Volume 70 | Number 3 Article 8

3-1-1992

Schad v. Arizona: Diminishing the Need for Verdict Specificity

James J. McGuire

Schad v. Arizona: Diminishing the Need for Verdict Specificity

Most Americans take for granted that a criminal defendant will not be convicted unless the jury renders a unanimous verdict. In state criminal proceedings, however, the United States Constitution provides no such guarantee.[1] Instead, the states may decide by statute whether to afford the protection of a unanimous verdict. Although many states do, they often neglect to specify exactly what the jurors must agree upon in order to reach unanimity.[2] In *Schad v. Arizona*[3] the United States Supreme Court addressed this issue—almost.

Under Arizona law both premeditated murder and murder during the course of a felony constitute first-degree murder.[4] In *Schad* the State prosecuted Edward Schad for first-degree murder, but rather than alleging either premeditated murder or felony murder, it charged Schad with both.[5] Because the State allowed the jury to return a general guilty verdict, the defendant claimed that his conviction was not necessarily unanimous as guaranteed: the jury was not required to specify the theory on which it convicted Schad and, therefore, some jurors might have believed the defendant was guilty of premeditated murder while some might have believed he was guilty of felony murder.[6] The Supreme Court looked at the problem differently, focusing instead on the limits of a state's power to define crime—that is, whether the Due Process Clause of the Constitution prohibits a state from equating premeditated murder and felony murder.[7] A plurality of the Court concluded that felony murder and premeditated murder may be considered alternate means of establishing the crime of first-degree murder, and thus the jury need not agree on only one alternative.[8]

This Note recounts the plurality's opinion and examines the varied

---

1. *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (affirming the constitutionality of a nonunanimous verdict in a state criminal trial).

2. *See, e.g.*, ARIZ. CONST. art. II, § 23; IDAHO CONST. art. I, § 7; N.C. CONST. art. I, § 24.

3. 111 S. Ct. 2491 (1991).

4. ARIZ. REV. STAT. ANN. § 13-1105.A (1989); see *infra* note 74 and accompanying text for the language of the statute.

5. *Schad*, 111 S. Ct. at 2495 (plurality opinion).

6. *Id.* at 2495-96 (plurality opinion).

7. *Id.* at 2496 (plurality opinion).

8. *Id.* at 2504 (plurality opinion). The plurality also held that where a jury is instructed on first-degree (premeditated and felony) murder and on second-degree murder, the Constitution does not require that it also be instructed on lesser-included offenses of felony murder. *Id.* at 2505 (plurality opinion).

case law upon which the plurality relied.[9] It then analyzes the way in which the plurality reframed the jury unanimity issue as one of definitional limitations,[10] and the implications of this reframing.[11] The Note further assesses the plurality's reliance on precedent and analogy,[12] its assumption that premeditation and the commission of a felony are means of satisfying a *mens rea* element of first-degree murder,[13] and its due process-fundamental fairness inquiry.[14] The Note concludes that the plurality's recharacterization of the jury unanimity issue is misguided. Moreover, even within the terms of definitional limitations, the plurality's reliance on precedent and analogy is unpersuasive, and its due process analysis is superficial and uninformative because the plurality failed to offer anything more than a survey of current and historical practice.

On August 1, 1978, seventy-four year old Lorimer Grove left his home in Bisbee, Arizona, driving a Cadillac and towing a camper.[15] Two days later an abandoned rental car containing some of Grove's belongings was found off U.S. Highway 89 in Arizona.[16] Edward Schad had rented the car the previous December but never returned it.[17] On August 9 Grove's body was found strangled to death in the underbrush by Highway 89, but the body was not identified until October 11.[18] In late September Schad was arrested in Salt Lake City, Utah, for parole violation and possession of a stolen automobile.[19] The stolen automobile—Grove's Cadillac—also contained some of Grove's personal belongings. In addition, Schad had two of Grove's credit cards in his wallet.[20] Later, while in jail, Schad made a number of incriminating statement's about Grove's death to one of his friends.[21]

After Grove's body was identified, a grand jury in Yavapai County, Arizona, indicted Schad on one count of first-degree murder, and he was extradicted from Utah to stand trial.[22] Schad was prosecuted and con-

