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# STRAIGHTFORWARD ON ITS FACE BUT MINDBENDING IN ITS APPLICATION: JUROR CONCURRENCE IN CRIMINAL TRIALS

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## I. INTRODUCTION

While the number of jury trials in the United States—both criminal and civil—has dropped in recent decades,[1] trial by jury remains an integral and indispensible aspect of our legal system.[2] The length of trials may fluctuate, the jurors may change, the parties may vary, and the claims may differ, but, with few exceptions, all trials culminate in the quintessential component of our jury system: the jury verdict. In both the criminal and civil context, this final jury determination has far-reaching consequences, including the preclusion of certain issues from re-litigation, the

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[1] Patricia Lee Refo, *The Vanishing Trial*, A.B.A. J. SEC. LITIG., Winter 2004, at 1, 2, *available at* http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf (noting that "federal courts actually tried fewer [civil and criminal] cases in 2002 than they did in 1962, despite a fivefold increase in the number of civil filings and more than a doubling of the criminal filings over the same time frame").

[2] *Id.* (stating that over 4,500 civil jury trials and over 3,500 criminal jury trials were conducted in 2002 by federal courts alone).

prohibition of a subsequent prosecution, and more deferential appellate review. But upon which findings must jurors agree in order to render a proper verdict?

At least on the criminal side, the answer would appear to be straightforward: Ever since *In re Winship*[3] in 1970, it is well settled that the Due Process Clause requires a jury to find "proof beyond a reasonable doubt of every fact necessary to constitute the crime."[4] But as axiomatic as this holding may seem, the distinction between necessary facts of a crime and "mere means" of its commission has confounded courts for years.[5] The Supreme Court, recognizing the need to re-address such an important issue, attempted to provide some guidance in this area through two landmark cases decided just before the turn of the twenty first century: *Schad v. Arizona*[6] and *Richardson v. United States*.[7] It failed. These cases, mirroring the uncertainty of lower tribunals, sharply divided the Court, producing an atypical alignment of justices and resulting in five separate opinions that further muddied the jurisprudential waters.[8]

The import of this issue could not be greater since the "requirement that all jurors agree on the criminal conduct committed by the defendant is rooted . . . in the interaction of the right to a trial by jury and the due process guarantee that no one shall be found guilty except on a finding of guilt beyond a reasonable doubt."[9] The Alaska Supreme Court explained that:

> [i]f the jury is not required to agree on what criminal conduct a defendant has committed, there can be no guarantee that the jury has agreed that the defendant committed a crime beyond a reasonable doubt. In the case where the state is alleging alternative crimes, as opposed to alternative theories of a single crime, jurors who unanimously agree that some crime has been committed may nonetheless disagree as to which crime and may harbor reasonable doubts as to the alternatives.[10]

Of course, this concern must be balanced against the principle that juror concurrence on immaterial factual issues will unduly burden the prosecution, allowing guilty defendants to go free. Indeed, as Justice Scalia observes, the rule "that when a single crime can be committed in various ways, jurors need not agree

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[3] *In re* Winship, 397 U.S. 358 (1970).

[4] *Id.* at 364.

[5] Schad v. Arizona, 501 U.S. 624, 634 (1991) (drawing a distinction between "mere means" and "a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings").

[6] *Id.* at 624.

[7] Richardson v. United States, 526 U.S. 813 (1999).

[8] Peter Westen & Eric Ow, *Reaching Agreement on When Jurors Must Agree*, 10 NEW CRIM. L. REV. 153 (2007) (In *Richardson*, Chief Justice Rehnquist and Justices Scalia and Thomas (who all commonly align with the prosecution), voted for the defendant, while Justice Ginsburg (who typically aligns with the defense) voted for the prosecution. In *Schad*, Justice Souter (who commonly aligns with the defense) voted for the prosecution, while Justice White (who typically aligns with the prosecution) voted for the defense.).

[9] Khan v. State, 278 P.3d 893, 899 (Alaska 2012).

[10] *Id.*

upon the mode of commission" is "not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict."[11] The issue becomes: What level of specificity properly balances these considerations?

This pernicious problem is sown into the very fabric of the American legal system. It is therefore imperative that courts, adrift in this jurisprudential Sargasso Sea,[12] chart a course so as not to impose unjust punishment on innocent parties, while also embracing the integrity of legislative and judicial choices. This article seeks to: (1) critically examine the problem of juror concurrence as discussed in *Schad*; (2) analyze the effect of *Richardson* on the analytical framework set out in *Schad*; (3) explore the problems caused by the *Schad-Richardson* framework; and (4) propose one possible solution to the issue of juror concurrence.

## II. OVERARCHING PRINCIPLES

Before delving into the law in this area, it is helpful to take a step back to examine some of the overarching principles and intertwining legal concepts at work. Part of what makes the jury unanimity issue so interesting is its place at the intersection of numerous legal doctrines, such as the presumption of innocence, duplicity, multiplicity, legal sufficiency of the evidence, the reasonable doubt standard, void for vagueness, sentencing, and double jeopardy. These doctrines affect, or become affected by, juror concurrence in intricate ways. Some of these more significant aspects are discussed below. Additionally, a careful tightrope must be walked between the conviction of only culpable defendants and the danger of placing an undue burden on the prosecution such that guilty persons go free.[13]

First and most important among these doctrines is the presumption of innocence and its corollary, the reasonable doubt standard. Long has it been said: "[B]etter that ten guilty persons escape, than that one innocent suffer."[14] The idea that one is innocent until proven guilty is "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law,"[15] and the reasonable doubt standard protects criminal defendants by serving as "a prime instrument for reducing the risk of convictions resting on factual error."[16]

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[11] *Schad*, 501 U.S. at 649-50.

[12] *See* Albernaz v. United States, 450 U.S. 333, 343 (1981) (speaking of the Double Jeopardy Clause, the Court noted that "the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."). The Sargasso Sea is part of the North Atlantic Ocean. Described as elliptical in shape and strewn with floating seaweed, it "was first mentioned by Christopher Columbus, who crossed it on his initial voyage in 1492. The presence of the seaweed suggested the proximity of land and encouraged Columbus to continue, but many early navigators had the fear (actually unfounded) of becoming entangled within the mass of floating vegetation." *Sargasso Sea*, BRITANNICA.COM, http://www.britannica.com/EBchecked/topic/524237/Sargasso-Sea (last visited May 5, 2012).

[13] For more on this point, see the introduction to this article.

[14] 4 WILLIAM BLACKSTONE, COMMENTARIES 352 (1769). For an in depth discussion of just exactly how many guilty people should go free rather than one innocent person suffer, see Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).

[15] *In re* Winship, 397 U.S. at 363.

[16] *Id.*

As the Supreme Court explained in *Winship*: "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[17] Therefore, it is critical that we err on the side of innocence (i.e. specificity) rather than guilt (i.e. generality) when analyzing the juror concurrence problem.[18]

These two doctrines are also important for understanding why the juror concurrence issue has a constitutional dimension and thus requires judicial intervention. The presumption of innocence is a foundational principle of our criminal justice system, and the reasonable doubt standard is a constitutional safeguard of that principle.[19] It is this reasonable doubt standard that is jeopardized by a lack of juror concurrence: "If the jury is not required to agree on what criminal conduct a defendant has committed, there can be no guarantee that the jury has agreed that the defendant committed a crime beyond a reasonable doubt."[20] Accordingly, a lack of juror agreement when such agreement is required to assure that the prosecution has proved a crime beyond a reasonable doubt constitutes a violation of *Winship*, as well as the Due Process Clauses of the Fifth or Fourteenth Amendments.[21] This is the central question of this article: When does a lack of juror concurrence jeopardize the reasonable doubt standard?

Relatedly, "an essential of the due process guaranteed by the Fourteenth Amendment" is that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."[22] This is the doctrine of legal sufficiency: Upon appellate review of the trial record, "the critical inquiry. . . [is] to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."[23] But it is important to note that this is simply a minimum standard; the only question is "whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[24] Despite this minimal inquiry, legal sufficiency doctrine may be one important factor lurking in the background of juror concurrence because, even if jurors need not agree upon a specific theory put forth by the

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[17] *Id.* at 363-64.

[18] *See* Ward v. State, 78 Ala. 441, 447 (1885) ("The punishment of an innocent person is regarded as a greater evil, than the acquittal of one guilty; and the policy of the law is, that, in cases of doubt, it is safer to err in acquitting than in condemning. This policy is often expressed in the form, that it is better that many, or a definite number of guilty persons shall escape, than that one innocent should be made to suffer. These are but expressions of the practical effect of the rule of reasonable doubt, and that the jury should have an abiding conviction, to a moral certainty, of the truth of the charge.")

[19] *Winship*, 397 U.S. at 363-64.

[20] Khan v. State, 278 P.3d at 899.

[21] The Due Process Clause of the Fifth Amendment applies to the federal government while the Due Process Clause of the Fourteenth Amendment applies to the states.

[22] Jackson v. Virginia, 443 U.S. 307, 316 (1979).

[23] *Id.* at 318.

[24] *Id.*

prosecution, there must still be legally sufficient evidence of each theory for a conviction to be upheld.[25]

The doctrines of duplicity and multiplicity are also crucial to our understanding. "Duplicity is the joining of two or more distinct and separate offenses in a single count," while multiplicity is "charging a single offense in several counts."[26] For our purposes, duplicity is important because if an indictment is duplicitous, "there is no way for a jury to convict on one offense and acquit on another offense contained in the same count. A closely related problem is that, because the jurors have two crimes to consider in a single count, they may convict without reaching a unanimous agreement on either."[27]

One may ask why the issue of juror concurrence is not solved solely by the doctrine of duplicity—i.e., because distinct crimes were separated at the indictment stage (by striking duplicitous charges) the juror concurrence problem should be obviated. But this is not so. Take the federal conspiracy statute as an example.[28] That statute requires someone in the conspiracy to "do any act to effect the object of the conspiracy,"[29]or, as commonly stated, to commit an "overt act." But must jurors unanimously agree upon the overt act committed in order to convict a criminal defendant? We will ask this question again when we look at the solution to this problem, but for now, it suffices to say that this issue is not solved by the doctrine of duplicity: conspiracy is only one *crime*, but the jury unanimity problem arises from one *element* of that crime (the requirement of an overt act). Additionally, duplicitous counts are not always separated at the indictment stage. Indeed, the defendant may gain certain advantages by aggregating multiple charges in a single count.[30] As the foregoing demonstrates, while the duplicity doctrine may be helpful in certain situations, it is not of talismanic significance when attempting to solve the juror agreement problem.

The preceding discussion makes it apparent that the issue of juror concurrence does not exist in a vacuum but instead relates to, and depends upon, the guarantees provided by other legal doctrines.

