the requisite facts are found to be true. The rules set forth the necessary (or essential) precondition that must be found to exist before punishment can be imposed on the accused. That is what is meant for a legal rule to create liability by defining a "crime." Prosecutions for crime thus are meant to create liability for punishment and to legitimate the imposition of punishment on the offender for the crime committed. The law of capital murder illustrates the possible use of the ultimate form of government oppression, "unfounded criminal charges brought to eliminate enemies." Since government alone wields this awesome power, the framers sought to prevent this form of oppression by interposing "the common-sense judgment of a jury" between government and the people.

The framers thus undoubtedly believed that it was the legislative body's task to fashion the definition of the various crimes as it saw fit. Facts function under this conception of crime in any way they are told by the legislative body. The Constitution imposes constraints only on the liability function of the facts (or rules) that the legislature selects to define a crime. If the legislature defines the facts or rules so that they create liability for punishment, or liability for enhanced punishment, then the right to a jury attaches to the process of establishing their existence. This must be true regardless of the name given to that process, regardless of whether we call it a "trial," a "guilt phase," a "penalty phase," or a "sentencing hearing," for government can oppress with apparently legitimate punishment only those whom it first makes liable for punishment.

Of course, the liability created must be for "punishment" before

351. Id. at 156.
352. But even if we reject the presumed intention of the framers as the basis for interpreting the jury trial guarantee, the fundamental conception of "crime" remains unchanged. It is derived from our common law heritage, and it means neither more nor less than a set of facts or rules that create liability for punishment. It can mean no less for otherwise the constitutional guarantee of the right to trial by jury cannot protect the People from government oppression. Our conception of crime cannot be severed from the constitutional guarantee that restraints its abuse. It can mean no more for otherwise legislatures would be unduly restrained in defining new crimes for new situations. Constitutional guarantees must be vigilantly and vigorously enforced, but they should not be extended beyond the point at which they cease to further the constitutional guarantee and intrude on the constitution's allocation of law-making power to the legislative branches of government. The relevant precedent confirms this view. See infra text beginning at note 395.
the sixth amendment is applicable.\textsuperscript{353} Arguably, the punitive nature of the sanction imposed as a result of the proof of the requisite liability rules may present a difficult question in a marginal case,\textsuperscript{354} but that is surely not an issue when the rules create liability for the death penalty.

Under this analysis, the dividing line between the sixth amendment right to a jury trial and the \textit{Spaziano-Hildwin} rule (that factually based sentencing factors may be determined by the court at a sentencing hearing) depends upon the function performed by the particular feature and its relation to the purposes of the jury trial. The sixth amendment right to a jury trial attaches to the liability functions of a given rule, but not to its sentencing functions. Thus, when a legislative body defines a particular feature so that it functions both to create liability for punishment (or liability for enhanced punishment) and to assess the appropriate punishment, the determination of the existence or nonexistence of that feature for liability purposes must be triable by a jury, but the sentencing function of the rule may be assigned to the court at a sentencing hearing in which the jury does not participate. In other words, the terms “crimes” and “criminal prosecutions” in the two constitutional provisions mean nothing more and nothing less than “rules creating liability for punishment” and “proceedings to determine the existence of rules creating liability for punishment.”\textsuperscript{355}

The analysis does not differ if the particular feature has only a single function. If it functions to impose liability for punishment, then the right to jury trial attaches to that particular feature. Its existence or nonexistence must be determinable by a jury. On the other hand, if the particular feature functions only as a sentencing factor, then the trial court may determine its existence or nonexistence at the sentencing stage of the capital proceedings. This is true even if the particular feature is factually based.

The alternative formulation of the capital sentencing procedure of the Model Penal Code provides a concrete example for analysis. We begin by analyzing the functions of the aggravating circumstances:

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. . . .

The Court, in exercising its discretion as to sentence, and the

\textsuperscript{353} See McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (sixth amendment right to jury trial not applicable to the adjudication of liability rules in state juvenile court proceedings).

\textsuperscript{354} See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 163-70 (1963) (holding two acts of Congress invalid because Congress employed the sanction of deprivation of nationality as punishment without providing the protections afforded by the fifth and sixth amendments).

\textsuperscript{355} See \textit{supra} text accompanying notes 332-52.
jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.\footnote{356. \textit{Model Penal Code}, § 210.6(2) (1980) (alternative formulation of Subsection (2)) (emphasis added).}

Since a sentence of death is possible if, but only if, one of the enumerated aggravating circumstances is found to exist, the aggravating circumstances function to create liability for the punishment of death.\footnote{357. See id. comment 5, at 135-36; \textit{supra} text accompanying notes 65-68.} In other words, proof of at least one aggravating circumstance is a necessary condition for the imposition of the enhanced punishment of death. If no aggravating circumstance is found to exist, then no death sentence is possible. This means, of course, that the enumerated aggravating circumstances function as factually based liability rules. It also means that aggravating circumstances are "crimes" within the meaning of the two constitutional provisions, and that the proceedings to determine their existence or nonexistence are "criminal prosecutions" within the meaning of the sixth amendment. The sixth amendment right to a jury trial thus attaches to the determination of the existence or nonexistence of the aggravating circumstances, and since the "alternative formulation" does not permit jury trial of this issue, the Model Penal Code provision (if it were enacted into law) violates the sixth amendment guarantee.\footnote{358. This discussion assumes that a violation of the sixth amendment guarantee is per se invalid. For a discussion of this question, see \textit{infra} text accompanying notes 367-98.}

As seen above, this analysis applies even though the Model Penal Code does not label aggravating circumstances "crimes," and even though the Code provides for their litigation in a separate sentencing hearing held by the court alone.\footnote{359. See \textit{supra} text accompanying notes 59-69.} Even though the Model Penal Code's aggravating circumstances function as sentencing factors, as long as they also function to make enhanced punishment possible, a jury must determine their existence or nonexistence. A state is free to use judicial sentencing under \textit{Spaziano}, but it may not violate the offender's sixth amendment right when it does so. The state may use aggravating circumstances as factually based sentencing factors under \textit{Hildwin}, but the aggravating circumstances may not also function to create liability for a sentence of death.\footnote{360. For a discussion of how this may be done, see \textit{infra} text accompanying notes 385-89.}
A sentencing factor thus does not concern liability for punishment in general, or liability for an enhanced punishment, or liability for a range of possible punishments. A sentencing factor concerns the selection of the punishment from a prescribed range after liability for that range of punishment is established. In the context of a capital sentencing procedure, a sentencing factor aids in the selection of the appropriate sentence between two alternatives: death or some form of imprisonment. Sentencing factors (or sentencing rules) thus operate in the sentencing realm after the defendant is admitted to that realm by the appropriate liability rules. They are exclusively concerned with the question of the choice of punishment for which the defendant previously has been found liable. Sentencing factors (or rules) have no role to play in the question of whether the defendant shall be punished, and they have no role to play in selecting the range of possible punishments. Those functions are the exclusive province of the liability rules.