9. *See infra* notes 75-139 and accompanying text.
10. *See infra* notes 141-46 and accompanying text.
11. *See infra* notes 147-53 and accompanying text.
12. *See infra* notes 154-60 and accompanying text.
13. *See infra* notes 161-67 and accompanying text.
14. *See infra* notes 168-77 and accompanying text.
15. *Schad*, 111 S. Ct. at 2495 (plurality opinion).
16. *Id.* (plurality opinion).
17. *Id.* (plurality opinion).
18. State v. Schad, 163 Ariz. 411, 413, 788 P.2d 1162, 1164 (1989), *aff'd sub. nom.* Schad v. Arizona, 111 S. Ct. 2491 (1991).
19. *Schad*, 111 S. Ct. at 2495 (plurality opinion).
20. *Id.* (plurality opinion).
21. State v. Schad, 163 Ariz. 411, 413, 788 P.2d 1162, 1164 (1989), *aff'd sub nom.* Schad v. Arizona, 111 S. Ct. 2491 (1991).
22. *Schad*, 111 S. Ct. at 2495 (plurality opinion).

victed of first-degree murder on premeditated murder and felony murder theories, and sentenced to death. The Arizona Supreme Court overturned his conviction because the trial court failed to instruct the jury on the definitions of the alleged underlying felonies.[23] On retrial Schad was again prosecuted under theories of premeditated murder and felony murder.[24] The jury convicted Schad of first-degree murder and, after a sentencing hearing, sentenced him to death.[25] The Arizona Supreme Court affirmed the conviction and rejected Schad's contention that the jury was required to agree specifically on a single theory of first-degree murder.[26]

The United States Supreme Court granted certiorari[27] and affirmed the conviction.[28] The plurality framed the issue as whether it was permissible under the Due Process Clause for Arizona to define both premeditated murder and felony murder as first-degree murder.[29] If it was, then the defendant received the unanimous verdict guaranteed him by Arizona law. Four Justices concluded that it was permissible,[30] one Justice concurred in this result but argued that the due process analysis was unnecessary,[31] and four Justices dissented.[32] Justice Souter wrote for the plurality.[33]

---

23. *Id.* (plurality opinion); *see* State v. Schad, 142 Ariz. 619, 621, 691 P.2d 710, 712 (1984). According to the Arizona Supreme Court, the prosecution described to the jury what robbery was, but the trial judge failed to give an explicit instruction as to its elements:

> [T]he jury was informed that it could convict Schad of the first-degree murder if it found the murder was committed during a felony, yet inexplicably, no underlying felony was defined. Fundamental error is present when a trial judge fails to instruct on matters vital to a proper consideration of the evidence. Knowledge of the elements of the underlying felonies was vital for the jurors to properly consider a felony murder theory. This was absent.

Id. at 620-21, 691 P.2d at 711-12 (citation omitted).

24. *Schad*, 111 S. Ct. at 2495 (plurality opinion).

25. *Id.* (plurality opinion).

26. *Id.* at 2495-96 (plurality opinion); State v. Schad, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989), *aff'd sub nom.* Schad v. Arizona, 111 S. Ct. 2491 (1991).

27. Schad v. Arizona, 111 S. Ct. 243 (1990).

28. *Schad*, 111 S. Ct. at 2505.

29. *Id.* at 2496 (plurality opinion).

30. *Id.* at 2494 (plurality opinion). The four Justices in the plurality were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter.

31. *Id.* at 2505-07 (Scalia, J., concurring in part and concurring in the judgment); *see infra* note 56 (discussing Justice Scalia's concurrence).

32. *Schad*, 111 S. Ct. at 2507-12 (White, J., dissenting). The four dissenting Justices were Justices White, Marshall, Blackmun, and Stevens.

33. The plurality also considered whether it was necessary, under Beck v. Alabama, 447 U.S. 625 (1980), to give an instruction on a lesser-included offense of felony murder when there was already an instruction on second-degree murder. *Schad*, 111 S. Ct. at 2504 (plurality opinion). By a five-to-four vote the Court concluded that it was not. *Id.* at 2494 (plurality opinion). Justice Souter wrote for the majority.

In *Beck*, the defendant was sentenced to death following his conviction for robbery-inten-

Justice Souter began the plurality's analysis by stating that jury unanimity was not really at issue.[34] In support of this proposition, he suggested an analogy. In criminal indictments, the State is not required to "specify which overt act, among several named, was the means by which a crime was committed."[35] This flexibility has been extended beyond the indictment stage to the verdict level itself, in which " 'there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.' "[36] The rule was developed to provide

---

tional killing. *Beck*, 447 U.S. at 627-30. Alabama law prohibited conviction for lesser-included offenses in capital cases; therefore, the trial judge was forbidden to instruct on felony murder as a lesser-included offense of robbery-intentional killing. *Id.* at 628. As a result, the jury was faced with an all-or-nothing choice: to convict the defendant of robbery-intentional killing, which carried with it the death sentence, or to acquit. *Id.* at 627-29. According to the *Beck* Court, the absence of a third option, which the lesser-included charge would have provided, deprived the defendant of his due process protections by enhancing the risk of an unwarranted conviction. *Id.* at 637. The Court held that in a capital case where the exclusion of a lesser-included offense instruction increases the level of uncertainty in the jury's decision, a statute barring such an instruction violates the Due Process Clause. *Id.* at 638.