## III. *SCHAD V. ARIZONA*

On August 9, 1978, "a highway worker discovered the badly decomposed body of 74-year-old Lorimer Grove in the underbrush off U.S. Highway 89, about nine miles south of Prescott, Arizona," and "a coroner determined that he had been strangled to death."[31] Testimony at trial indicated that Grove was last seen leaving his home in Bisbee, Arizona on August 1, 1978, about 300 miles south of Prescott, driving a new Cadillac and pulling a camper-trailer.[32] Edward Schad was stopped for

[25] *See* Schad v. Ryan, 671 F.3d 708, 717-18 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 432 (2012). There is some dispute as to this point among lower courts.

[26] 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 142.

[27] *Id.*

[28] 18 U.S.C. § 371 (2006).

[29] *Id.*

[30] *See infra* text accompanying note 129.

[31] Schad v. Arizona, 501 U.S. 624, 628 (1991).

[32] State v. Schad, 788 P.2d 1162, 1164 (Ariz. 1989), *aff'd*, 501 U.S. 624 (1991).

speeding in New York State about a month later driving Grove's Cadillac and, several weeks after that, was "arrested in Salt Lake City, Utah, for a parole violation and possession of a stolen vehicle."[33] "During his incarceration in the Salt Lake City jail, the defendant spoke with John Duncan and made several inculpatory statements."[34] A search of the Cadillac (which Schad was still driving at the time of his arrest) revealed several items belonging to the victim, including credit cards that he had been using since August 2, 1978.[35] Other items belonging to Grove (including a "unique mirror contraption" designed and built by the victim) were found in a Ford that had been rented by Schad about nine months earlier and never returned.[36] The car was abandoned about 150 miles north of where Grove's body was discovered.[37]

After extradition and a trial, Schad was convicted of first-degree murder and sentenced to death. His conviction, however, was later set-aside on collateral review.[38] During his retrial, the prosecution, pursuant to the Arizona first-degree murder statute,[39] advanced two theories of first-degree murder: premeditated murder and felony murder (specifically, murder in the course of a robbery).[40] The court instructed the jury that "all 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty."[41] After deliberations, Schad was again convicted of first-degree murder and again sentenced to death.[42]

The key to understanding *Schad* is that the plurality and dissent, both interpreting the Due Process Clause,[43] are asking and answering very different questions. Indeed,

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[33] *Schad*, 501 U.S. at 628.

[34] *Schad*, 788 P.2d at 1164.

[35] *Schad*, 501 U.S. at 628.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 629.

[39] Justice White lays out the statute in its entirety:

> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree.

*Id.* at 653 (citing ARIZ. REV. STAT. ANN. § 13-452 (1973)).

[40] *Id.*

[41] *Id.* Although it is immaterial for the purposes of this Article, it should be noted that the defense requested a jury instruction on theft as a lesser included offense. *Id.* ("The court refused, but did instruct the jurors on the offense of second-degree murder, and gave them three forms for reporting a verdict: guilty of first-degree murder; guilty of second-degree murder; and not guilty.")

[42] *Id.*

[43] While the main focus of these cases on jury unanimity involve the Due Process Clause of the Fifth or Fourteenth Amendments, the jury trial guarantee of the Sixth Amendment (applied to the states through the Fourteenth Amendment) is also implicated.

they are not on different sides of the same playing field, but on different playing fields altogether. The plurality frames the issue as "one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions, not one of jury unanimity."[44] In other words, the plurality asks the question: Does a criminal statute drafted in this manner comport with due process? The dissenters, in contrast, are asking a question pertaining to the next step in the process: They concede that Arizona is perfectly within its rights to draft a criminal statute like the one at issue in Schad, but instead ask whether "it violates due process for a State to invoke more than one statutory alternative, each with different specified elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt."[45]

Justice Souter, answering the plurality's question, formulates a test based on the history/novelty[46] of the criminal statute in question and the moral equivalence of the alternative methods of its commission:

> (1) a history of disregard of juror concurrence creates a presumption against constitutionally requiring it, but the presumption can be overcome if elements of an offense lack moral equivalence; (2) the novelty of elements creates a presumption in favor of constitutionally requiring juror concurrence, but the presumption can be overcome if the elements are morally equivalent.[47]

In deriving this test, Souter notes that "[s]tates must be permitted a degree of flexibility in defining the 'fact[s] necessary to constitute the crime' under *Winship*," but that even when courts give deference to the criminal statutes promulgated by state legislatures, such statutes are not immune from constitutional scrutiny.[48] Elaborating on the weight of moral equivalence, he argues that when two alternative means of commission are supposed to be equivalent paths to the same statutory crime, "they must reasonably reflect notions of equivalent blameworthiness or culpability," and therefore, the critical question in this case is "whether felony murder may ever be treated as the equivalent of murder by deliberation."[49]

Justice White explains the dissenting position: "Here, the question is not whether the State 'must be permitted a degree of flexibility' in defining the elements of the offense. Surely it is entitled to that deference."[50] Indeed, White is true to his word; he is giving Arizona more deference than the plurality by allowing its legislature to draft criminal statutes without regard to history/novelty or moral equivalence. He then reframes the issue: "But having determined that premeditated murder and felony murder are separate paths to establishing first-degree murder, each containing

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[44] *Id.* at 631.

[45] *Id.* at 656 (White, J., dissenting).

[46] Westen & Ow, *supra* note 8, at 168 (noting that novelty is the converse of history).

[47] Westen & Ow, *supra* note 8, at 177.

[48] *Schad*, 501 U.S. at 639 ("[A]s in the burden-shifting cases, 'there are obviously constitutional limits beyond which the States may not go.'" (quoting Patterson v. New York, 432 U.S. 197, 210 (1977))).

[49] *Id.* at 643-44 (emphasis added).

[50] *Id.* at 657.

a separate set of elements from the other, the State must be held to its choice."[51] He then proposes a clear-cut rule: Jurors are constitutionally required to concur when a defendant is tried for violating two or more statutory alternatives that necessarily include irreconcilable elements.[52] By this test, jurors in *Schad* should have been required to produce a unanimous conviction solely on the basis of either premeditated murder or felony murder, but not some combination of both.

Justice Scalia, who creates a plurality of the Court, agrees with the other four justices of the plurality insofar as the question is one of legislative drafting and not one of jury unanimity, but disagrees with their method of scrutinizing the statute. Writing only for himself, Scalia renounces Souter's position that historical practice creates only a presumption of juror concurrence and bluntly states that "[i]t is precisely the historical practices that define what is 'due.'"[53] Commenting on the moral equivalence aspect, Scalia asserts his view that "[p]erhaps moral equivalence is a necessary condition for allowing such a verdict to stand, but surely the plurality does not pretend that it is sufficient."[54] He illustrates: "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts."[55]

Some commentators have suggested that this is an incomplete test put forth by Justice Scalia "because, while it explains why and when certain defendants ought to lose (i.e., when history is against them), it cannot explain why and when other defendants ought to win."[56] But this analysis misses the mark. Under Scalia's approach, history is determinative in both directions: If history does not support the defendant's position, he loses; if it does, he wins. Justice Scalia does not purport to say that moral equivalence is a necessary, but not sufficient condition of allowing a guilty verdict to stand under this statute; rather, he is merely pinpointing a flaw in Justice Souter's mode of analysis. In Scalia's view, it is Souter's approach that is incomplete, not his own.[57]

Because the entire plurality (including Justice Scalia) found historical support for the alternative means of first-degree murder specified by the Arizona statute and four justices of the plurality (excluding Scalia) found the alternatives of premeditated murder and felony murder to be reasonably morally equivalent, Schad's conviction was upheld.[58]

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[51] *Id.* at 657-58 (White, J., dissenting) (citation omitted).

[52] *Id.*

[53] *Id.* at 650 (Scalia, J., concurring).

[54] *Id.* at 651.

[55] *Id.*

[56] Westen & Ow, *supra* note 8, at 178.

[57] *Schad*, 501 U.S. at 651 (Scalia, J., concurring) ("Thus, the plurality approves the Arizona practice in the present case because it meets *one* of the conditions for constitutional validity," namely history. "It does not say what the *other* conditions are, or why the Arizona practice meets them.").

[58] *Id.* at 652.

## IV. *RICHARDSON V. UNITED STATES*

The Supreme Court left this issue untouched until seven years later. By this time, three of the four *Schad* dissenters had left the Court. Justices White, Marshall, and Blackmun were replaced by Justices Ginsburg, Thomas, and Breyer, respectively. Justice Stevens, the lone remaining *Schad* dissenter, flipped sides in *Richardson* to join Justices Rehnquist, Scalia, Souter, Breyer, and Thomas to form the majority.[59] Justices Kennedy and O'Connor, who had joined the plurality in *Schad*, flipped to dissent in *Richardson*, and were joined by Justice Ginsburg.[60]

The facts of *Richardson* are relatively unimportant, so it is convenient that they are also straightforward. Defendant Eddie Richardson was indicted for running a Chicago street gang that distributed heroin, crack cocaine, and powder cocaine from 1984 to 1991.[61] He had allegedly "run the gang, managed the sales, and obtained substantial income from those unlawful activities."[62]

The jury convicted Richardson under 21 U.S.C. § 848(a), a federal law which imposes a minimum prison term of twenty years upon a person who engages in a "continuing criminal enterprise" ("CCE").[63] The CCE statute "makes it an offense (1) to derive 'substantial income [or resources]' (2) from managing five or more persons (3) to commit a 'series of violations.'"[64] At issue in *Richardson* is this third requirement of a "series of violations." Justice Breyer, writing for the majority, sets out the question as follows: "In this case, we must decide whether the statute's phrase 'series of violations' refers to one element, namely a 'series,' in respect to which the 'violations' constitute the underlying brute facts or means, or whether those words create several elements, namely the several 'violations,' in respect to each of which the jury must agree unanimously and separately."[65]

The majority held that a jury must be unanimous as to three individual violations which formed the basis of the "continuing series" in order to convict.[66] The Court viewed Congress' use of the word "violation" as evidencing a Congressional intent to "to have the jury decide whether the defendant had actually violated a particular provision of law on each of the three alleged occasions."[67] The Court also noted that, because approximately ninety numbered sections may be considered "violations"

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[59] Richardson v. United States, 526 U.S. 813, 814 (1999).

[60] *Id.*

[61] *Id.* at 816.

[62] *Id.*

[63] *Id.* at 815.

[64] Westen & Ow, *supra* note 8, at 172. The second requirement of "managing five or more persons" could also be described as a combination of two requirements: (1) acting in concert with five or more other persons, and (2) occupying a position of organizer, supervisor, or manager, with respect to those persons. *Richardson*, 526 U.S. at 825 (Kennedy, J., dissenting). However, any such distinction is immaterial for our purposes.

[65] *Richardson*, 526 U.S. at 817-18.

[66] *Id.* at 824. The Court assumed, but did not decide, that the necessary number of violations to make a "continuing series" was three. *Id.* at 818.