At this point we should distinguish liability rule analysis from a similar component of element analysis used by both the Adamson court and the Amici in Walton. Both the Adamson court and the Amici in Walton rely on the fact that the "elements" of a crime are used to create liability for punishment. Under their versions of element analysis, the presence of a liability creating function indicates that the particular factor is an element of the crime. Since (according to this theory) the sixth amendment attaches to the elements of a crime, the right to a jury trial attaches to the determination of the existence or nonexistence of that factor. Liability rule analysis, on the other hand, does not identify the elements of the crime. Rather, liability analysis directly defines the meaning of "crime" in the two jury trial provisions in the Constitution. Although element analysis might possibly be altered to reach the same result, as we have seen, ele-

361. See supra text accompanying notes 279-80.
362. See supra text accompanying notes 253-56.
363. Element analysis thus puts the cart before the horse. The elements of a crime collectively function to create liability for punishment (original or enhanced), but the elements of a crime are simply a description of the legislative body's definition of the crime.
364. Assuming that the second prong of the Amici's test is meant to describe a liability rule, see supra text accompanying note 253, then the Amici's proposed test would reach the same result as the liability-rule analysis if the following changes were made:
(1) The first prong of Amici's suggested test should be abandoned for the reasons discussed above. See supra text beginning at note 232.
(2) The second prong should be abandoned as a test for identifying the elements of a crime. Instead, it should be used to draw the line between the right to a jury trial and the Spaziano-Hildwin rule. In other words, it should be used to define "crime" in the Constitution's two jury trial provisions.
(3) The implication that the second prong is only applicable to "a greater offense" (or
ment analysis should not be used to determine whether the existence or nonexistence of a particular factor is triable by a jury under the sixth amendment. 365

The framers of the Constitution would probably marvel at the way the Model Penal Code and most modern statutes define eligibility for the death penalty. But their conception of crime embodied in the two jury trial provisions of the Constitution is as adequate today to protect the right to a jury trial as it was when the Constitution was adopted. The framers would be surprised by the details of these new crimes, but they would have no difficulty deciding what issues must be tried by a jury under the sixth amendment. 366

B. A Weighing of Interests Analysis Under Duncan

The right to a jury thus attaches to the determination of the existence or nonexistence of the Model Penal Code’s aggravating circumstances because they are “crimes” within the meaning of the sixth amendment. They are “crimes” because they function to create liability for enhanced punishment. If a violation of the sixth amendment jury trial guarantee invokes a per se test of invalidity, then the Model Penal Code’s “alternative formulation” is unconstitutional. But the Court’s holding in Duncan, that the sixth amendment right to a jury trial does not apply to “petty offenses,” implies that a weighing of interests test may be applicable to the sixth amendment:

So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh

"enhanced sentencing") should be abandoned. See supra text accompanying notes 235-37. The liability-rule analysis governs the attachment of the right to a jury trial for all crimes, great or small, provided that the crime is not a petty offense.

(4) The qualification that the enhanced punishment must be "substantial" should be abandoned. Facts that establish or create liability for any and all punishment must be triable by a jury under the sixth amendment, provided that the crime is not a petty offense.

Of course, element analysis would be abandoned with these changes, and liability analysis would be used to determine when the right to a jury trial attaches to any given factual issue in a criminal case.

365. See supra text accompanying notes 331-32.

366. The framers would be surprised, of course, by: (1) the allocation of the determination of the liability rules to the sentencing phase of a trial (for, as we have seen, this was an unprecedented “innovation” of the Model Penal Code), (2) the architecture of the capital proceeding, and (3) the details of the concepts used to create liability. See supra text accompanying notes 345-52.
the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.\(^{367}\)

This passage can be read to suggest the possibility that the sixth amendment right to a jury trial may be overridden, once it has attached, if the defendant's interests in a jury determination of the liability rules are outweighed by legitimate government interests—interests not closely associated with the risk of government oppression.\(^{368}\) The Court also has been reluctant to stifle all state experimentation with new procedures that arguably encroach upon the right to a jury trial.\(^{369}\) Although each of these situations is clearly distinguishable from the problem at hand, a weighing of the respective interests of the defendant and the state still confirms the conclusion that the Model Penal Code's "alternative formulation" violates the sixth amendment guarantee.\(^{370}\)

The interests of the defendant in a jury trial of the liability rules in a capital case are the same today as they were when the sixth amendment guarantee was adopted. What then are the possible state interests that might support the Model Penal Code's allocation of the determination of the aggravating circumstances to the court at the sentencing phase of the trial? Since the Model Penal Code pre-dated Furman by ten years, we can explore this issue best from the perspective of a state wishing to enact the "alternative formulation" proposed by the Court.

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\(^{368}\) See also Codispoti v. Pennsylvania, 418 U.S. 506 (1974) (sixth amendment right to jury trial applies to post-verdict criminal contempt proceedings if the sentences aggregate to more than six months); Bloom v. Illinois, 391 U.S. 194 (1968) (sixth amendment right to trial by jury attaches to the trial of serious criminal contempt despite the fact that no jury was required at common law—seriousness is determined by the sentence actually imposed in the absence of legislative specification of the penalty).

\(^{369}\) See Ludwig v. Massachusetts, 427 U.S. 618 (1976) (Massachusetts' two-tier trial system does not unduly burden the right to a jury trial although the Massachusetts' system makes a jury trial available only after a conviction in a first-tier trial in which a jury is not available because the right to trial by jury is guaranteed in a second-tier trial.).

\(^{370}\) The "petty offense" exception to the right to trial by jury was justified by the settled usage of the common law and by the presumed intention of the framers of the sixth amendment. Blanton v. City of North Las Vegas, 109 S. Ct. 1289 (1989), Baldwin v. New York, 399 U.S. 66 (1970), and Duncan v. Louisiana, 391 U.S. 144 (1968), thus support the conclusion that the right to a jury trial attaches to the litigation of liability rules that create liability for a death penalty without engaging in a balancing of interests analysis. The cases that define the constitutionally required jury, though they apparently depart from the common law jury as it existed when the sixth amendment was drafted, all preserve the right to a jury trial of the liability rules in a manner that the Court found to be consistent with the purpose of the sixth amendment guarantee. See, e.g., Burch v. Louisiana, 441 U.S. 130, 134-37 (1979); Apodaca v. Oregon, 406 U.S. 404, 410-12 (1972); Williams v. Florida, 399 U.S. 78, 98-103 (1970).
by the Model Code.\textsuperscript{371}

I have been able to discover five possible state goals. First, some state officials believed that the Court’s holding in \textit{Furman} prohibited jury sentencing in capital cases.\textsuperscript{372} Under this view, the litigation of the aggravating circumstances must be allocated to the trial court at a separate sentencing hearing in order to satisfy the requirements of the cruel and unusual punishment clause as the \textit{Furman} Court interpreted it. This interest deserves little weight, for it misconstrues \textit{Furman’s} holding. In \textit{Spaziano}, the Court observed that “[s]entencing by the trial judge certainly is not required by \textit{Furman v. Georgia}.”\textsuperscript{373}

The second possible reason for allocating the litigation of the existence or nonexistence of the necessary aggravating circumstances to the trial court at the sentencing hearing is that the Model Penal Code’s capital sentencing procedure provided a persuasive example for doing so.\textsuperscript{374} In other words, the provision might be adopted simply because of the Model Penal Code’s extraordinary influence on contemporary criminal law. Since the American Law Institute saw nothing wrong with the procedure, it provided an “alternative formulation” to be used as a model to accomplish judicial sentencing in capital cases. There is no substantial interest, of course, in simply copying a “model” procedure. The weight of the state interest must be determined by assessing the model’s rationale for this allocation. Since the Model Penal Code’s purpose was to create a “final judgment [on the sentence to be imposed] based upon a balancing of aggravations and of mitigations,”\textsuperscript{375} and since this interest could be used independently of the Model Code as a reason for this allocation, the weight of that interest receives consideration immediately below. But before we turn to that interest, we should remember that the Model Penal Code was promulgated before the Court decided \textit{Duncan}.\textsuperscript{376} Thus, the Code’s authors did not draft the “alternative formulation” with the sixth amendment in mind.