The majority explained that the *Schad* facts were clearly distinguishable from *Beck* because *Beck* prohibited limiting the jury instruction to an all-or-nothing choice between first-degree murder and acquittal, while the *Schad* jury was instructed on a third option of second-degree murder. *Schad*, 111 S. Ct. at 2504-05 (plurality opinion). Thus, the petitioner could succeed in his argument only if *Beck*'s due process standard mandated an instruction on every lesser-included offense of a capital crime and if robbery was in fact a lesser-included offense in Arizona. *Id.* at 2504 (plurality opinion).

While it might appear self-evident that the charged underlying felony is a lesser-included offense of the felony murder charge, such is not the case in Arizona, where "there is no lesser-included offense to felony murder." State v. Schad, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989), *aff'd sub nom.* Schad v. Arizona, 111 S. Ct. 2491 (1991). Thus, the Arizona Supreme Court believed that the evidence against Schad supported a robbery conviction, *id.*, but held that the *Beck* requirement of instruction on a lesser-included offense of felony murder was not implicated because Arizona recognized no such lesser-included offenses. *Id.*

According to the *Schad* plurality, it would be highly irrational to assume that a jury, convinced Schad had committed some crime but not first-degree murder, would nonetheless convict him of first-degree murder rather than second-degree murder. *Schad*, 111 S. Ct. at 2505 (plurality opinion). Therefore, the Court was satisfied with the reliability of the jury's verdict. *Id.* (plurality opinion). Because the *Beck* analysis did not lead to the conclusion that a jury in a capital case necessarily had to be instructed on every lesser-included noncapital offense, the *Schad* plurality did not consider whether in this instance robbery was such a lesser-included offense. *Id.* (plurality opinion).

34. *Schad*, 111 S. Ct. at 2496 (plurality opinion). Schad argued that the Sixth Amendment right to an impartial jury and the Eighth Amendment prohibition against cruel and unusual punishment combined to require jury unanimity in state capital cases. *Id.* (plurality opinion). The Court declined to address directly this issue, however, because the jury was unanimous in its conclusion that the defendant was guilty. *Id.* (plurality opinion). *But see infra* notes 141-46 and accompanying text (suggesting that jury unanimity actually was in question).

35. *Schad*, 111 S. Ct. at 2496 (plurality opinion) (citing Andersen v. United States, 170 U.S. 481, 504 (1898)).

36. *Id.* at 2497 (plurality opinion) (quoting McKoy v. North Carolina, 110 S. Ct. 1227, 1236-37 (1990) (Blackmun, J., concurring) (footnotes omitted)).

flexibility with regard to the *actus reus* elements of a crime; in *Schad* the Court was confronted with the somewhat different problem of "alternative mental states."[37] Nevertheless, the plurality could "see no reason . . . why the rule that the jury need not agree as to mere means of satisfying the *actus reus* element of an offense should not apply equally to alternative means of satisfying the element of *mens rea*."[38] The real question, then, was whether due process prohibited Arizona from equating the commission of a felony with premeditation as a means of establishing the *mens rea* of first-degree murder.[39] If it did not, then the rule that there need not be jury agreement as to the means of establishing the essential elements of a crime would compel the conclusion that a jury could validly convict the defendant without specifically agreeing on whether first-degree murder was established by premeditation or by the commission of a felony. Before answering this question, however, the plurality argued that a detailed exercise in statutory construction was necessary to demonstrate that Arizona defined premeditation and the commission of a felony as means to a *mens rea* element of first-degree murder rather than as essential elements.[40]

According to the plurality, the Court does not have the authority to substitute its construction of a state statute for that of the state's courts.[41] Because the Arizona courts had found it permissible to return a general guilty verdict on a first-degree murder charge, they had "effectively" determined that premeditation and commission of a felony are means to satisfying a *mens rea* element, rather than independent elements of the crime.[42] The plurality's acceptance of the state court's conclusion is con-

37. *Id.* (plurality opinion).