[67] Jessica A. Roth, *Alternative Elements*, 59 UCLA L. REV. 170, 193 (2011) (citing *Richardson*, 526 U.S. at 818).

under the CCE statute, allowing a jury to convict without agreeing on the three specific violations would cover up "wide disagreement among the jurors about just what the defendant did, or did not, do," thus raising due process concerns akin to those in *Schad*.[68] Employing the canon of constitutional avoidance along with their view that a "violation" requires jury unanimity, the majority "opted for the construction that would obviate the potential constitutional concerns."[69]

In dissent, Justice Kennedy viewed the matter differently. In his view, "Congress intended the 'continuing series of violations' to be one of the defining characteristics of a continuing criminal enterprise, and therefore to be a single element of the offense, subject to fulfillment in various ways."[70] He further declared: "The important point is not just that the violations occurred but that they relate to the enterprise and demonstrate its ongoing nature, hence the requirement of a 'continuing' series. Evidence that the accused supervised a ring that engaged in thousands of illegal transactions is more probative of the continuing nature of the enterprise than evidence tending to show three particular violations."[71] Notably, in Part II of his opinion, Justice Kennedy adheres to a *Schad*-like mode of analysis[72] concerning the legislative drafting of the CCE statute and concludes that there is no "reason to think Congress' definition of the CCE offense was irrational, or unfair under fundamental principles, or an illicit attempt to avoid the constitutional requirement of jury unanimity."[73] For these reasons, among others,[74] the dissenters determined that a jury must only unanimously find a "continuing series of violations" as a whole, not three specific violations constituting a series.[75]

## V. *SCHAD-RICHARDSON* FRAMEWORK

Amalgamating *Schad* and *Richardson*, we are able to derive a tripartite framework for analyzing jury unanimity issues in criminal trials. Step One is a preliminary step of statutory interpretation.[76] Step Two is an analysis of the permissibility of the statute given the statutory interpretation of Step One. Step Three analyzes whether jury unanimity is required under the statute as written and

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[68] *Id.*

[69] *Id.*

[70] *Richardson*, 526 U.S. at 828.

[71] *Id.*

[72] For a more thorough explanation of Justice Kennedy's analysis, see Part V, *infra*.

[73] *Richardson*, 526 U.S. at 837.

[74] The dissent also noted that proving three specific violations would increase the burden on prosecutors in the sense that "the transactions may have been so numerous or taken place so long ago that they cannot be recalled individually." *Id.* at 833. Additionally, the dissent points out that the majority inadequately described why the "other elements of the CCE statute can be fulfilled without juror unanimity as to the means of fulfillment." *Id.* at 830 (noting the majority's conclusory assertion that these other elements "differ in respect to language, breadth, [and] tradition" from the continuing series element").

[75] *Id.* at 828.

[76] In *Schad*, this step was already completed by the Arizona Supreme Court. *See* Schad v. Arizona, 501 U.S. 624, 637 (1991).

interpreted. To map these steps onto the opinions we have examined: the *Richardson* majority and Part I of the *Richardson* dissent both conduct a Step One analysis,[77] the *Richardson* dissent in Part II and the *Schad* plurality perform a Step Two analysis, and the *Schad* dissent executes a Step Three analysis.

The relationship between these three steps is critical to our understanding of the aggregate framework. An example will nicely illustrate this point. If a statutory interpretation at Step One reveals that A and B are elements and not means, then they are not alternatives (rendering a Step Two analysis moot) and they require jurors to concur (rendering a Step Three analysis moot). If A and B are considered means and not elements at Step One, then a Step Two analysis must be done in order to determine whether these means are properly classified as alternatives to the same crime, or whether they must be split into separate crimes. If the latter, then jury unanimity is required (rendering a Step Three analysis moot); if the former, then one may also perform a Step Three analysis.

In examining these seminal cases, it is clear that Step Three commands relatively little support from the Court: Both the *Schad* plurality and the *Richardson* dissent feel that a Step Two analysis of statutory permissibility effectively ends the inquiry and therefore do not proceed to the Step Three analysis championed by Justice White.[78] The purpose in framing this analytical structure as three distinct steps is to demonstrate that Steps Two and Three are not inconsistent with one another and, as we will see in subsequent sections, performing these latter two steps may help cure some of the deficiencies present in both modes of analysis.

## VI. PROBLEMS WITH THE *SCHAD-RICHARDSON* FRAMEWORK

There are five principal reasons the current framework for analyzing juror concurrence should be disregarded: (1) *Schad* and *Richardson* were wrongly decided, (2) the framework is unworkable, (3) it engenders confusion and uncertainty of application, (4) it may produce unjust results, and (5) it conflicts with the *Winship* standard.

### *A.* Schad *and* Richardson *Were Wrongly Decided*

Even on its own terms, *Schad* was wrongly decided. First, Justice Souter's opinion relied on the fact that "the Arizona Supreme Court has effectively decided that, under state law, premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element."[79] However, the Arizona Supreme Court never so held. It had only determined that premeditated murder and felony murder were alternative means under the Arizona first-degree murder statute not requiring juror concurrence (as did the U.S. Supreme Court in *Schad*); it never specifically stated that the two theories of

[77] Roth, *supra* note 67, at 191-92 ("*Richardson* was resolved, however, as a matter of statutory interpretation, which the Supreme Court was at liberty to engage in (unlike in Schad) because the statute at issue was a federal offense rather than a state crime. But precisely because *Richardson* was a statutory ruling, it did not change the constitutional framework created by *Schad*.").

[78] *See Schad*, 501 U.S. at 644, 659 (failing to perform a Step Three analysis); *Richardson*, 526 U.S. at 837 (same).

[79] *Schad*, 501 U.S. at 637.

murder were means of satisfying the *mens rea* element.[80] Indeed, this could not possibly be true since premeditated murder and felony murder fundamentally require different forms of *mens rea*.[81] Does any distinction between alternative theories of a *crime* and alternative theories of *mens rea* make a difference? As we will see, it very well could. Further, as Justice Souter notes,[82] the previous Arizona Supreme Court rulings were decided on the basis of *state* constitutional law.[83] As such, they should have had no binding effect on the U.S. Supreme Court when deciding the same issue as a matter of *federal* constitutional law.[84]

Justice Scalia's analysis is also misguided: While he relies solely on settled historical practice, his historical analysis is flawed. It is true, as Scalia notes, that the "common law recognized no degrees of murder; all unlawful killing with malice aforethought received the same punishment—death."[85] Scalia was also correct in saying that it is Arizona's variant of a 1794 Pennsylvania statute that was as issue in *Schad*.[86] However, just because a similar statute existed for almost two hundred years does not mean the proposition at issue has been settled for that time. When one follows the historical criminalization of murder leading up to the 1794 law discussed by Scalia, the inevitable conclusion is that this forerunning statute was enacted as a means of dividing murder into varying degrees, allowing lesser sentences for less culpable conduct.[87] Indeed, the preamble to that statute supports such a contention:

> Whereas the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual, and it hath been found by experience, that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments: And whereas it is the duty of every government to endeavour to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to public safety: Therefore . . . it is hereby enacted . . . That no crime whatsoever, hereafter committed (except murder of the first degree) shall be punished by death . . . .[88]

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[80] *See* State v. Encinas, 647 P.2d 624, 627-28 (Ariz. 1982); State v. Axley, 646 P.2d 268, 277 (Ariz. 1982) (indictment was not duplicitous because although "the first count of the indictment set forth the two bases delineated in [the Arizona statute] for classifying appellant's actions as first degree murder, it charged him with only one crime").

[81] *See infra* Part VI.E.

[82] *Schad*, 501 U.S. at 637.

[83] *Encinas*, 647 P.2d at 627 ("Appellant raises the argument that he was denied the right to a unanimous jury verdict as guaranteed by Ariz. Const. Art. 2, [§] 23.")

[84] Danforth v. Minnesota, 552 U.S. 264, 291-92 (2008) (Roberts, C.J., dissenting) ("State courts are the final arbiters of their own state law; this Court is the final arbiter of federal law.").

[85] *Schad*, 501 U.S. at 648 (Scalia, J., concurring).

[86] *Id.* at 649.

[87] *See* Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).

[88] *Id.* at 772.

As is evident from the above passage, the purpose of the Pennsylvania statute was to prevent the punishment of death for all crimes other than first-degree murder. It says nothing about whether juries must agree on a theory of first-degree murder to render a proper a verdict. Thus, the main object was suitable punishment, not jury unanimity. While these facts do not directly refute Scalia's position, they certainly demonstrate that his conclusion is built upon a chimerical foundation: The mere classification of two theories as first-degree murder does not mean that the jury should be allowed to convict a defendant of first-degree murder without agreeing upon the specific theory.[89] Scalia cites no authoritative text or judicial decision as historical support for the actual issue at hand.

Likewise, the *Richardson* Court missed the mark by performing a faulty statutory interpretation. The reason for this lies in the unedited statutory language of the CCE provision, which, ironically, is relied on by both opinions.[90] It reads:

> [A] person is engaged in a continuing criminal enterprise if—
> (1) he violates any provision of [the federal drug laws, i.e.,] this subchapter or subchapter II of this chapter the punishment for which is a felony, and
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> (B) from which such person obtains substantial income or resources.[91]

As we can now plainly see, the Justices in *Richardson* were focused only on subparagraph (2). Justice Kennedy actually states this fact in so many words.[92] But the real issue is the "continuing series of violations" requirement in the context of the entire CCE provision. Nobody is convicted of only conducting a "continuing

[89] Likewise, Justice Scalia's reliance on common law also does not solve the issue. It is unclear from Blackstone's Commentaries (generally considered the authoritative source on common law issues) whether felony murder was indeed considered "murder" under the common law. While Blackstone notes that "if one intended to do another felony, and undesignedly kills a man, this is also murder," the next sentence only discusses the concept of transferred intent: "Thus if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other." 4 WILLIAM. BLACKSTONE, COMMENTARIES 198-201 (1769). By using the word "thus" in the succeeding sentence it is unclear whether Blackstone is explaining the idea of felony murder or transferred intent. Even assuming it is the former, this argument suffers from the same deficiency as Scalia's reliance on the 1794 Pennsylvania statute, namely, the mere classification of two theories as "murder" does not mean that the jury should be allowed to convict a defendant of "murder" without agreeing upon the specific theory.

[90] Richardson v. United States, 526 U.S. 813, 815-16 (1999).

[91] 21 U.S.C. § 848(c) (2006).

[92] *Richardson*, 526 U.S. at 825 (Kennedy, J., dissenting) ("We are concerned with subparagraph (2).").

series of violations" in defiance of subparagraph (2), they are convicted of conducting a CCE in contravention of the entire excerpted portion.[93]

If looked at from this perspective, the landscape of this debate is shifted. Subparagraph (2) references subparagraph (1) when it says, "such violation is a part of a continuing series of violations."[94] By definition, then, Congress has already clearly articulated that one violation must be found as part of the "continuing series of violations." Presumably, if Congress intended three specific violations to be found (pursuant to the majority opinion), Congress would have said as much in subparagraph (1). Having established that a jury must unanimously find all "fact[s] necessary to constitute the crime," or, as the *Richardson* majority puts it, all elements of a crime, it seems clear that Congress intended a jury be unanimous as to only one particular drug violation (punishable as a felony) as part of the "continuing series of violations."[95] All other violations making up that "continuing series" should therefore be considered mere means of satisfying the same element and a jury should not be required to concur as to those means.