The third possible reason for litigating aggravating circumstances at the sentencing hearing is to create a symmetrical procedure

\textsuperscript{371} See supra text accompanying notes 53-58.
\textsuperscript{372} See infra note 373; see also NATIONAL ASS’N OF ATTORNEYS GEN., SUMMARY OF PROCEEDINGS 1973, at 23-25 (1973) (remarks of Robert L. Shevin, Attorney General of the State of Florida).
\textsuperscript{374} See supra text accompanying notes 53-74.
\textsuperscript{375} MODEL PENAL CODE § 210.6 comment 5, at 135 (1980); see supra text accompanying notes 65-68.
\textsuperscript{376} See supra text accompanying notes 74-75.
by the existence or nonexistence of both the aggravating circumstances and the mitigating circumstances are determined at the same time in the same proceeding. The purpose of contemporaneous adjudication of the existence of both aggravation and mitigation is to avoid according disproportionate significance to the aggravating circumstances. This might occur if the aggravating circumstances were determined to exist at an earlier stage of the trial. The commentary to the Model Penal Code gives precisely this reason for its recommendation.

When a jury determines the existence of aggravating and mitigating circumstances for both liability and sentencing (as in the great majority of the states that employ the capital sanction), there is no adverse impact on the constitutional right to trial by jury when this symmetrical allocation is made. Both the defendant's interest in a jury trial and this interest can be easily implemented. When the trial court is the sentencing authority, however, the state can implement the symmetrical allocation only by abridging the defendant's right to a jury trial. There is no sensible reason to pursue a mechanical policy in favor of symmetry when the judge decides the sentence. The state's interest in avoiding the inflation of the significance of the aggravating circumstances may have considerable weight when the sentencing authority is the jury. But when trial judges are the sentencing authorities, we expect them to be able to follow the law and to accord no exaggerated significance to a jury finding of the existence of one or more aggravating circumstances. Indeed, trial judges are routinely presented with this very task whenever defendants are sentenced in noncapital criminal cases in which aggravating circumstances are built into the definition of the crime: first, the jury finds the defendant guilty of the aggravated offense, and then mitigation is presented to the court at the sentencing hearing. We rely on judges not to accord inflated weight to the offense found by the jury and to weigh fairly the mitigation found to exist in the sentencing hearing against the aggravated offense found by the jury. There is no reason to suspect that judges are incapable of making the same balanced judgment in a capi-

377. See id.
378. See id.
379. See supra text accompanying notes 354-55.
380. The apprehension that a jury will inflate the significance of an aggravating circumstance found in the guilt phase of a trial rests on the assumption that deciding all of the aggravating facts before any mitigating facts are determined may prejudice the jury in favor of a death sentence. Of course, this may or may not be true. When the jury is the sentencing authority, however, nothing appears to be lost by litigating both the liability function and the sentencing function of the aggravating circumstances in the sentencing phase of the capital trial.
tal case. Indeed, it would be ludicrous to deny the defendant the right to a jury trial on the ground that by doing so, the state is protecting the defendant from the possibility of the court according questionable significance to the jury’s prior finding that one or more aggravating circumstances exist in the case.

The interest in avoiding inflation of the aggravating circumstances in the sentencing process thus deserves little weight, surely not enough weight to override the defendant’s interest in a jury trial. We can rely upon juries to determine the liability function of the aggravating circumstances and upon judges to use the aggravating circumstances found by the jury as sentencing factors when striking the vital balance between aggravation and mitigation during the sentencing phase of the trial.\textsuperscript{381}

The fourth possible state interest is administrative convenience. The question of the existence of aggravating circumstances will arise only after there is a finding of guilt of an offense which can be aggravated. In the Model Penal Code’s classification scheme, an aggravating circumstance can only attach to a finding of guilt of the crime of murder.\textsuperscript{382} If the jury convicts of a nonqualifying homicide offense,\textsuperscript{383} then there is no need to litigate the issue of the existence of aggravating circumstances. Allocating the litigation of the existence of the aggravating circumstances to the sentencing phase of the trial thus would save time and money whenever the defendant is found guilty of a nonqualifying homicide offense. On the other hand, the Model Penal Code’s allocation promotes the expenditure of time and money whenever there is a finding of guilt of a qualifying offense and a later finding in the sentencing hearing that no aggravating circumstances exist. If the question of the existence or nonexistence of the aggravating circumstances were litigated in the guilt phase, a sentencing phase of the trial would not have been necessary in this situation. Whether the allocation of the adjudication of the existence of aggravating circumstances to the sentencing phase of the trial actually promotes

\textsuperscript{381} The Model Penal Code’s basic provision was probably crafted on the assumption that the jury would participate in the sentencing process. Since the Model Penal Code took no position on the identity of the sentencing authority in a capital case, but instead attempted to draft a provision suitable for use when either the jury or the trial judge acts as the sentencing authority, this provision was probably inadvertently included in the alternative draft designed to adopt court sentencing in capital cases. See supra text accompanying notes 59-74. The Model Penal Code’s “alternative formulation” thus appears to have been produced without sufficient thought to this problem.

\textsuperscript{382} Model Penal Code § 210.6(1) (1980).

\textsuperscript{383} For example, manslaughter rather than murder in a state that follows the Model Penal Code’s scheme, and murder in the second degree rather than murder in the first degree in Arizona and other states with similar laws.
administrative efficiency thus is highly debatable. In any event, whatever weight we assign to a speculative assertion of administrative efficiency clearly must be insufficient to justify denying a defendant's constitutional right to a jury trial.\textsuperscript{384}

The last possible state interest is the most important: the adoption of judicial sentencing in capital cases. Although most of the states that currently employ the death penalty provide for jury participation in the capital sentencing process,\textsuperscript{385} there is a significant body of opinion supporting court sentencing in capital cases.\textsuperscript{386} The view is grounded on the belief that judicial sentencing would "lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."\textsuperscript{387} As important as this interest may be, it is not furthered by allocating the determination of the liability function of the aggravating circumstances to the court at the sentencing phase of the capital trial.\textsuperscript{388} Judicial sentencing in capital cases does not require judicial determination of liability. Judicial sentencing can be implemented if the law divides the two functions of the aggravating circumstances, the liability function and the sentencing function, and allocates only the sentencing function of the aggravating circumstances to the sentencing stage of the trial. There the court alone would determine the appropriate sentence by balancing the aggravating circumstances found to exist by the jury at the guilt phase (the liability phase) against the mitigating circumstances found by the court at the sentencing hearing. The trial court does not need to determine the existence of aggravating circumstances as a rule creating liability in order to determine the proper sentence, just as the trial court does not need to make the finding of guilt of the

\textsuperscript{384} See supra notes 368-69.

\textsuperscript{385} See supra text accompanying notes 98-102.

\textsuperscript{386} Neither the Model Penal Code nor the American Bar Association's Standards for Criminal Justice took a position on whether capital punishment should be utilized or, whether a jury should participate in the capital sentencing process if capital punishment is utilized. See supra text accompanying notes 60-61. Similarly, the National Advisory Commission on Criminal Standards and Goals took no position on whether capital punishment should be an available sanction. See National Advisory Commission On Criminal Standards And Goals, Corrections, Standard 5.2, commentary at 152-53 (1973) (Hereinafter NAC Corrections); id. Standard 16.7 commentary at 568, the standards favor court sentencing in all situations (See NAC Corrections, Standard 16.8(1): "All sentences should be determined by the court rather than by a jury." Accord National Advisory Commission On Criminal Standards and Goals, Courts Standard 5.1 (1973): "Jury sentencing should be abolished in all situations.

\textsuperscript{387} This presumably includes capital sentencing.