38. *Id.* (plurality opinion). Justice Souter warned that this conclusion was not a recognition of the State's unlimited power to define criminal conduct through any combination of mental states or overt acts. *Id.* (plurality opinion). He also suggested an analogy to the Court's "vagueness" cases: just as the Due Process Clause prohibits overly broad or incomprehensibly vague definitions of crime—which are subject to wide ranging interpretations by individuals of common intelligence, *id.* (plurality opinion) (citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939))—it likewise prohibits irrational groupings of unrelated acts or mental states under the general rubric of "crime." *Id.* at 2497-98 (plurality opinion).

39. *Id.* at 2500 (plurality opinion).

40. *Id.* at 2499-500 (plurality opinion).

41. *Id.* at 2499 (plurality opinion).

42. *Id.* at 2499-500 (plurality opinion). This notion apparently derives from the fact that Arizona's courts have labelled the commission of a felony the "legal equivalent" of premeditation. *See id.* at 2497 (plurality opinion) (quoting State v. Serna, 69 Ariz. 181, 188, 211 P.2d 455, 459 (1949), *cert. denied*, 339 U.S. 973 (1950)). Nevertheless, it is not clear that legal equivalence eliminates the need to prove independently either premeditation or the underlying felony, and thereby makes both evidentiary burdens merely a way to satisfy the *mens rea* element of first-degree murder. For example, under Arizona's first-degree murder statute, arson and kidnapping are legally equivalent in that they can both supply the requisite *mens rea*

sistent with the general rule that decisions as to whether facts are material, and thus must be proved individually as essential elements, or immaterial, serving only as the means of satisfying an essential element, are decisions most appropriately made by the State, not the Supreme Court.[43] Nevertheless, a point exists beyond which the state cannot, consistent with the Due Process Clause, relieve itself of the burden of proving certain facts.[44] Finding that point, the plurality noted, requires that the state action be measured against the due process requirement of fundamental fairness, as evidenced both by historical and current practice, and by a sense of equivalent culpability.[45]

In the plurality's opinion, equating premeditation with the commission of a felony as mental states of comparable culpability "finds substantial historical and contemporary echoes."[46] The shift from the common-law definition of murder as a crime committed with malice aforethought to the modern statutory equivalent of premeditation has carried along with it the inclusion of the commission of a felony as one possible means of establishing the requisite mental state.[47] In fact, numerous states have, over a substantial period of time, held that there need be no jury agreement as to which of these means supplied the necessary mental state.[48] Arizona's equating of the two means was not outside the norm of current or historical practice, and was presumptively likely to meet the

for a first-degree murder conviction. ARIZ. REV. STAT. ANN. § 13-1105.A.2 (1989). But clearly the State could not establish arson-murder by proving to the jury that a kidnapping and a murder had been committed. *See also infra* notes 161-67 and accompanying text (arguing that premeditation and the commission of a felony are distinct, essential elements which cannot be established in the alternative).

43. *Schad*, 111 S. Ct. at 2499-500 (plurality opinion). The plurality contended that deference for such state decisions is evident in the Court's approach to burden-shifting cases. *Id.* at 2500-01 (plurality opinion) (citing Martin v. Ohio, 480 U.S. 228, 232 (1987); McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986); Patterson v. New York, 432 U.S. 197, 201-02 (1977)). The Court confronted a similar argument in both the burden-shifting cases and in *Schad*: each petitioner attempted to show that the State had the burden of proving some fact—a mitigating or aggravating circumstance in the burden-shifting cases, the means to the requisite *mens rea* in *Schad*—which was not properly an essential element of the charged crime. *Id.* (plurality opinion). In both situations the Court had to decide, "as an abstract matter, what elements an offense must comprise." *Id.* at 2501 (plurality opinion). It concluded that the problem commanded judicial restraint and respect for legislative decisionmaking, rather than the adoption of a bright-line test. *Id.* (plurality opinion).

44. *Id.* (plurality opinion) (citing *Patterson*, 432 U.S. at 210).

45. *Id.* at 2500 (plurality opinion).

46. *Id.* at 2501 (plurality opinion)

47. *Id.* at 2501-02 (plurality opinion) (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5, at 210-11 (1986); 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 21-22 (London, MacMillan 1883)).