### *B. Unworkability*

Justice Souter's test in *Schad* based on the history/novelty of the crime and the moral equivalence of its constituent parts is problematic because it is unworkable: There is no established standard of either novelty or moral equivalence by which to judge criminal statutes. How much historical support is needed for the plurality's rebuttable presumption to arise? Do we look at the history of the offense as defined by the legislature (i.e. first-degree murder) or at the individual parts of the statute at issue (i.e. premeditated murder and felony murder)? Do not all offenses have a basis in history since they are almost always analogous to some other offense or offenses in varying degrees?[96] And what is the plurality's standard for "reasonable moral equivalence"? Must one only look at the criminal statute at issue, or should other criminal statutes be consulted as well?[97] The plurality's approach, as set forth by Justice Souter, does not—and to a certain extent, cannot—answer these questions.

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[93] A CCE conviction is actually based on section 848(a), which states: "Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment." The term "continuing criminal enterprise" is then defined in section 848(c) as excerpted. 21 U.S.C. § 848(a), (c) (2006).

[94] *Richardson*, 526 U.S. at 825 (Kennedy, J., dissenting) (emphasis added).

[95] The majority and the dissent both agree that elements must be found unanimously while means do not. *Id.* at 828 ("We begin on common ground, for, as the Court acknowledges, it is settled that jurors need not agree on all of the means the accused used to commit an offense.").

[96] *See* Westen & Ow, *supra* note 8, at 170 (using the example of the Racketeer Influenced Corrupt Organizations Act (RICO): RICO was "created out of whole cloth to target organized crime. In one sense RICO is new, because no such statutes exist at common law or on a state level; yet, it another sense, RICO is nothing but a substantive version of what governments traditionally prosecute as criminal conspiracies.").

[97] *Id.* at 170-71 ("The metric cannot be based upon how other statutes or constitutional provisions treat the elements because by that metric, *Schad* would have come out differently. . . . Some states abolish felony murder altogether, while others treat it as second-degree murder; and the Eighth Amendment distinguishes between them for purposes of the death penalty.").

The other approach taken by the *Schad* plurality is Justice Scalia's test based on history. While this assessment is elegant in its simplicity, it raises many of the same questions as Justice Souter's opinion, such as how much historical support is needed and how one can determine history versus novelty when newly defined crimes draw upon elements from other, more historically grounded offenses. Additionally, Justice Scalia's approach seems to restrict legislatures in defining criminal conduct by consigning them to historical practice when establishing alternative theories for the same crime.

Justice White's dissenting opinion in *Schad* provides a Step Three—jury unanimity—analysis without regard to the permissibility of the legislative choice (Step Two). Unfortunately, there is a problem with his method as well. Because White gives complete deference to legislatures at Step Two[98] instead of performing a Step Two analysis, his Step Three, while solving the problem of jury unanimity, does not resolve the issue of legislative choice. For example, if Arizona defined first-degree murder as either premeditated murder or failure to file a tax return, then Justice White would require unanimity as to one theory or the other but would not require the theories to be split into separate offenses as the *Schad* plurality would. Therefore, pursuant to this example, a defendant could conceivably be convicted of first-degree murder for failing to file a tax return (and be punished as such) as long as the jury was unanimous on such a finding. Implicit in Justice White's complete deference to legislatures is the idea of political accountability: If the people do not approve of premeditated murder and failure to file a tax return as alternatives to first-degree murder, then they may exert their influence on representatives to repeal such a law or vote for candidates who will. However, as seen in the *Schad* plurality and *Richardson*, a good number of justices believe this is the exact question posed by the Due Process Clause. They argue that it should not be left to the political process and therefore, Step Two is the only relevant inquiry after statutory interpretation.[99]

Justice Kennedy, in Part II of his *Richardson* dissent, also attempts to adjust the Step Two analysis as set forth in *Schad*. By this test, "jurors need not concur on alternative statutory elements unless (1) combining the elements in a single statute is irrational; (2) not requiring jurors to concur is fundamentally unfair to defendants; or (3) the statute aggregates elements for the illicit purpose of avoiding the constitutional requirement of jury unanimity."[100] But this test does not appear to be any different than Justice Souter's. Looking at the first two criteria, is not a statute's rationality part of what makes it fundamentally fair or unfair to defendants? Justice Souter certainly thought so—his inquiry was guided by "the concept of due process with its demands for fundamental fairness and for the rationality that is an essential component of that fairness."[101] It is, in fact, these questions of fairness and rationality that the *Schad* plurality sought to resolve by formulating its two modes of analysis (Justice Souter's and Justice Scalia's, respectively). Justice Kennedy adds little to expound upon these considerations besides merely restating the problem in broader

[98] Schad v. Arizona, 501 U.S. 624, 652-62 (White, J., dissenting).

[99] *See id.*; *Richardson*, 526 U.S. 813.

[100] *See* Westen & Ow, *supra* note 8, at 180 (internal quotation marks omitted).

[101] *Schad*, 501 U.S. at 637 (citations omitted).

terms.[102] Importantly, however, Kennedy argues that the majority's fear of a statute criminalizing "the existence of a series of crimes without a requirement of jury unanimity on any underlying offense" is unfounded because "the various elements [of the CCE statute] work together to channel the jury's attention toward a certain kind of ongoing enterprise."[103]

Justice Kennedy's third inquiry—whether the statute aggregates elements for the illicit purpose of avoiding the constitutional requirement of jury unanimity—is also problematic. First, it is difficult to see how legislative intent is relevant at all. If, say, Arizona had drafted the first-degree murder statute in *Schad* to specifically avoid the jury unanimity requirement, then how does that fact transform an otherwise constitutional statute into an unconstitutional one? A legislature's choice in crafting criminal statutes should only be rendered unconstitutional insofar as it undermines the integrity of guilty verdicts;[104] illicit legislative purpose is not simply some talisman to be invoked whenever courts struggle to construct a coherent framework for analyzing particular constitutional infirmities. Second, this inquiry begs the exact question at issue: What does the Constitution require regarding jury unanimity?[105] If a legislature crafts a criminal statute to avoid the jury unanimity in instances of A and B, but the Constitution only requires unanimity in instances of C and D, then the legislature's intent is of no import. Justice Kennedy's illicit purpose inquiry simply presupposes a uniform standard for juror concurrence that does not exist.

### *C. Confusion*

The Supreme Court's annunciation of a comprehensive framework that cuts across two cases (which are eight years apart) makes that very framework burdensome to unearth and difficult to comprehend.

Nowhere is this more apparent than in the habeas corpus context where federal courts may not grant such a writ unless a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[106] In one instance, the Fifth Circuit, befuddled by *Schad*, concluded that "the Texas courts did not unreasonably

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[102] Commentators have also suggested that the irrationality aspect of Justice Kennedy's test is essentially a useless inquiry. Using Kennedy's example of a statute that criminalizes committing a robbery or failing to file a tax return, these commentators note that the irrationality in combining these means is precisely the reason such a statute does not exist. Westen & Ow, *supra* note 8, at 181 (This hypothetical statute "fails to serve the purpose of aggregating offenses that tend to generate overlapping forms of proof, and it fails to serve the purpose of aggregating offenses that involve comparable culpability or require comparable punishments.").

[103] *Richardson*, 526 U.S. at 836 (Kennedy, J., dissenting).

[104] *See* Westen & Ow, *supra* note 8, at 181-82 (contrasting the First Amendment's Establishment Clause and the Fifth, Sixth, and/or Fourteenth Amendments at issue here: "The reason the Establishment Clause prohibits the state from placing the Ten Commandments in public places for religious purposes is that the Establishment Clause is designed to prohibit the state from *expressing a preference* for one religion over another. In contrast, an accused's Fifth, Sixth, and Fourteenth Amendment interest in juror concurrence is not a right regarding expressions by the state but a right regarding the integrity of guilty verdicts.").

[105] *Id.* at 182.

[106] 28 U.S.C.A. § 2254(d)(1) (West 2013).

apply clearly established federal law as determined by the United States Supreme Court because whether the jury charge at issue went beyond the limits of how a state may define a single offense of multiple murder is not clearly established."[107] The issue in that case stemmed from an incident where the petitioner and two of his compatriots had shot and killed three rival gang members in quick succession.[108] He was convicted under the Texas capital murder statute,[109] which states "[a] person commits [capital murder] if he commits murder as defined under [Texas law] and . . . the person murders more than one person . . . during the same criminal transaction."[110] At trial, the jury was instructed that it could convict the defendant if "it found that he killed (1) Torres and either Bravo or Cain; or (2) Bravo and either Torres or Cain; or (3) Cain and either Torres or Bravo."[111] The petitioner sought habeas relief on the grounds that "the jury instructions violated [his] constitutional rights by not requiring the jury to agree unanimously on which two of the victims he killed."[112]

The circuit court scrutinized the *Schad* plurality opinions, but failed to find a coherent rule to follow, stating, "it would be impractical to try to derive any single test for the level of definitional and verdict specificity permitted by the Constitution," in light of the Supreme Court's "inability to lay down any bright-line test."[113] The court concluded, "were we to undertake the fundamental fairness analysis adopted by the plurality in *Schad*, with its various components, the outcome would be far from clear."[114]

In contrast to the Fifth Circuit, one district court was not so perturbed by the uncertainty established by *Schad*. In that case, the petitioner had been convicted of spousal abuse, which, under California law, "can be prosecuted as a single act offense or as a continuous course of conduct offense."[115] Requesting habeas relief, the petitioner argued that "the trial court should have provided the jury with an instruction that it must unanimously agree on which act or acts constituted infliction of great bodily injury" under the statute.[116] The district court clung to one principle from *Schad*—"when a single crime can be committed by various means, the jury need not unanimously agree on which means were used, as long as they agree that the crime was committed"[117]—along with the proposition that when a statute

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[107] Paredes v. Thaler, 617 F.3d 315, 322 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1050 (2011).

[108] *Id.* at 317.

[109] *Id.* at 318.

[110] TEX. CODE ANN. § 19.03(a)(7)(A) (2011).

[111] *Paredes*, 617 F.3d at 318.

[112] *Id.*

[113] *Id.* at 323.

[114] *Id.* at 324-25.

[115] People v. Saddler, No. Do48364, 2008 WL 660271, at *5 (Cal. Ct. App. Mar. 13, 2008).

[116] Saddler v. Evans, No. 09-2067, 2011 WL 9150943, at *23 (S.D. Cal. Dec. 20, 2011), *adopted*, 2012 WL 4364664 (S.D. Cal. Sept. 24, 2012).

[117] *Id*. at *25.

"contemplate[s] a continuous course of conduct based on a series of acts committed over a period of time, the court is not required to give a unanimity instruction" as a basis for denying habeas relief.[118] This court concluded that *Schad* established clear precedential law, but it completely overlooked *Richardson* which arguably set forth a rule in direct contradiction to that *Schad* proposition.