\textsuperscript{388} See supra text accompanying notes 379-81.
qualifying homicide offense. These are necessary findings, but a jury can make them without substantially interfering with the accuracy or fairness of the process of judicial sentencing. Indeed, as we have seen before in the discussion of the third possible interest, this type of sentencing procedure is routinely found in cases in which the aggravating circumstances form part of the definition of an aggravated offense.

By allocating the determination of the liability function of aggravating circumstances to the jury at the guilt phase of the trial, and the sentencing function of aggravating circumstances to the court at the sentencing phase of the trial, the state can fully guarantee the defendant's sixth amendment right to a jury trial and fully achieve its goals of consistency and fairness in capital sentencing. Given the state's ability fully to achieve both of these goals by the simple process of allocating the liability function to the jury and the sentencing function to the trial court, the state's interest in allocating both of these functions to the trial court is entitled to little weight.

Since the state's interest in allocating the determination of both functions to the trial court at the sentencing hearing is so minimal, I suspect that it was thoughtlessly done—that it was nothing more than a transfer of the regular provisions (which were designed with jury participation in sentencing in mind) into the Code's "alternative formulation," without adequate reflection.\textsuperscript{389} Regardless of the reason for adopting this allocation scheme, however, the state's interest in adopting judicial sentencing is so minimally furthered by allocating the determination of the liability function of the aggravating circumstances to the court at the sentencing hearing, and so completely destructive of the defendant's jury trial right, that the constitutional right should triumph under any interest balancing test.

Because the Court has never held that a state's interest was sufficient to override a defendant's sixth amendment right to a jury trial in a serious criminal case, the Court has not yet identified overtly a standard of review as appropriate for deciding whether a state's interest can override the defendant's sixth amendment right to a jury trial. Nevertheless, in view of the Court's determination that the sixth amendment right to a jury trial "is fundamental to the American scheme of justice,"\textsuperscript{390} the sixth amendment right undoubtedly deserves some form of heightened scrutiny. The Court's sixth amendment jurisprudence has used a per se test of invalidity when a state abridges the right to trial by jury in a serious criminal case, although the Court has not specifically stated that it employed this standard of

\textsuperscript{389} See supra text accompanying notes 73-74.

\textsuperscript{390} Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
review in doing so.\textsuperscript{391} Under that per se standard, once the Court determines that the right to a jury trial has been abridged, the Court holds the state’s abridging action unconstitutional without balancing the interests of the state and the defendant. Under the per se standard, since the jury trial right attaches to the determination of the liability function of the aggravating circumstances, the allocation of this determination to the court at the sentencing hearing violates the sixth amendment right to trial by jury and is thus unconstitutional.

Not infrequently, however, the Court has protected fundamental constitutional rights by balancing the respective interests of the parties. When a right is found to be a “fundamental constitutional right,” the Court has strictly scrutinized the state action that abridges the fundamental constitutional right in question.\textsuperscript{392} Under the strict scrutiny standard, the constitutional right prevails unless the state demonstrates that its interest is “compelling.”\textsuperscript{393} Furthermore, the state must show that its action is necessary to further that compelling interest.\textsuperscript{394} The presence of a less restrictive alternative that will equally further the state’s goal demonstrates that the state’s action is not necessary to further its interest.\textsuperscript{395} If the strict scrutiny standard of review is applicable to the jury trial right, then the sixth amendment right must prevail. For the reason indicated above, the state’s interest falls far short of being sufficiently weighty to be called “compelling,” and there exists a less restrictive alternative that equally serves the state’s goal of judicial sentencing in capital cases.

Indeed, in \textit{Bloom v. Illinois}\textsuperscript{396} the Court may have applied the strict scrutiny form of an interest balancing test to decide that the interests asserted by the state in punishing contempt of court without the interference of a jury were not sufficiently compelling to override the defendant’s sixth amendment right. After deciding that criminal contempt is a “crime” within the meaning of the sixth amendment (which it surely is), the Court scrutinized the interests the state offered to justify dispensing with the jury trial right and concluded, “[n]or are there compelling reasons for a contrary result.”\textsuperscript{397}

But it is not necessary to determine the exact standard of review

\textsuperscript{391} See supra note 343.
\textsuperscript{393} Shapiro, 394 U.S. at 634-38.
\textsuperscript{395} See, e.g., Shapiro v. Thompson, 394 U.S. at 634-38.
\textsuperscript{396} 391 U.S. 194 (1968).
\textsuperscript{397} Id. at 208.
appropriate for the protection of the sixth amendment right to a jury trial. Under any standard of review that meaningfully protects the sixth amendment guarantee, the right to a jury trial should prevail. None of the examined interests that might support allocating the determination of the liability function to the trial judge at the sentencing hearing are sufficiently substantial to outweigh the defendant’s sixth amendment right. Moreover, there is a readily available alternative method to advance the state’s goal of judicial sentencing. That goal is obtainable by allocating the sentencing function of the aggravating circumstances to the court at the sentencing hearing and by allocating the determination of the liability function to the trier of fact at the guilt phase of the trial. If the two functions of the aggravating circumstances are allocated in this way, the defendant’s right to a jury trial is fully preserved and the state’s goal of judicial sentencing is fulfilled.

C. Supreme Court Precedent

There is no real tension between the rules established by Duncan and Spaziano. The sixth amendment’s purpose of preventing government oppression is completely fulfilled when the jury returns its verdict on the “crimes” charged. Nevertheless, a constitutional line must be drawn between the right to a jury trial and the Spaziano-Hildwin rule. State v. Quinn, Adamson v. Ricketts, and McMillan v. Pennsylvania all recognize the need for drawing this constitutional line. The common fault of Quinn and Adamson is not in recognizing that a constitutional line had to be drawn, but rather in how those cases drew the line. Both cases used the “elements” of crime as the boundary between the jury trial right and the Spaziano-Hildwin rule, but neither effort was successful. Under the analysis used in Quinn and Adamson, a “crime” for the purposes of the sixth amendment is defined as any particular feature of state law that has the requisite “elements” of a crime. On the other hand, the liability-rule analysis defined “crime” for the purposes of the sixth amendment as any particular feature of state law that functions to create liability for punishment, regardless of whether it creates liability for punishment when none existed before, or whether it creates liability for greater punishment. The inferred intention of the framers of the Constitution supports this analysis.

398. The presence of this less restrictive alternative both undermines the weight of the state’s interest and provides an independent basis for invalidating the state’s abridgment of the sixth amendment right.

399. See supra text accompanying notes 223-32 & 257-62.
The Supreme Court has never been presented with a claim that required the Court to select between these two competing methods for defining "crime" for the purposes of the two jury trial provisions in the Constitution. The question explored here is whether either analysis is more consistent with existing Supreme Court precedent.

There is no reason to repeat the full analysis of Duncan v. Louisiana and Spaziano v. Florida set forth above.

Duncan confirmed the purpose of the jury trial guarantee and interpreted the due process clause of the fourteenth amendment to embrace the sixth amendment's right to trial by jury. Duncan, however, did not plumb the meaning of "crime" or "criminal prosecution," for Gary Duncan's conduct and the resulting prosecution fit all conceivable definitions of those terms. The only definitional issue raised in Duncan was whether the crime was a "petty" offense and thus outside the scope of the jury trial guarantee. On the other hand, Spaziano held that the sixth amendment guarantee does not extend to the determination of the appropriate punishment to be imposed on the defendant. The Spaziano rule was revisited by the Court in Hildwin v. Florida. Hildwin made explicit what was implicit in Spaziano: The right to a jury trial does not extend to the determination of factually based sentencing factors. Rather, under the sixth amendment, the trial judge may make the necessary factual findings that aggravating and mitigating factors exist, and the trial judge may then determine the sentence. In other words, Spaziano established the principle that a jury is not required to determine the sentence in a capital case; Hildwin made clear that a jury determination was not required to determine the existence of factually based sentencing factors. Since no claim was presented in either Spaziano or Hildwin that the aggravating circumstances in Florida's capital sentencing scheme are "crimes" masquerading as sentencing factors, neither case explored the meaning of "crimes" or "criminal prosecutions" for sixth amendment purposes.