48. *Id.* at 2502 (plurality opinion). As evidence of widespread support of this notion, Justice Souter cited cases from several jurisdictions. *See infra* note 77 and cases cited therein.

criterion of fundamental fairness.[49] Despite these strong indications of compliance with due process, however, Justice Souter admitted that Arizona's practice was still "open to critical examination."[50]

Although the plurality was unwilling to establish a bright-line test for determining whether alternative means of satisfying a *mens rea* element are materially different, it did concede that the alternative mental states had to "reasonably reflect notions of equivalent blameworthiness or culpability."[51] The specific question, then, was whether robbery-murder and premeditated murder could be considered equivalently culpable.[52] The plurality turned to *Tison v. Arizona*,[53] wherein the Court had found the death penalty permissible for felony murderers who played a major role in the underlying felony but who did not actually commit or intend the killing.[54] Relying on *Tison*, the plurality declared that "it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that . . . moral disparity bars treating [premeditation and the commission of a felony] as alternative means to satisfying the mental element of a single offense."[55] The plurality allowed that greater jury specificity probably is a sound idea, but held "only that the Constitution did not command such a practice on the facts of this case."[56]

---

49. *Schad*, 111 S. Ct. at 2502 (plurality opinion).

50. *Id.* at 2502-03 (plurality opinion).

51. *Id.* at 2503 (plurality opinion).

52. *Id.* (plurality opinion).

53. 481 U.S. 137 (1987); *see infra* notes 129-39 and accompanying text.

54. *Tison*, 481 U.S. at 158.

55. *Schad*, 111 S. Ct. at 2503-04 (plurality opinion).

56. *Id.* at 2504 (plurality opinion). Justice Scalia, who represented the fifth vote in favor of affirmance, disagreed with the plurality's rationale despite his belief that the plurality correctly identified the issue as whether "the Due Process Clause of the Fourteenth Amendment requires the subdivision of [first-degree murder] into (at least) premeditated murder and felony murder." *Id.* at 2506 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia concluded that the plurality reached the correct answer, but was off the mark in its analysis. *Id.* (Scalia, J., concurring in part and concurring in the judgment). In fact, he argued that

> [s]ubmitting killing in the course of a robbery and premeditated killing to the jury under a single charge is not some novel composite that can be subjected to the indignity of "fundamental fairness" review. It was the norm when this country was founded, was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today.

Id. at 2507 (Scalia, J., concurring in part and concurring in the judgment). Under Justice Scalia's conception of the problem, when judges subject historically well-grounded procedures to a fundamental fairness test, it is the judges themselves who are open to attack. *Id.* (Scalia, J., concurring in part and concurring in the judgment). The plurality's analysis failed, in Justice Scalia's opinion, because it provided no substantive basis for a fundamental fairness test, other than equivalent blameworthiness. *Id.* (Scalia, J., concurring in part and concurring in

Justice White, joined by three other Justices, wrote a dissenting opinion which expressed sharp disagreement with the plurality's framing of the issue, its analysis, and its conclusion.[57] In Justice White's opinion, the plurality mischaracterized the constitutional issue by focusing on whether premeditated murder and felony murder were permissibly alternative ways of establishing first-degree murder.[58] Instead, the plurality should have addressed the due process requirement, set out in *In re Winship*,[59] that every fact necessary to convict a criminal defendant must be

---

the judgment). In Justice Scalia's view, equivalent blameworthiness might be necessary but it could not be sufficient *Id.* (Scalia, J., concurring in part and concurring in judgment). Therefore, Justice Scalia argued, the plurality could do nothing more than fall back repeatedly on historical justification. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia based his analysis on the assumption that the plurality had asked the right question: whether the Due Process Clause prohibits Arizona from labeling both felony murder and premeditated murder as first-degree murder. *Id.* at 2506 (Scalia, J., concurring in part and concurring in the judgment). A more appropriate question, however, might well be whether the Due Process Clause prohibits Arizona from allowing the jury to return a general guilty verdict on first-degree murder when both premeditated murder and felony murder have been charged. *See infra* notes 141-46 and accompanying text.

Even under Justice Scalia's conception of the question, it is not clear that his analysis is correct. By way of illustration, Justice Scalia suggested that

> [w]hen a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.