Outside the habeas context, both state and federal courts have also had trouble applying the *Schad-Richardson* framework. In *State v. Brown*, the Kansas Supreme Court confronted a Kansas statute which criminalized "any lewd fondling or touching of either a child who is under 14 years of age or the offender[,] done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both"[119] The defendant argued that the jury should have been instructed to agree upon which *mens rea* they found as a basis for his conviction; i.e. whether he had the intent to arouse or satisfy the sexual desires of the child, himself, or both.[120] After a lengthy statutory analysis, the court found that "the legislature did not define the requisite *mens rea* element for [this statute] in two or more distinct ways," and that the phrase "'either the child or the offender, or both' merely describes a secondary matter . . . purely descriptive of factual circumstances that may prove the distinct, material mental state element of the crime," thus not requiring juror agreement.[121] With regard to another statute that criminalizes "exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another,"[122] the court similarly held that "the distinct, material *mens rea* of the crime at issue, as articulated by the legislature, is the unified intent to arouse or gratify sexual desires. . . . The phrase 'offender or another' does not create alternative means and does not trigger concerns of jury unanimity"[123]

The problem demonstrated in *Brown* is not the court's analysis of legislative intent. Rather, the problem is the fact that this determination of legislative intent ended the court's inquiry. According to the *Schad-Richardson* framework canvassed above, the *Brown* court should have proceeded to a Step Two analysis of statutory permissibility given this statutory interpretation. In other words, the court should have further asked whether it is constitutionally permissible for a legislature to equate, say, intent to arouse or gratify the sexual desires of the offender with the intent to arouse or gratify the sexual desires of another. Mistakenly, the court thought that statutory interpretation was the end of the story.

Similarly, the Sixth Circuit in *United States v. DeJohn*[124] engaged in statutory analysis of 18 U.S.C. § 922(g)(1), which criminalizes the possession of "any firearm" by any person "who has been convicted in any court of[] a crime punishable

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[118] *Id.* at *26.

[119] State v. Brown, 284 P.3d 977, 992 (Kan. 2012).

[120] *Id.*

[121] *Id.* at 993.

[122] *Id.*

[123] *Id.*

[124] United States v. DeJohn, 368 F.3d 533 (6th Cir. 2004).

by imprisonment for a term exceeding one year."[125] The defendant argued "that because the indictment charged the possession of two different firearms as a single violation of 18 U.S.C. § 922(g)(1), prohibiting the possession of firearms by a felon, he was entitled to a jury instruction stating that the jury must unanimously decide which firearm he possessed."[126] Adopting the statutory interpretation of the First Circuit on this issue, the court held "that the particular firearm possessed is not an element of the crime under § 922(g), but instead the means used to satisfy the element of 'any firearm,'" and therefore determined that jury unanimity was not required.[127] But again, according to *Schad*, this should not have concluded the issue.[128]

As we can see, state and federal courts of all levels have struggled to apply the *Schad-Richardson* analytical framework.

### *D. Potentially Unjust Results*

A more in-depth look at the facts of *Schad* sheds light upon why the *Schad-Richardson* framework may cause perverse results in certain cases. As canvassed above, all evidence in the *Schad* case was circumstantial; police only pieced together Schad's connection with the victim's death after he was arrested in Utah for a parole violation.[129] At trial, Schad's defense was that he had merely received some property stolen from Grove, but had not participated in the robbery or killing.[130]

Defense counsel pointed out numerous inconsistencies as to the evidence against Schad, stating, for example, "Grove was known to have regularly carried thousands of dollars in cash, and he had cashed a check for over $2,000 the day before leaving Bisbee. Yet, if Schad had obtained a large sum of money from Grove, why would he quickly start using the credit cards?"[131] Additionally, in discussing the disappearance of the camper-trailer that Grove had been pulling, defense counsel argued that "[i]ts disappearance also suggested that someone else could have committed the robbery and murder, kept the camper and Grove's cash, and then sold or exchanged the other property."[132] As defense counsel made clear, it is doubtful that Schad would have

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[125] 18 U.S.C. § 922(g)(1) (2006).

[126] *DeJohn*, 368 F.3d at 540.

[127] *Id.* at 542.

[128] This situation accurately displays the interaction of duplicity in an indictment and the problem of jury unanimity at trial: because possession of two different weapons can be charged as only one crime under duplicity principles, there becomes a problem of juror concurrence at trial. *See* United States v. Verrecchia, 196 F.3d 294, 297-301 (1st Cir. 1999) (indictment charging one violation of § 922(g) for the possession of two different weapons is not duplicitous).

[129] Schad v. Arizona, 501 U.S. 624, 628 (1991).

[130] *Id.* ("[P]etitioner claimed that the circumstantial evidence proved at most that he was a thief, not a murderer.").

[131] Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 MO. L. REV. 1, 63 (1993).

[132] *Id.*

murdered and robbed Grove alone and then driven the rented Ford.[133] One commentator explains:

> If he had accosted Grove or committed the murder near where the Ford was abandoned (as the government theorized), why would he have driven 150 miles south in one or the other of the cars with either Grove or Grove's dead body? This seemed particularly unlikely given that he would have to have driven through the center of Prescott and also because at the time there was a highly publicized manhunt going on throughout central Arizona for the famous "Tison gang." The gang had pulled off a successful prison break from the state penitentiary at Florence only three days earlier. But, if Schad had first encountered Grove near where the body was found, how had he arrived at that location and how had the mirror contraption subsequently ended up in the Ford 150 miles to the north? Schad could not have driven two cars at the same time, but why would he have been at the Prescott forest without the Ford? A basis for doubt existed that Schad had committed a robbery; an even stronger basis for doubt existed that he had perpetrated or aided in a premeditated killing.[134]

If one was already skeptical of the *Schad* Court's holding, the foregoing analysis will not do much to assuage those concerns. While the evidence seems to provide at least some evidence that Schad committed felony murder, one may ask how an inference of premeditated murder could be made. The Ninth Circuit indeed asked and answered this question in 2009 when it faced another case in the never-ending *Schad* litigation, stating, "[t]he circumstances of Grove's death, including the fact that the murder was accomplished by ligature strangulation, permitted the jury to infer that the killing was intentional and premeditated."[135] Further, the court noted that "Schad's description to New York authorities of Grove as an elderly man strengthened the inference that Schad had encountered Grove in person," and held that "Schad's statement to Duncan that he would deny being near the scene of the crime" could permit "a rational jury to infer that Schad knew about Grove's death."[136] From the evidence taken as a whole, it seems clear that jurors could have found premeditated murder or felony murder, casting doubt on the verdict by "cover[ing] up wide disagreement among the jurors about just what the defendant did, or did not, do."[137]

Similarly, setting the misguided statutory analysis aside, *Richardson* is problematic under the majority's definition. In dissent, Justice Kennedy points out how the majority's holding—requiring jury unanimity as to three specific violations—wreaks havoc on the remaining elements of the statute:

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[133] *Id.*

[134] *Id.*

[135] Schad v. Ryan, 671 F.3d 708, 717-18 (9th Cir. 2011). For full procedural history, see *Schad*, No. 13-16895, 2013 WL 5498094, at *1 (9th Cir. Oct. 4, 2013), *reh'g denied*, 2013 WL 5525713 (9th Cir. Oct. 7, 2013), *cert. denied*, 187 L. Ed. 2d 273 (2013).

[136] *Id.* at 718.

[137] Richardson v. United States, 526 U.S. 813, 819 (1999).

> In my view, the necessary consequence of the Court's ruling is that the three specific crimes must themselves be the ones, in the words of the statute, "from which [the accused] obtains substantial income or resources." 21 U.S.C. § 848(c)(2)(B). Just any three will not do. This significant new burden will make prosecutions under the CCE statute remarkably more difficult. Three small transactions will probably not generate substantial income, and it is unlikely that each transaction will involve five or more other persons. Or there might be different views among the jurors as to which transactions netted substantial income and as to which were undertaken in concert with five or more others. It is disruptive of the statutory purpose to require the Government at the outset to isolate just three or more violations and then relate all the other parts of the CCE definition to just these offenses.[138]

The majority failed to specifically address this argument.

Moreover, the Government and Justice Kennedy both raised the argument that the remaining CCE elements do not require such a heightened showing. For example, the statute requires that the defendant had supervised five or more persons, but "no one claims that the jury must unanimously agree about the identity of those five other persons."[139] Likewise, "the jury may also disagree about the brute facts that make up other statutory elements such as the 'substantial income' that the defendant must derive from the enterprise, § 848(c)(2)(B), or the defendant's role in the criminal organization, § 848(c)(2)(A)."[140] The majority dismisses these salient arguments simply by acknowledging that those aforementioned elements "differ in respect to language, breadth, tradition, and the other factors we have discussed."[141] No further explanation is given.

Finally, Justice Kennedy notes that three specific violations may be quite difficult for the prosecution to prove at trial.[142] Indeed, "[t]o the extent the CCE offense aims to punish acting as leader of a drug enterprise, it targets an ongoing violation," and "[t]o the extent it relies on there being a series of violations, it may be susceptible to difficulties of proof which make it reasonable to base a conviction upon the existence of the series rather than the individual violations."[143] As in *Richardson* itself, "the transactions may have been so numerous or taken place so long ago that they cannot be recalled individually."[144] The majority's only response to this contention is that if individual specific violations are too difficult to prove, then this casts doubt upon the existence of a requisite "continuing series."[145] But this again misses the point of the statute: the purpose of a CCE crime is to punish those

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[138] *Id.* at 830-31.

[139] *Id.* at 824.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 831.

[143] *Id.* at 833.

[144] *Id.*

[145] *See id.* at 823.

who organize or direct ongoing narcotics-related activity; the "continuing series element, as a consequence, is directed at identifying drug enterprises of the requisite size and dangerousness, not at punishing drug offenders for discrete drug violations."[146] By ignoring the plain language and intent of Congress in formulating the CCE offense, the majority unduly hamstrings prosecutors and inordinately confuses jurors, potentially allowing culpable offenders to evade conviction.

### *E. Conflict with* Winship

Consider the following: In his *Schad* dissent, Justice White was particularly concerned that premeditated murder and felony murder possessed no elements in common except for the finding of a murder,[147] stating the plurality affirmed Schad's conviction "without knowing that even a single element of either of the ways for proving first-degree murder, except the fact of a killing, has been found by a majority of the jury, let alone found unanimously by the jury."[148] Using burglary as an example, Justice White argues that his method "would not require proof beyond a reasonable doubt of such factual details as whether a defendant pried open a window with a screwdriver or a crowbar," but it would "require the jury to find beyond a reasonable doubt that the defendant in fact broke and entered, because those are the 'fact[s] necessary to constitute the crime,'" pursuant to *Winship*.[149]

Under a plain reading of the *Schad* statute, first-degree murder (for our purposes) is considered a murder committed either with premeditation or committed in the course of perpetrating or attempting to perpetrate a robbery.[150] As Justice White notes, each of these separate, alternative theories includes its own set of elements. In other words, a finding of premeditated murder necessarily includes a finding of (i) a death caused by the defendant with (ii) malice and (iii) premeditation, while a finding of felony murder necessarily includes a finding of (a) robbery or attempted robbery and (b) a death caused in commission thereof.[151]

As we can see, there are really three statutory levels at play here. In descending order of generality, they are: (1) the crime of first-degree murder; (2) the alternative theories by which a defendant may be convicted of first-degree murder, including premeditation and felony murder; and (3) the elements of each alterative theory. The question then becomes: Which level is the level of "fact[s] necessary to constitute the crime" pursuant to *Winship*?