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400. See supra text accompanying notes 103-54.
401. See supra text accompanying notes 114-15.
404. Id. at 2057.
405. Id.
406. In Spaziano, the Court observed: Petitioner does 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. Spaziano, 468 U.S. at 458. In Hildwin, the "petitioner argued that 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." 109 S. Ct. at 2056. The Court rejected this
At the outset, *Quinn* may be set aside, for that case concerned the right to jury trial guaranteed by the Oregon Constitution. But *Adamson* derived its element analysis from the Supreme Court's due process jurisprudence, 407 which began with *In re Winship*. 408 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." 409 If *Winship* and its progeny require element analysis for the purpose of the requirement of proof beyond a reasonable doubt, then is element analysis required for the purpose of defining the border of the sixth amendment right to a jury trial? No. On the contrary, the reasonable doubt cases are easily distinguished. They govern the allocation of the risk of nonpersuasion in what is always conceded to be a criminal case. Neither the due process clause in general nor the reasonable doubt standard in particular concern policing the boundaries between the substantive criminal law and some other body of law, such as the law of sentencing. Thus, the *Winship* doctrine operates only within the borders of the substantive criminal law as defined by the legislative body. 410 The element analysis employed by the *Winship* doctrine thus seeks to distinguish the elements of the crime (which must be proved by the prosecution beyond a reasonable doubt) from other components of the criminal law, such as self-defense 411 and the affirmative defense of extreme emotional disturbance 412 (in which case a burden of proof may be allocated to the defendant). The task of drawing the line that distinguishes the substantive criminal law from the law of sentencing is entirely different. As we have seen, element analysis was not designed to perform this border-defining function, and when attempts have been made to employ element analysis for that purpose, they have been completely unsuccessful. Consequently, the Court's *Winship* doctrine neither compels nor counsels the use of element analysis for the task at hand.

Nevertheless, *Hildwin* mentions element analysis, 413 and it forms

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407. *Adamson v. Ricketts*, 865 F.2d 1011, 1024 (9th Cir. 1988).
409. *Id.* at 358.
a major portion of the Court's discussion in McMillan. Since both cases resolve sixth amendment jury trial claims, do Hildwin and McMillan require element analysis to define the borderline between the substantive criminal law and the law of sentencing? Again, the answer is no. Hildwin's reference to the elements of a crime respond to petitioner's McMillan argument. Thus, the argument that element analysis must provide the line sought here depends entirely upon McMillan. The petitioner's principal argument in McMillan "was that visible possession of a firearm is an element of the crimes for which they were being sentenced and thus must be proved beyond a reasonable doubt under In re Winship." The Court concluded, however, that visible possession was not an element of the offense under the Winship doctrine, but instead, a sentencing factor, which was not governed by Winship's proof requirement. Petitioner's argument of the sixth amendment issue in their brief was truncated. It focused on the fact that visible possession is a factual determination that relates to the manner in which the crime was committed, and as such, under the sixth amendment, the jury must make that determination. Petitioners did not mention Spaziano in their brief. Spaziano and element analysis, on the other hand, were the focal points of respondent's reply:

[Petitioners] argue that the jury must determine all ultimate facts concerning the offense committed. As shown above, however, possession of a firearm is not an element of the crimes enumerated in the Act. It is not an ultimate fact about the crime, but instead a fact relevant to sentencing. Therefore, the relevant inquiry is whether the sixth amendment requires a sentencing jury.

It is clear that the sixth amendment carries no such requirement. There is no sixth amendment right to jury sentencing

The McMillan Court accepted respondent's characterization of visible possession as a sentencing factor, and rejected the petitioner's claim under Spaziano.

415. Id.
416. Id. at 83.
417. Id. at 84-91.
419. Id.
420. See id. at iii-vi.
422. McMillan, 477 U.S. at 93. For the text of the Court's single sentence rejection, see supra text accompanying note 305.
Given the brevity of the argument concerning the sixth amendment issue, *McMillan* cannot be said to adopt element analysis as the test for determining the attachment of the sixth amendment right to a jury trial. More importantly, *McMillan's* discussion of the function performed by the visible possession requirement lends some support to liability analysis as the basis for determining when the sixth amendment right to a jury trial attaches to a factual finding. However, because these statements were made during the Court's discussion of the *Winship* claim, they cannot be said to adopt that approach.

During the course of rejecting the *Winship* argument, Justice Rehnquist wrote for the Court:

[The visible possession requirement] 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. . . . Petitioners' claim that visible possession under the Pennsylvania statute is "really" an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment . . . . but it does not.

As I read this passage, it means that if visible possession functions as a liability rule, then the petitioners' argument that it is an element of the offense subject to *Winship's* requirement of proof beyond a reasonable doubt has more appeal, though it may be only "superficial." The Court is reticent to use element analysis to "really" find a crime when the legislature has not meant to define one. The Court restates its distaste for this use of element analysis later in the opinion. "Pennsylvania's decision," wrote Justice Rehnquist, "has not transformed against its will a sentencing factor into an 'element' of some hypothetical 'offense.'"

Liability analysis, on the other hand, does not work in this way. Under liability analysis, the Court does not "find" a new crime when

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423. As noted above, once the Court determines that a particular feature is an element of the crime, it is clear that the right to a jury trial attaches to the factual determination of that element's existence. This right does not attach because the particular feature is an element of the crime, but because all of the elements of a crime function as liability rules. Still, not all liability rules are properly classified as elements of a crime. Thus, the fact that visible possession is not an element of the crime should not be dispositive of the right to a jury trial. However, since visible possession did not operate as a liability rule in the Pennsylvania Act, the sixth amendment right did not attach. See infra text accompanying notes 426-30.


425. *Id.* at 90.
a legislature did not mean to create one. It does not transform any feature of state law into a crime against the legislative will. It does not require the Court to recognize some hypothetical offense. Instead, the state legislature is held responsible for nothing more and nothing less than what it does. The legislative body is free to define crime in any way it sees fit. Facts operate in any way the legislative body says they act. If the facts define a crime, so be it. If the facts define some other feature of state law, then regardless of its name, the sixth amendment right to a jury trial depends upon how that feature actually functions. If it creates liability for punishment, then the right to a jury trial attaches. But by assessing the actual function of the feature created by the legislative body, the Court does not tell the state that it has created a crime when it did not mean to do so. There is a substantial difference between the message that the legislature cannot create a rule that imposes liability for punishment without providing for jury trial, and telling a state that it has "really" created a crime that does not appear as such in the penal statutes.

Read correctly, the McMillan Court's statement about equating liability rules with elements of the offense expresses the Court's distaste for element analysis and its inevitable message that the legislative body has created a crime when none was intended. It may also reflect the Court's intuitive distrust of equating liability rules with elements of an offense.426 Since this is not required when liability rules are used to determine when the right to a jury trial attaches, and since McMillan recognizes the critical importance of liability rules, McMillan appears to support liability analysis.