It helps to analyze from the bottom up here. The first question is whether there is any meaningful distinction between the alternative theories of conviction—Level

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[146] *Id.* at 829.

[147] Schad v. Arizona, 501 U.S. 624, 653 (1991).

[148] *Id.* at 655 ("[A] verdict that simply pronounces a defendant 'guilty of first-degree murder' provides no clues as to whether the jury agrees that the three elements of premeditated murder or the two elements of felony murder have been proved beyond a reasonable doubt. Instead, it is entirely possible that half of the jury believed the defendant was guilty of premeditated murder and not guilty of felony murder/robbery, while half believed exactly the reverse.").

[149] *Id.* at 656-57.

[150] For a description of the statute in its entirety, see *supra*, note 39.

[151] *See Schad*, 501 U.S. at 653-54.

Two—or the elements of those theories—Level Three—in terms of *Winship*. This question must be answered in the negative. Both premeditated and felony murder theories necessarily include a finding of the elements that constitute those respective theories. For example, a jury in *Schad* cannot unanimously agree on the theory of felony murder without also agreeing, beyond a reasonable doubt, there was (a) a robbery or attempted robbery and (b) a death caused in commission thereof. Therefore, a distinction between Levels Two and Three is meaningless here since a requirement of one necessarily implicates the other.

The question then becomes whether Level One or Level Two is the level of "fact[s] necessary to constitute the crime." The plurality never explicitly tackled this question because, in their view, they solved both the issue of statutory permissibility and the issue of jury unanimity by grounding their analysis in a determination of the former.[152] But what happens if we proceed to the question of jury unanimity under this statute (as deemed permissible by the plurality)?

It is clear that Level Two, as a whole, is necessary for a finding of first-degree murder (Level One). Under the plurality's approach, the jury in *Schad* was unanimous on a Level Two finding in terms of the entire level and, Level Two being necessary to a finding of Level One, was allowed to convict on this basis. But a closer look at the plurality's holding reveals an important issue. Because the plurality's approach focuses on Level Two—the alternative theories—as a whole rather than separately, the only fact necessary to constitute a crime under this statute—the only fact upon which all jurors must agree—is the fact of first-degree murder. But how can this be? Looking through the lens of *Winship*, if the "crime" at issue is first-degree murder, then the "fact[s] necessary to constitute the crime" cannot also be first-degree murder as the plurality concludes.

## VII. PROPOSED SOLUTION

This section will cover one possible solution to the juror concurrence problem. It starts by examining the difficulty of crafting a resolution to the problem. I then set forth my proposed solution in Subsection B and apply it to examples discussed in Subsection C.

### *A. Framing the Problem*

The difficulty in crafting a solution to this problem cannot be overstated. First, the stakes could not be higher. This area involves the culpability of people who, if found guilty, could be deprived of their liberty (incarceration) or even their lives (in death penalty cases). Second and relatedly, a solution to the problem of juror concurrence must walk a careful tightrope between "the competing dangers of convicting too many innocent defendants and exculpating too many guilty ones."[153] A high level of specificity, for example, requiring that jurors agree to whether the accused committed a murder with a gun or a knife, will significantly hamper prosecutors' ability to convict guilty defendants because prosecutors would then be forced to prove minute details beyond a reasonable doubt. Conversely, a low level of specificity, such as requiring merely a guilty verdict as to the crime charged without any juror agreement as to the underlying facts, would pose a serious risk of convicting innocent persons.

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[152] *Id.* at 631.

[153] Howe, *supra* note 131, at 24.

The juror-agreement problem is especially difficult because there are a myriad of statutes and an infinite number of factual scenarios that could cause such issues. Indeed, minor factual deviations, even arising under the same statute, could cause juror concurrence problems that are not of equal gravity.[154] Moreover, even statutes that are clear on their face might create difficulties in situations where the government, unchallenged by the defendant, opts to include multiple crimes in a single charge of the indictment instead of splitting these crimes into separate counts.[155] For example, suppose a defendant is charged with committing wire fraud in violation of 18 U.S.C. § 1343, where each interstate wire transmission that carries out a scheme to defraud is a separate crime.[156] The prosecution charges three such wire transmissions under a single count and the defendant does not bring a duplicity challenge to this charge. Must the jury agree as to which wire transmission is the basis of the conviction?

An additional problem when trying to fashion a solution to this problem is where to draw the line. If we concede that maximum specificity (juror agreement on every detail) and minimum specificity (jury agreement only on the verdict without regard to any factual details) are not the proper requirements, then we enter a gray area where the danger is whether jurors may be too confused to render a proper verdict. But determining how much potential jury confusion threatens the reasonable doubt

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[154] For example, take federal statute 18 U.S.C. § 2313, which criminalizes "conceal[ing], stor[ing], barter[ing], sell[ing] or dispos[ing] of" a stolen motor vehicle while knowing it to be stolen. Professor Howe explains that, under this statute, small factual differences could have a large impact:

> A court might confront whether it is a material difference that one witness claims the defendant always kept the car in his garage while another witness claims the defendant always kept the car in a warehouse several miles away. The court could reach a decision about whether this factual difference is important enough that jurors ought to be required to coalesce on its resolution before returning a guilty verdict. Yet, the court might also posit, for example, a similar case in which one witness claimed a stolen car was always parked in the defendant's driveway while another witness claimed that the car was always parked on a public street near the defendant's home. The court might next imagine a similar case in which one witness claimed a stolen car was parked in the defendant's driveway while another witness claimed he kept the stolen car parked in his garage.

Howe, *supra* note 131, at 25 n.102.

[155] Defendants may do this for a variety of reasons. First, a single count (as opposed to multiple counts) limits a defendant's potential sentence if convicted. For example, charging two crimes, each with a ten-year maximum penalty, under a single count means that the defendant can only be sentenced to a maximum of ten years. However, if the defendant were to split these crimes and be convicted of both, then he could spend up to twenty years in prison. Additionally, a defendant may prefer the aggregation of offenses under a single count in order to obtain broader protection from subsequent prosecution under the Double Jeopardy Clause. *See* United States v. Rigas, 605 F.3d 194 (3d Cir. 2010) (en banc) (barring second prosecution when the government alleged that the defendants had violated 18 U.S.C. § 371 under the theory that they had conspired to cheat the United States out of their taxes because they had not paid taxes on the income that the first prosecution (and conviction) established they had wrongfully obtained).

[156] United States v. Jefferson, 674 F.3d 332, 367 (4th Cir. 2012) (citing Badders v. United States, 240 U.S. 391, 394 (1916)), *cert. denied*, 133 S. Ct. 648 (2012).

standard, and therefore necessitates juror concurrence on more specific details, is a question with no easy answer. The problem is further complicated by the fact that one could create many distinctions between different statutes and within statutes. One could distinguish between elements and means,[157] "syntactically simple" and "multiple verb" statutes,[158] statutes where *actus rei* and *mentes reae* are mutually dependent and non-mutually dependent,[159] a requirement of an unambiguous verdict instead of a "generic verdict,"[160] and many other potential differentiations. The countless ways to skin the proverbial cat of juror concurrence further obscures an already murky problem.

As we can see, the rights at stake, the careful line that must be walked, and the infinite number of scenarios where juror concurrence problems may arise make it extremely difficult to draw a clear line between constitutionally valid and constitutionally infirm jury instructions.

### *B. Proposed Solution*

I propose a two-step inquiry to determine whether juror agreement is required: (1) are the alternatives at issue a result of factual divergence or statutory divergence?, and (2) if the alternatives are a result of statutory divergence, is it rational for the legislature to make the statutory alternatives different routes to the same crime? The important point here is that, under this proposed solution, Step Two is a constitutional requirement while Step One is a quasi-constitutional prophylactic rule akin to *Miranda v. Arizona*.[161] In sum, if the juror concurrence issue arises due to statutory divergence then agreement is presumptively required subject to rationality analysis and legislative override; if the problem is a result of factual divergence then juror concurrence is not required.

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[157] *See* Richardson v. United States, 526 U.S. 813, 817 (1999).

[158] "Syntactically simple" statutes are those that are absolutely clear and unambiguous on its face. For example, 18 U.S.C. § 1114 (2006) prohibits killing any federal officer because of, or during the commission of, his duties. Multiple verb statutes are those that list various ways for a crime to be committed. For example, 18 U.S.C. § 2313 (2006) criminalizes "conceal[ing], stor[ing], barter[ing], sell[ing] or dispos[ing] of" a stolen motor vehicle knowing it to be stolen.

[159] "Mutually dependent" refers to an actus reus that relies on one specific mens rea in order to create a crime. For example, 18 U.S.C. § 1029 (2006) criminalizes "fraud and related activity in connection with access devises" in various ways. One is guilty of violating § 1029 if he "knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices" or if he "knowingly uses, produces, traffics in, has control or custody of, or possesses hardware or software, knowing it has been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization." On the other hand, non-mutually dependent statutes do not contain any actus reus that must be paired with any specific mens rea. For example, 18 U.S.C. § 2313 (2006) criminalizes "conceal[ing], stor[ing], barter[ing], sell[ing] or dispos[ing] of" a stolen motor vehicle knowing it to be stolen—any one of the actus rei can be paired with the mens rea (knowledge of its stolen nature) to convict a defendant.

[160] *See* Elizabeth R. Carty, Schad v. Arizona*: Jury Unanimity on Trial*, 42 CATH. U. L. REV. 355, 388 (1993).

[161] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

Understandably, this first step makes little sense in the abstract. Several explanations are needed: Why is Step One a prophylactic rule? What are factual and statutory divergences, and why do they matter? How do these distinctions play out in practice?

By way of background, the Supreme Court decided *Miranda* in 1966.[162] The Fifth Amendment states that an individual may not be "compelled in any criminal case to be a witness against himself,"[163] and "[t]o the ends of protecting that right, *Miranda* requires law-enforcement officers to give warnings, including the right to remain silent, before interrogating individuals who are 'in [police] custody.'"[164] This "prophylactic rule[] [is] designed to insulate the exercise of Fifth Amendment rights from the government compulsion, subtle or otherwise, that operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."[165] In other words, "*Miranda* merely created a prophylactic rule that establishes an irrebuttable presumption of involuntariness with respect to statements made during custodial interrogation that are not preceded by *Miranda* warnings."[166] Accordingly, the requirement of *Miranda* warnings is not, in and of itself, a constitutional requirement dictated by the Fifth Amendment (or the Fourteenth Amendment which incorporates this right against the states),[167] a fact made clear by the Supreme Court's recent decision to "repeat[] Miranda's refrain about permitting legislative alternatives that are 'at least as effective' in protecting the Fifth Amendment."[168]

What I propose is a Step One akin to *Miranda* in the sense that it is a prophylactic measure designed to protect an individual's Fifth and Fourteenth Amendment rights to due process. And, like *Miranda*, this rule may be overridden by legislative alternatives that are equally protective of a defendant's due process right to juror agreement. This makes sense for several reasons. First, as a textual matter, both the constitutional provision at issue in *Miranda* (the Self-Incrimination Clause of the Fifth Amendment) and the right at issue here (the due process right of juror concurrence on every fact necessary to constitute the crime) are governed by the same constitutional language: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."[169] There is no textual reason why prophylactic

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[162] *Id.*

[163] U.S. CONST. amend. V. "[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[164] United States v. Panak, 552 F.3d 462, 465 (6th Cir. 2009) (citations omitted).

[165] Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (internal quotation marks omitted).

[166] United States v. Abrego, 141 F.3d 142, 169 (5th Cir. 1998).

[167] *Panak*, 552 F.3d at 465.

[168] Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1596 (2008).

[169] U.S. CONST. amend. V. While the Fifth Amendment Due Process Clause only applies to the federal government, the Fourteenth Amendment Due Process Clause applies to the states and is both textually and doctrinally identical. U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."). *See* Dusenbery v. United States, 534 U.S. 161, 167 (2002) (treating the Due Process Clauses of both

measures should be employed for the protection of one constitutional right but not for a constitutional right that is both textually adjacent to and governed by the same preamble ("No person shall . . .").

Second, this first step is purposely designed to be over inclusive in order to adequately safeguard the presumption of innocence and its extension, the requirement of proof beyond a reasonable doubt.[170] As such, it will require juror concurrence in situations where juror disagreement may not jeopardize the reasonable doubt standard. This parallels *Miranda*. The core Fifth Amendment violation protected by *Miranda* is a coerced statement of self-incrimination, but not all statements made in absence of *Miranda* warnings are involuntary; *Miranda* is purposely broader than the constitutional right it is designed to protect.[171] And, like the *Miranda* context, a legislature is not barred from enacting statutes that are "at least as effective" as the prophylactic rule advocated here—i.e., statutes can be enacted that allow jurors not to agree when disagreement does not endanger the reasonable doubt standard.

Third, a key rationale of the *Miranda* rule applies with equal weight to the aspect of due process at issue here. Prior to *Miranda*, the Supreme Court "evaluated the admissibility of a suspect's confession under a voluntariness test."[172] That test examined "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession" by looking at "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[173] However, *Miranda* was decided, at least in part, on the premise that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself."[174] In other words, the voluntariness test became too confusing to apply because of the infinite number of factual scenarios that could cause a court to question the voluntariness of a confession.

This rationale applies with equal force here. As mentioned in Section VII.A, *supra*, the juror agreement problem is especially difficult because there are a myriad of statutes and an infinite number of factual scenarios that cause such problems. The murkiness of examining whether a custodial interrogation is coerced or voluntary is akin to the murkiness present when courts must examine whether juror disagreement jeopardizes the reasonable doubt standard: In both arenas, the inquiry is incredibly

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amendments equally). Therefore, there is no difference in this scenario between the due process protections in state and federal court. Also of note is the fact that the Self-Incrimination Clause—the constitutional provision at issue in *Miranda*—is applied to the states through the same Due Process Clause of the Fourteenth Amendment at issue here. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964). This only strengthens the idea that *Miranda* and the prophylactic rule advocated here have an equal constitutional basis.

[170] As noted in *supra*, Part I, "[i]t is part of our legal tradition that conviction of the innocent is far more abhorrent than exoneration of the guilty." Howe, *supra* note 131, at 13 (citing numerous authorities for that proposition).

[171] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[172] Dickerson v. United States, 530 U.S. 428, 432-33 (2000).

[173] *Id.* at 434 (citations omitted).

[174] *Id.* at 435 (citations omitted).

fact specific and may lead to widely disparate outcomes across cases depending on the statute at issue and/or the facts of the specific case.[175] In accordance with *Miranda*, therefore, it is desirable for the Court to lay down a uniform, bright-line rule to govern these situations in absence of explicit, effective alternatives laid down by the relevant legislature.[176]

Having covered the reasons for a quasi-constitutional prophylactic rule, it is now necessary to describe what that rule is. I propose a relatively simple test: Are the alternatives at issue a result of factual divergence or statutory divergence? If the alternatives are a result of factual divergence, then juror concurrence is not required; if they are the result of statutory divergence, then concurrence is presumptively required subject to rationality analysis and legislative override. But what are factual and statutory divergences, and why do they matter?

Put simply, I define factual divergence as one or more alternative facts, not caused by the statute at issue, that may give rise to juror agreement problems. For example, 18 U.S.C. § 922(g)(1) criminalizes the possession of "any firearm" by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year."[177] If an indictment charged the possession of two different firearms as a single violation of this statute, need a jury agree upon which firearm was possessed in order to render a proper guilty verdict? For now, it suffices to say that this is an example of factual divergence: The statute is clear on its face that the *actus reus* of the crime is the possession of any firearm, but it is the facts of the actual case—the defendant's potential possession of two firearms—which causes the juror concurrence issue.

Conversely, I define statutory divergence as one or more specific alternatives within the four corners of the statute that give rise to the problem of juror agreement. As an example, 18 U.S.C. § 1201(a) makes it a crime to unlawfully "seize[], confine[], inveigle[], decoy[], kidnap[] abduct[], or carr[y] away and hold[] for ransom and reward" another person.[178] Must a jury agree upon which enumerated action was taken by the defendant in order to render a proper guilty verdict? This is a classic example of statutory divergence: While the statute and the facts of any given case are invariably intertwined to a certain extent, it is clear here that the juror concurrence issue arises because of the statutory alternatives listed, not the specific facts of any individual case.

The effect of this distinction in my proposed solution is that statutory divergence requires jurors to agree subject to legislative override (remember, this step is merely a quasi-constitutional prophylactic rule), while factual divergence does not.

So why does this distinction matter? As noted above, the primary concern when crafting this prophylactic rule was to create a uniform standard that is

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[175] *See generally* Howe, *supra* note 131 (advocating a case-by-case appraisal of whether juror concurrence is required given the difficulties presented by varying factual scenarios).

[176] It is beyond the scope of this Article to determine whether Miranda was correctly decided; I employ the use of a *Miranda*-like prophylactic rule merely to create a clear framework in this area. Because *Miranda* is still good law, there is no reason why it should not be applied in the area of juror agreement as long as it is a valid test for the Self-Incrimination Clause.

[177] 18 U.S.C.A. § 922(g)(1) (West 2013).

[178] 18 U.S.C. § 1201(a) (2006).

straightforward and easy to apply. But that line must still be drawn somewhere, and I chose to draw it between the statute and the facts. I did this for several reasons.

First, the "fact[s] necessary to constitute the crime" under *Winship* inherently depend on the "crime" at issue, which, as noted, will be the definition spelled out within the four corners of the statute. Put simply, if the legislature defines the crime by explicit statutory language and that language makes clear the necessary elements of a crime, then any underlying factual disagreement within those elements is of no moment.[179] Put another way, any juror disagreement on the basis of factual divergence is unimportant because it is not "necessary to constitute the crime" as defined by the legislature. Thus, as long as every prohibition specifically spelled out in the statute is agreed upon, the jury instructions cannot be adjudged constitutionally infirm.

Second, this distinction is relatively simple. While I hesitate to deem any distinction in this area "simple," I believe this is as straightforward as a rule can be without compromising the values discussed above. There are, however, a narrow set of statutes which skirt the line between statutory and factual divergence. For example, Arkansas's money laundering statute reads as follows:

> (a) A person commits the offense of criminal use of property or laundering criminal proceeds if the person knowingly:
> (1) Conducts or attempts to conduct a transaction involving criminal proceeds that were derived from any predicate criminal offense, or that were represented to be criminal proceeds from any predicate criminal offense, with the intent to:
> (A) Conceal the location, source, ownership, or control of the criminal proceeds;
> (B) Avoid a reporting requirement under state or federal law; or
> (C) Acquire any interest in the criminal proceeds; or
> (2) Uses or makes available for use any property in which he or she has any ownership or lawful possessory interest to facilitate a predicate criminal offense.[180]

Must jurors agree upon the "predicate criminal offense" to reach a proper guilty verdict? Under my proposed rule, this question must be answered in the negative: There are no specific alternatives listed within the four corners of this statute; it merely references other laws. Therefore, the issue of which predicate criminal offense forms the basis of the conviction is outside the purview of the statute. This is factual divergence not requiring juror concurrence.

This is a bit of an odd result considering the alternative. Take the federal Racketeer Influenced and Corrupt Organizations Act (RICO), which, along with other requirements, criminalizes various forms of racketeering activity under 18 U.S.C. § 1962.[181] However, the definition of "racketeering activity" is contained in 18 U.S.C. § 1961 and lists specific state and federal crimes that constitute this

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[179] One may view this as a reframing of the "elements versus means" distinction, but I go further by defining exactly what the elements are—i.e., the words within the four corners of the statute.

[180] ARK. CODE ANN. § 5-42-204 (West 2013).

[181] 18 U.S.C.A. § 1962 (West 2013).

"racketeering activity."[182] Need jurors concur on which racketeering offenses are the basis of a § 1962 conviction? Under the command of my proposed rule, the answer would be no because there are no statutory alternatives listed within the four corners of § 1962. However, if Congress had used that same definition but merely included it in § 1962 instead of a separate statute, then jurors would be required to agree on the specific racketeering activity. While this seems like an odd result, it is not illogical. As we will see in more examples, *infra*, legislatures frequently cite other statutes in order to criminalize some specific act in connection with the cited statutes. In other words, legislatures in these situations are not focused on these underlying predicate offenses but on the prohibited action done in connection with those offenses; the defendant could still be prosecuted separately for those underlying offenses but the legislature is seeking to go further by writing laws that use them as mere predicates.

Third, the factual divergence-statutory divergence distinction works in conjunction with the second step of my proposed solution. The first step looks at whether factual or statutory divergence is at issue and, if the latter, the second step prohibits legislatures from defining these crimes in an irrational manner. If factual divergence were to be regulated by my proposed solution, Step Two would make little sense: Analyzing the rationality of legislative choices does not matter if the issue arises solely because of factual divergence unrelated to statutory alternatives.[183]

The Step Two rationality analysis is nothing new. Courts determine whether statutes are rationally written all the time. The purpose of this inquiry is to serve as a slight check on legislatures such that they do not collect alternatives under a single element that are not logically connected. For example, suppose Congress rewrote the CCE statute as follows: "[A] person is engaged in a continuing criminal enterprise if he engages in a continuing series of violations of Title 18 of the United States Code." This would be an irrational revision. Title 18 of the U.S. Code contains a myriad of provisions ranging from "knowingly and with intent to defraud possessing fifteen or more" counterfeit credit cards,[184] to committing acts of terrorism that transcend national boundaries.[185] This hypothetical statute fails the rationality test because it does not aggregate offenses that tend to generate overlapping forms of proof, it has no further elements (such as deriving substantial income or occupying a position of authority) to channel the jury's discretion toward a particular type of ongoing enterprise, and it fails to serve the purpose of aggregating offenses that involve comparable culpability.