Before we move to a consideration of the final case, we should note that the "visible possession" feature of the Pennsylvania Act at issue in McMillan does not function as a liability rule. A finding of its existence does not create any new or additional liability beyond that fixed by the finding of guilt of the underlying offense. In other words, McMillan was liable for the punishment mandated by the finding before the visible possession finding was made. The visible possession feature operated "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."427 A necessary corollary of McMillan's holding is that sentencing factors may function to control the sentencing authority's discretion. Indeed, some of

426. Both the second prong of the test proposed by Amici in Walton v. Arizona and the Adamson Court's identification of the liability-creating function of the Arizona aggravating circumstances are used to identify the elements of a new capital crime.
the capital sentencing schemes currently used in the United States employ sentencing factors in precisely this way. For example, the Arizona capital sentencing statute provides that the court "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated . . . [and] there are no mitigating circumstances sufficiently substantial to call for leniency." 428 If we set aside for a moment the fact that the aggravating circumstances in the Arizona statute function as both liability rules and as sentencing factors, and instead focus solely on their sentencing function, the sentencing-factor aspect controls the sentencing court's discretion in precisely the same way that the visible possession requirement functioned under the Pennsylvania Act. 429 As long as a particular feature of state law does not also operate to create new or enhanced liability for punishment, the right to a jury trial does not attach. There may be objections to controlling the sentencer's discretion by mandating a particular sentence, but those objections are not rooted in the sixth amendment right to a jury trial. 430

Although the distinctions drawn in McMillan generally support the use of liability analysis to define "crime" and thus to determine the right to a jury trial, Bloom v. Illinois 431 more forcefully supports it. In Bloom, which was a companion case to Duncan v. Louisiana, the Court held that the sixth amendment right to a jury trial applied to the adjudication of serious criminal contempt charges. 432 Until Bloom, the Court consistently had upheld the constitutional power of the state and federal courts to punish any criminal contempt without a jury trial. 433 "Whether 'criminal contempt' really is or is not a crime is a question as to which there has been much dispute." 434 Bloom ended this long debate, at least with respect to the sixth amendment right to a jury trial:

Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. . . . [C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of

429. See infra text accompanying notes 466-70.
432. A serious criminal contempt charge is one that does not fall within the "petty offense" exception to the sixth amendment jury trial right recognized in Duncan. Id. at 211.
433. Id. at 195-97.
criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates.

Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes.435

The Court thus found that criminal contempt is a “crime” because: (1) it is a violation of the law punishable by fine or imprisonment; (2) a conviction for criminal contempt has the same impact on the defendant as an ordinary criminal conviction; and (3) a conviction for criminal contempt serves the same state interests as does a criminal conviction. Distilled to its essence, this means that a “crime” for the purpose of the sixth amendment jury trial right is a rule that creates liability for (is a law which, when violated, is punishable by) the criminal sanction (from the perspective of both the defendant and the state). It is the liability function of any rule or factual finding, regardless of its name, that invokes the sixth amendment right to a jury trial, provided, of course, that it creates liability for a “serious”436 criminal sanction.

Although precedent is not unequivocal on this question, the inferred intention of the framers of the Constitution, Supreme Court precedent, and the sixth amendment’s purpose to thwart government oppression all indicate that “crime” means a rule (or package of rules) that creates liability for punishment.437

VI. CONCLUSION

A “crime” under the English common law is a factually based rule (or a package of rules) that creates liability for punishment. A crime either (1) creates liability for punishment for what was previously lawful conduct, or (2) creates liability for enhanced punishment

436. For a discussion of the sixth amendment’s “petty offense” exception, see supra text accompanying notes 114-15.
437. Because the aggravating circumstances in the “alternative formulation” of the Model Penal Code’s capital sentencing procedure and in the capital sentencing procedures of Arizona, Idaho, Montana, and Nebraska function to create liability for punishment, they are “crimes” within the meaning of the jury trial guarantee of the sixth amendment. Because these statutes do not provide for jury determination of the existence or nonexistence of these aggravating circumstances, these capital sentencing statutes violate defendants’ rights to trial by jury. For an analysis of the Arizona, Idaho, Montana, and Nebraska capital sentencing statutes, see infra Section VII (Appendix).
for conduct already subject to a lesser punishment. In the former situation, the crime creates original liability (as with the original homicide offense at common law); and in the latter situation (as with the distinction between murder and manslaughter at common law), the crime creates enhanced liability. These were evidently the lessons gleaned from the common law tradition by the framers of the Constitution as they crafted the right to trial by jury. This is the conception of "crime" incorporated into the jury trial guarantee of Article III. Furthermore, this conception of crime is the common root between the Article III provision and the jury trial guarantee of the sixth amendment. It is also the fundamental conception of crime we embrace today.

The right to a jury trial has as its goal thwarting government oppression by placing the "common-sense judgment of a jury" between the charge brought and the punishment sought by government.⁴³⁸ Government cannot eliminate enemies by a criminal prosecution (the oppression thwarted by the sixth amendment), unless the government first makes the defendant liable for punishment in a trial before a judge "too responsive to the voice of higher authority."⁴³⁹ The sixth amendment, of course, was adopted when the fear of government oppression by the crown was demonstrable. But the voice of "higher authority" which may be too responsively followed by judges is not the voice of an executive officer alone. It may also be the voice of "vindictiveness on the part of the people."⁴⁴⁰ The sixth amendment right to a jury trial thus also protects the accused from the oppression made possible when a judge heeds the voice of "an indignant people, roused into hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies."⁴⁴¹ The fear of oppression fueled by the popular will is as real today as it was when the sixth amendment was adopted. This is especially true when the defendant is charged with a capital crime.

The right to trial by jury also protects the accused from "corrupt or overzealous prosecutor[s] and against compliant, biased, or eccentric judge[s]."⁴⁴² In other words, the right to trial by jury protects the integrity and the legitimacy of the process of conviction which, in a capital case, leads to the awesome sanction of taking the life of a fellow human being to further state policy. Since government oppres-

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⁴³⁹ Id.
⁴⁴¹ Id.
⁴⁴² Duncan, 391 U.S. at 156.
sion by the criminal sanction is possible only if the accused is first held liable for punishment, the jury's exclusive power to find the facts that invoke liability rules is the engine that thwarts oppression.

Furthermore, the conception of crime as a factually based rule (or a package of rules) that creates liability for punishment serves the goals of the sixth amendment while it permits legislative bodies freedom to define crimes in any way the legislative body sees fit. The legislative body is restricted only in how it commands the facts to function. If they function to create liability for punishment (original or enhanced), then the sixth amendment requires a jury determination of the truth of the charges brought against the defendant (unless a jury is waived). If they perform any other task, then a jury determination is not required under the sixth amendment.

Finally, liability analysis simplifies the law for everyone. Legislative bodies will have only one easily applied rule to determine whether a jury trial is necessary for any feature of the criminal law it may wish to create. It need only be concerned with the work that it makes the feature perform. The task of the courts is simplified as well. Under liability analysis, courts do not "find" a new crime by struggling to identify the "elements" of an offense, when none was intended by the legislative body. Instead, the legislature is held responsible for nothing more and nothing less than what it does. A court's only concern is with how the particular feature of state law actually functions. If it creates liability for punishment, then the sixth amendment guarantee requires a jury trial of the facts that make punishment possible. If the particular feature performs only other functions, a jury is not required under the sixth amendment.

VII. APPENDIX: THE CAPITAL SENTENCING PROCEDURES IN ARIZONA, IDAHO, MONTANA, AND NEBRASKA

A. Arizona

In 1901, Arizona divided murder into two degrees, based on the Pennsylvania formula. The death penalty was reserved for first degree murder, and unfettered discretion to select between death or imprisonment in the territorial prison for life was conferred on the jury. The Arizona Penal Code, which was adopted shortly after Arizona was admitted into the Union, likewise divided murder into two degrees, limited the death penalty to first degree murder, and

443. The Revised Statutes of Arizona Territory, Tit. VIII, Ch. 1, §§ 172-74. Sec. 174.
conferred unfettered discretion on the jury to fix the punishment at death or life imprisonment. With a few minor non-substantive changes, these provisions were carried forward into the Arizona Code of 1939, and into the Criminal Code of 1956. On May 14, 1973, Arizona became the fourteenth state to restore capital punishment in the wake of Furman. The legislation repealed the death penalty as a possible punishment for four crimes, expanded the definition of first degree murder, and replaced unfettered capital sentencing discretion with a capital sentencing procedure derived from the Model Penal Code. Thus, jury sentencing for first degree murder, used in Arizona since 1901, was abandoned in the new legislation. The available evidence suggests that it was abolished because of the nearly universal rejection of jury sentencing in non-capital cases during the latter half of the twentieth century, and because of the widely held belief that jury sentencing in capital cases would violate the cruel and unusual punishment clause of the eighth amendment as interpreted in Furman v. Georgia. Upon conviction of the redefined capital crime of first degree murder, a sentencing hearing must be held. The trial judge was, and still is, the sole sentencing authority in

446. Ariz. Code of 1939, §§ 43-2901 to 43-2903 (1940). Sections 170 and 171 of the 1913 Penal Code were combined into a single section (Section 43-2901) in the Code of 1939, and several changes were made in the punctuation. Sections 43-2902 and 43-2903 of the Code of 1939 are identical to Sections 172 and 173 of the Penal Code of 1916. Id.
449. These four crimes were: (1) assault with a deadly weapon or force by a life prisoner, ARIz. REV. STAT. ANN. § 13-250 (1973); (2) kidnapping, id. § 13-492; (3) boarding or interfering with a train with the intent to rob, id. § 13-644; and (4) depositing or exploding explosives with the intent to injure persons or property, id. § 13-922. See Act of May 14, 1973, ch. 138, §§ 3, 6-8, 1973 Ariz. Sess. Laws 967, 970-72.
450. Act of May 14, 1973, ch. 138, § 1, 1973 Ariz. Sess. Laws 966-67. The definition of first degree murder was expanded to include a murder committed “in avoiding or preventing lawful arrest or effecting an escape from custody,” and the first degree felony murder rule was expanded by adding kidnapping and the sexual molestation of a child under the age of thirteen years; nonetheless, the death penalty for felony-murder-rape was confined to rape in the first degree. Id.
451. Id. § 5.
453. E.g., MODEL PENAL CODE § 6.02; 3 STANDARDS FOR CRIMINAL JUSTICE Standard 18-1.1 (2d ed. 1980); MODEL SENTENCING AND CORRECTIONS ACT § 3-206(c) (Uniform Law Comm'rs 1979); CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, STANDARDS 5.1, 16.8(1) (National Advisory Comm. 1973).
Arizona. The statute enumerated six aggravating circumstances and four mitigating circumstances. The burden of proving the aggravating circumstances beyond a reasonable doubt was placed on the prosecution, whereas the defense had the burden of proving the existence of the enumerated mitigating circumstances by a preponderance of the evidence. The trial court was required to return a special verdict setting forth its findings as to the existence or nonexistence of each of the aggravating and mitigating circumstances. The sentencing decision was to be made as follows:

In determining whether to impose a sentence of death or life imprisonment without possibility of parole, the court shall take into account the aggravating and mitigating circumstances and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated and that there are no mitigating circumstances sufficiently substantial to call for leniency.

This provision makes a death sentence the mandatory punishment for first degree murder when the court finds the existence of one of the enumerated aggravating circumstances and finds either that there is no mitigating circumstance or that there is no mitigating circumstance sufficiently substantial to call for a sentence of less than death.

In 1977, Arizona adopted a revised penal code, but the revised code made no substantive changes in the capital sentencing procedure. Although amendments to the capital sentencing procedure have been made from time to time, none of these amendments are relevant to this discussion.

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455. Id.
456. Id. § 5(B).
457. Id.
458. Id. § 5(C).
459. Id. § 5(D).
460. See infra note 464.
462. Id. § 58. Section 13-454 was renumbered as Section 13-902, and several stylistic and conforming amendments were made to these provisions. Id.
Arizona’s aggravating circumstances impose a mandatory sentence of death whenever the court makes two findings: first, that the prosecution has proved the existence of one or more of the aggravating circumstances beyond a reasonable doubt; and, second, that the defense has not proved the existence of a mitigating circumstance or that any mitigating circumstance proved by the defense is not sufficiently substantial to call for leniency. \(^{464}\) Conversely, the statute prohibits the death penalty “[w]here none of the statutory aggravating circumstances are found to be present.” \(^{465}\) The aggravating circumstances, standing alone, thus function both to create liability for the death penalty and to impose an automatic sentence of death. Nevertheless, according to the Arizona Supreme Court, the aggravating circumstances “merely [set] forth guidelines for the determination of punishment after one is convicted of first degree murder.” \(^{466}\) In other words, the Arizona Supreme Court has held that Arizona’s aggravating circumstances are sentencing factors alone. In reaching this conclusion, the court applied “element analysis” in the traditional manner. The court did not analyze the function that the aggravating circumstances actually performed. \(^{467}\)

Since Arizona’s aggravating circumstances function to create liability for the punishment of death—since a sentence of death can only be imposed upon a finding of the existence of at least one special circumstance—the aggravating circumstances are liability rules under liability analysis. \(^{468}\) Accordingly, the determination of the existence


465. Gretzler, 135 Ariz. at 54, 659 P.2d at 13. This rule is typically invoked when the Arizona Supreme Court finds that the trial court erroneously found the existence of all of the aggravating circumstance, and as a consequence, the Arizona Supreme Court reverses the death penalty. E.g., State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979).


467. Id.

468. This is undeniably true. On its face, the statute provides that aggravating circumstances perform a liability function. Furthermore, under the common law, the substantive rules defining the crime of murder functioned to create liability for the death penalty and to impose an automatic sentence of death in exactly the same way that the aggravating circumstances function to impose liability for the death penalty. Indeed, this was true in England from ancient times until the death penalty was abolished in 1965. See supra text accompanying notes 11-17. The death penalty was permanently abolished in England in
or nonexistence of the aggravating circumstances must be made by a

1970. See supra text accompanying notes 18-20. Aside from the details of the definition of the aggravating circumstances in the two statutes, there are only three distinctions between the Arizona statute and the British Homicide Act. First, the British statute candidly recognized that the aggravating circumstances enumerated in the Act subdivided the old capital offense of murder into a capital and noncapital crime. In other words, the aggravating circumstances in the Homicide Act defined a new offense of capital murder. See supra text accompanying notes 15-17. In contrast, the Arizona Supreme Court has said that the Arizona statute does not create a new offense of capital murder. Blazak, 114 Ariz. at 206, 560 P.2d at 61. Second, the British jury determined the existence or nonexistence of the aggravating circumstances enumerated in the British statute. In the Arizona statute, that determination is made solely by the trial judge. Third, the existence or nonexistence of the aggravating circumstances of the Homicide Act were litigated in the guilt phase of a trial, whereas the existence or nonexistence of the aggravating circumstances is litigated in a subsequent sentencing hearing (a penalty phase) under the Arizona statute.

This was also true in the states that responded to Furman by enacting mandatory death penalty statutes. As noted above, 22 states enacted mandatory death penalty statutes in their initial response to Furman. See supra text accompanying notes 87-89. In 14 of these states, eligibility for a mandatory death sentence was dependent upon the existence or nonexistence of enumerated “aggravating circumstances.” In each of these states, the post-Furman legislation either divided a previously unitary offense into various degrees or redefined the pre-Furman law into capital and noncapital murder. The division between the highest degree of noncapital murder and capital murder was accomplished by the use of aggravating circumstances. For a discussion of these statutes, see Poulos, supra note 42, at 207-13.