As should be evident, this inquiry mirrors the existing *Schad-Richardson* framework. That is to say, Justice Souter's approach in *Schad* and Justice Kennedy's approach in *Richardson* (minus the illicit purpose inquiry) provide an adequate solution when statutory divergence is at issue. As should also be evident, very few

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[182] 18 U.S.C.A. § 1961 (West 2013).

[183] One could argue that a statute should still be required to list alternatives that are rationally related even if a specific case creates factual divergence under one element of the offense rather than implicating those statutory alternatives. While this point must be conceded, my point is simply one of raising that question in the correct posture to allow for an informed judicial determination—i.e., in a situation where the statutory alternatives themselves are at issue.

[184] 18 U.S.C. § 1029(a)(3) (2006).

[185] 18 U.S.C. § 2332(b) (2006).

statutes will be struck down at Step Two. The purpose of this inquiry is to only invalidate those laws that are so wildly irrational as to be a denial of due process.

### *C. Proposed Solution in Action*

It is helpful at this point to go through every step in my proposed solution with examples. Example 1: defendant is indicted in Idaho on one count of lewd conduct with minor child under sixteen. The statute reads:

> Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, [list of actions], when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony.[186]

At trial, the prosecution puts forth three instances where the defendant is alleged to have violated the statute. If this indictment overcame the duplicity bar (and we shall assume it did) then we have a jury unanimity issue at trial: Must the jury agree on one specific instance in order to convict the defendant?

First, we must determine whether factual or statutory divergence is at issue. This is a bit of an interesting case because it could be argued that the use of the phrase "lewd or lascivious act or acts" connotes two statutory alternatives: The jury must agree on the lewd or lascivious act performed by the defendant, or, alternatively, the jury must simply agree that the defendant committed lewd or lascivious acts. However, the statute goes on to state that "any of such acts" must been done with the requisite intent. This use of "acts" independent from the word "act" seems to indicate that the legislature contemplated this exact scenario: The prosecution would allege several acts and the jury must only agree that at least one act was committed. Accordingly, juror disagreement as to which lewd or lascivious act or acts the defendant committed is a product of factual divergence, thus not requiring juror agreement.

Two final points should be made here. First, as we can see from the above example, statutory interpretation is sometimes needed to determine whether factual or statutory divergence exists. Second, the legislature always has a choice to alleviate this need for statutory interpretation. For example, take the North Dakota offense of Continuing Sexual Abuse of a Child: "An individual in adult court is guilty of an offense if the individual engages in any combination of three or more sexual acts or sexual contacts with a minor under the age of fifteen years during a period of three or more months."[187] North Dakota's legislature was apparently well aware of possible juror agreement problems as the statute goes on to say, "[i]f more than three sexual acts or contacts are alleged, a jury must unanimously agree that any

[186] IDAHO CODE ANN. § 18-1508 (West 2013).

[187] N.D. CENT. CODE ANN. § 12.1-20-03.1 (West 2007). The use of the phrase "any combination" in this statute would lead to the conclusion that jurors need not agree upon any specific three acts in order to convict a defendant of this crime even absent an explicit statement. Therefore, this statute presents a good example of a situation where the legislature does not override the prophylactic rule, but instead reaffirms its use.

combination of three or more acts or contacts occurred. The jury does not need to unanimously agree which three acts or contacts occurred."[188]

Example 2: Defendant is charged in New York with one count of larceny, defined as follows:

> A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.
> Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:
> (a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses.[189]

Under common law, larceny by embezzlement was "the conversion by the embezzler of property belonging to another which has been entrusted to the embezzler to hold on behalf of the owner."[190] Common law larceny by false pretenses occurred "where the wrongdoer induces the owner of property to part with title by means of a false representation of an external fact."[191] At trial, the prosecution argues that the defendant committed either larceny by embezzlement or larceny by false pretenses in connection with his alleged obtaining of an expensive painting from the victim, which the defendant later sold for thousands of dollars. Must the jury agree as to the particular theory of larceny?

To answer this question, we must begin at Step One. At Step One of my proposed solution we must determine whether this is a case of factual or statutory divergence. Here, this is clear: The statute lists several different theories of larceny in the statute itself. Therefore, any juror disagreement as to the specific theory is a result of statutory divergence.

The next question is whether the New York legislature was rational in listing larceny by embezzlement and by false pretenses as alternatives to the same crime. The answer must be yes. New York has a very strong interest in criminalizing larcenous conduct and is reasonable to aggregate these theories of larceny in a single count because they require overlapping forms of proof and involve comparable culpability (both have been classified as "larceny" for centuries and both entail the unlawful obtaining of another's property). This seems quite rational on the part of New York.

Given the prophylactic nature of the Step One determination, the New York legislature could subsequently amend the statute to say: "If more than one theory of larceny is alleged, a jury must unanimously agree that any one of the alleged theories is satisfied. The jury does not need to unanimously agree upon one theory." The result of such an amendment would be to override the prophylactic rule and force courts, on a case-by-case basis, to determine whether a failure to agree on one base

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[188] *Id.*

[189] N.Y. PENAL LAW § 155.05 (McKinney 2013).

[190] People v. Yannett, 401 N.E.2d 410, 412 (N.Y. 1980).

[191] People v. Churchill, 390 N.E.2d 1146, 1149 (N.Y. 1979).

of liability would raise doubt that the offender engaged in any conduct that amounted to larceny. If so, the statute would be unconstitutional as applied to that defendant, and juror concurrence would therefore be required notwithstanding the legislature's contrary intent. As should be clear given the purposeful over inclusiveness of the prophylactic rule, this case-by-case inquiry is fact-specific: The facts of some cases may align with legislative intent and not require juror agreement on a specific theory while the facts of other cases may fall contrary to legislative intent and thus require such agreement.

Example 3: A defendant is indicted in federal court on one count of "employment or use of persons under 18 years of age in drug operations" in violation of 21 U.S.C. § 861, which reads as follows:

> It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally--
> (1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate any provision of [federal drug laws];
> (2) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense of [federal drug laws] by any Federal, State, or local law enforcement official; or
> (3) receive a controlled substance from a person under 18 years of age, other than an immediate family member, in violation of [federal drug laws].[192]

At trial, the prosecution's theory of the case is that the defendant paid three unknown young men to distribute cocaine in their respective neighborhoods and then to hide the proceeds from these sales in an unknown location. The defendant had employed these young men for several weeks. A government informant heard from an individual who purchased cocaine from one of these three young men that, during their transaction, they discussed how the seller was on his high school varsity basketball team as only a sophomore. The purchaser could not recall the name of the seller or the name of the high school that the seller attended.

First, must the jury agree upon which of the three young men was under the age of eighteen? Step One asks whether disagreement as to this issue is a result of factual or statutory divergence. Here, § 861 prohibits various uses of "a person under eighteen years of age" in connection with federal drug offenses. This seems to indicate that any juror disagreement over which person was under eighteen is immaterial because the statute merely criminalizes the use of "a"—i.e., one—such person. Accordingly, it is factual divergence here—the defendant's use of three individuals where any one of them could be under eighteen—that gives rise to potential juror disagreement. Therefore agreement on a specific underage individual is not required.

Second, must the jury agree upon the specific "provision of [federal drug laws]" that the defendant violated? From the explanation above,[193] we know that, at Step One, we only look within the four corners of the statute. This makes our answer to Step One clear: No alternatives are spelled out within the four corners of this statute and therefore disagreement over which "provision of [the federal drug laws]" forms

[192] 21 U.S.C.A. § 861 (West 2013).

[193] *See supra*, Part VI.B.

the basis of a guilty verdict is a result of factual divergence. Thus, juror agreement is not required.

Finally, must the jury agree upon (1) which subsection of § 861 is violated, and (2) which listed action within each subpart was taken by the defendant? In accordance with the prophylactic Step One, this question must be answered in the affirmative. The subsections spell out different theories of the crime within the four corners of the statute and therefore, any disagreement as to whether the defendant utilized the person under eighteen to violate any provision of federal drug laws or to assist in avoiding detection/apprehension for such an offense is the result of statutory divergence. Likewise, the alternative *actus rei* within each subsection—employ, hire, use, persuade, induce, entice, or coerce—are also explicitly listed by the legislature. Thus, juror agreement is required as to both the subsection that was violated and the listed action within that subsection that caused the violation.

The next step is then to determine whether these alternatives are rationally related. This question must also be answered in the affirmative. With respect to the separate subsection theories, the United States has a very strong interest in criminalizing this conduct and it is reasonable in providing these alternative theories because they require overlapping forms of proof and involve comparable culpability (many statutes criminalize both the commission of an offense and the escape or avoidance of apprehension after the commission of such an offense). Regarding the *actus rei* within each subpart, this rationality analysis results in the same conclusion. Indeed, the *Merriam-Webster Dictionary and Thesaurus* lists "employ" and "use" as synonyms, "employ" and "hire" as synonyms, "persuade" and "induce" as synonyms, and "persuade" and "entice" as related words.[194] It seems nearly axiomatic that the listed actions are closely related in meaning and are therefore reasonably related to the goal of criminalizing comparably culpable actions. Additionally, these alternatives will generate overlapping forms of proof.

## VIII. CONCLUSION

A clear-cut solution to the problem of juror concurrence is not easily fashioned. Courts and commentators have struggled immensely to establish a coherent framework that both preserves fundamental fairness for defendants and embraces the integrity of legislative and judicial choices. Too lax a standard (less specific agreement) would create a danger of convicting innocent persons, whereas too strict a standard (more specific agreement) would allow culpable defendants to go free.

While the Supreme Court has attempted to solve this problem through the establishment of the *Schad-Richardson* framework, we have seen that this tripartite analysis is unworkable, confusing, engenders the possibility of unjust results, and is in conflict with the seminal case of *In re Winship*.

We also saw the intersecting doctrines that frame this area, such as the presumption of innocence, duplicity, multiplicity, legal sufficiency of the evidence, and the reasonable doubt standard. While some commentators suggest that these surrounding doctrines provide sufficient protection of defendants' due process rights, we have seen that they are, at best, an incomplete solution to the problem.

Ultimately, a line must be drawn somewhere. In sum, I choose to draw that line between factual and statutory divergence by way of a two-step process: If the juror

[194] MERRIAM–WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com (last visited Dec. 28, 2012).

concurrence issue arises due to statutory divergence, agreement is presumptively required subject to rationality analysis and legislative override; if the problem is a result of factual divergence, however, juror concurrence is not required. While every analysis will have its pros and cons, I have crafted this solution with specific attention to the critical issue of due process: Whether the ability of the jury to reach agreement, beyond a reasonable doubt, on all facts necessary to constitute the crime is compromised.