Though there was a difference in their respective names, the “aggravating circumstances” and the “special circumstances” functioned in precisely the same way: They defined eligibility for the mandatory death sentence. See id. at 222-25. Furthermore, both the “aggravating circumstances” and the “special circumstances” operated in the same manner as the definition of murder at common law and the circumstances enumerated in the British Homicide Act, defining liability for the death penalty and imposing the death sentence. As with the British Homicide Act, the existence or nonexistence of the “aggravating circumstances” and the "special circumstances" was also determined by the jury. Finally, it was undeniable that these "aggravating circumstances" and "special circumstances" operated in the same manner as the definition of murder at common law and the circumstances enumerated in the British Homicide Act, defining liability for the death penalty and imposing the death sentence. The existence or nonexistence of the "aggravating circumstances" and the "special circumstances" was also determined by the jury. Finally, it was undeniable that these "aggravating circumstances" and "special circumstances" created liability rules or "crimes" under the liability analysis discussed above. See id. at 223-25. In the states that adopted mandatory capital punishment and used the term “aggravating circumstances,” the same three distinctions that differentiated the Arizona statute from the British Homicide Act separate the Arizona statute from these mandatory capital punishment statutes. First, the aggravating circumstance of the mandatory statutes obviously created substantive rules which defined an offense of capital murder, whereas the Arizona Supreme Court has held that the aggravating circumstances in the Arizona statute do not create a new capital offense of “aggravated first degree murder;” rather, the statute “merely sets forth guidelines for the determination of punishment after one is convicted of first degree murder.” Blazak, 114 Ariz. at 206, 560 P.2d at 61. In other words, the Arizona statute only creates sentencing rules according to the Arizona Supreme Court. Second, the jury determined the existence or nonexistence of the aggravating circumstances enumerated in the mandatory death penalty statutes, whereas that determination is made solely by the trial judge under the Arizona statute. Third, the existence or nonexistence of the aggravating circumstances enumerated in the mandatory death penalty statutes is litigated during the guilt-innocence determination (guilt phase), whereas the existence or nonexistence of the aggravating circumstances is litigated in a subsequent sentencing hearing (a penalty phase) under the Arizona statute. See supra text accompanying notes 454-59. Although these same three features distinguished the mandatory "special circumstance" death penalty statutes from the Arizona statute, there was a fourth distinction between these statutes and the Arizona law. The name given to the legal device that both established liability for the death penalty and imposed the death penalty was different. The
jury under the sixth amendment. Since the Arizona statute provides that this determination is to be made by the trial court, the Arizona capital sentencing procedure violates the offender's sixth amendment right to a jury trial in precisely the same way that the "alternative formulation" of the Model Penal Code's sentencing procedure violates the sixth amendment. Even if an interest balancing test is applied after it is determined that the sixth amendment right attaches, the interests of the State do not outweigh the right to a jury trial. If Arizona wishes to retain judicial sentencing in capital cases, it has two options. First, Arizona can provide for the determination of the existence or nonexistence of the aggravating circumstances by the jury in the guilt phase of the trial. Once a jury makes that determination, the trial court may use the aggravating circumstances as sentencing factors at the sentencing hearing. The second option is to amend the statute to remove the liability function that the aggravating circumstances now perform. The aggravating circumstances would then perform only a sentencing function, and the determination of their existence or nonexistence could be made by the trial court under Hildwin. Although there may be other objections to this approach, stripping the liability function from the aggravating circumstances would satisfy the sixth amendment guarantee, for no longer would there be a danger of government oppression. As the Arizona capital sentencing procedure now stands, the liability function of the aggravating circumstances violates the sixth amendment right to a jury trial.

B. Idaho, Montana, and Nebraska

1. Idaho

The Idaho capital sentencing procedures are essentially the same as those of Arizona.

Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

legal device was called a "special circumstance" in these mandatory death penalty statutes and an "aggravating circumstance" in the Arizona statute.

469. See supra text accompanying notes 332-437.
470. See supra text accompanying notes 367-98.
The trial court determines the existence or nonexistence of the aggravating circumstances at the sentencing hearing.\(^{472}\) Using traditional element analysis, the Idaho Supreme Court has held that the aggravating circumstances "are not elements of first degree murder," and thus there is no right to a jury trial of their existence or nonexistence under the sixth amendment.\(^{473}\)

2. MONTANA

The Montana capital sentencing procedure likewise provides for the determination of the aggravating circumstances by the trial court alone at a sentencing hearing.\(^{474}\) Montana's aggravating circumstances function in the same way as those in the Model Penal Code, the Arizona code, and the Idaho code:

In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 46-18-303 and 46-18-304 and 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. . . .\(^{475}\) Like the Supreme Courts of Arizona and Idaho, the Montana Supreme Court has employed traditional element analysis to conclude that "the aggravating circumstances found against the defendant are related to sentencing only, and are not elements of the crimes charged. . . . We conclude that the defendant was not entitled to a jury determination of whether the aggravating circumstances were present in this case."\(^{476}\)

3. NEBRASKA

The Nebraska capital sentencing procedure differs from the capital sentencing procedure of Arizona, Idaho, and Montana in several ways. The sentencing authority in Nebraska is either the trial judge or a panel of three judges,\(^{477}\) and the aggravating circumstances function as sentencing factors in materially different ways than in the other three states.\(^{478}\) But Nebraska's aggravating circumstances func-

\(^{472}\) Id. § 19-2515(d).
\(^{475}\) Id. § 46-18-305.
\(^{477}\) NEB. REV. STAT. § 29-2520 (1985).
\(^{478}\) In Nebraska, the mitigating circumstances need not outweigh the aggravating circumstances to warrant a judgment of less than death. Id. § 29-2522; State v. Stewart, 197 Neb. 497, 526, 250 N.W.2d 849, 866 (1977). Consequently, the death penalty is not made
tion to create liability for the death penalty in exactly the same way that the aggravating circumstances function to create liability for the death penalty in Arizona, Idaho, and Montana:

The Legislature therefor[e] determines that the death penalty should be imposed only for the crimes set forth in section 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; . . .

The Nebraska Supreme Court has held that there must be a valid finding of at least one aggravating circumstance before an offender is liable for a sentence of death. In other words, the Nebraska aggravating circumstances function to create liability for the death penalty. Nevertheless, without considering how the aggravating circumstances actually function in Nebraska, the Nebraska Supreme Court has employed traditional element analysis and has concluded that the Nebraska statute does not violate a defendant’s sixth amendment right to a jury trial.

C. Conclusion

The Idaho, Montana, and Nebraska aggravating circumstances thus function in precisely the same way that the aggravating circumstances function in the Arizona capital sentencing procedure and in the capital sentencing procedure set forth in the Model Penal Code’s “alternative formulation.” Because they function to create liability for the death penalty, and because they do not provide for jury determination of the existence or nonexistence of the aggravating circum-

479. NEB. REV. STAT. § 29-2519.
480. State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (1985). In Hunt, the court said: “Since no aggravating circumstance as defined in § 29-2523 exists, the sentence of death must be, and hereby is, set aside and vacated. The cause is remanded for resentencing in accordance with law.” Id. at 724, 371 N.W.2d at 721.
stances, these statutory schemes violate the sixth amendment right to a jury trial. This is so for precisely the same reasons that the aggravating circumstances in the Arizona statute and in the Model Penal Code's "alternative formulation" of its capital sentencing procedure violate the sixth amendment.482

482. See supra text accompanying notes 382-437.