Schad, 111 S. Ct. at 2506 (Scalia, J., concurring in part and concurring in the judgment). True as this observation might be, it adds very little to an understanding of the problem *Schad* raises because it focuses on the *actus reus* of the crime rather than the *mens rea*. A more profitable illustration might be the following: *X* is run down and killed by a car driven by *Y*. Six jurors believe *Y* purposefully and premeditatedly ran down *X* with the intention of killing her. Six jurors believe that *Y* committed a robbery and was in the course of flight from that robbery when he accidentally ran down *X*. (The six jurors who believe *Y* intentionally killed *X* do not believe he committed the robbery.) Despite the fact that premeditation and the commission of a robbery may be "legally equivalent," it is quite clear that a first-degree murder conviction based on the divided verdict suggested above should not stand. If *Y* did not commit the robbery (which, as a matter of law, he did not, because only six jurors were convinced that the elements of robbery were proven), then in order to convict, first-degree murder by premeditated intentional killing should have been proven to all twelve jurors—but it was not. If Y did not act with premeditated intent (which again, as a matter of law, he did not), then in order to convict, first-degree murder in the course of a felony should have been proven to all twelve jurors—but it was not. This differs from the illustration Justice Scalia offered because that illustration suggested alternative causes. In order to convict a defendant of first-degree murder it must be proven that the defendant *caused* the death, not that he caused it by strangulation or by fire. If six jurors in Justice Scalia's example believe the victim died by strangulation, and six believe she died in the fire but that the defendant did not set the fire, there could be no conviction. Only if all twelve jurors agree on cause is the verdict valid.

57. *Schad*, 111 S. Ct. at 2507-08 (White, J., dissenting).

58. *Id.* at 2508-09 (White, J., dissenting).

59. 397 U.S. 358 (1970).

proved beyond a reasonable doubt.[60] The true issue, Justice White argued, was whether it is permissible for a jury to convict a defendant of one crime on alternative theories "possessing no [essential] elements in common except the fact of a murder."[61] Conviction on these alternativee theories, the dissent concluded, would condone an impermissible mixing and matching of essential elements.[62] Under the holding of *Schad*, a defendant can be convicted of first-degree murder by a jury in which six jurors are convinced that the elements of felony murder have been proved, and six are convinced that the elements of premeditated murder have been proved.[63] "A defendant charged with first-degree murder is at least entitled to a verdict," Justice White admonished, which was "something petitioner did not get in this case as long as the possibility exists that no more than six jurors voted for any one element of first-degree murder, except the fact of a killing."[64]

Justice White dismissed the plurality's reliance on analogous case law.[65] Moreover, he maintained that the differing penalties for felony murder and premeditated murder mandated jury specificity.[66] Only in limited situations can the death penalty be imposed for felony murder; the death penalty was imposed in *Schad*, however, because the sentencing judge was convinced that the defendant was guilty of premeditated murder.[67] According to the dissent, "[i]t is clear, therefore, that the gen-

60. *Schad*, 111 S. Ct. at 2508 (White, J., dissenting) (citing *Winship*, 397 U.S. at 364).

61. *Id.* (White, J., dissenting). Justice White set out the essential elements of each type of murder: under Arizona law felony murder requires that the "defendant had the requisite intent to commit and did commit the underlying felony" but does "not require that the defendant commit the killing or even intend to kill, so long as the defendant [was] involved in the underlying felony." *Id.* at 2508-09 (White, J., dissenting). Premeditated murder, on the other hand, requires "an intent to kill as well as premeditation" and the actual commission of a killing. *Id.* (White, J., dissenting).

62. *Id.* at 2509 (White, J., dissenting).

63. *Id.* (White, J., dissenting).

64. *Id.* (White, J., dissenting).

65. *Id.* at 2509-10 (White, J., dissenting). According to Justice White, the vagueness cases provide an inappropriate analogy because the Arizona first-degree murder statute was in fact very specific, but the jury was allowed to return a general verdict and was not required to indicate on which of the alternate theories it convicted the defendant. *Id.* at 2509 (White, J., dissenting); *see infra* text accompanying notes 155-57. The dissent also dismissed the analogy to cases that held that the jury need not agree on the means of establishing the elements of a crime because, according to the dissent, the means were not at issue in *Schad*; the elements were. *Schad*, 111 S. Ct. at 2510 (White, J., dissenting); *see infra* note 154. Finally, Justice White argued that the plurality's burden-shifting analogy was misguided because Arizona had appropriately established the elements of first-degree murder by statute, but its courts were now inappropriately reading those elements out of the statute. *Schad*, 111 S. Ct. at 2510-11 (White, J., dissenting); *see infra* notes 158-60 and accompanying text.

66. *Schad*, 111 S. Ct. at 2511 (White, J., dissenting).

67. *Id.* (White, J., dissenting) (citing sentencing trial transcript).

eral jury verdict creates an intolerable risk that a sentencing judge may subsequently impose a death sentence based on findings that contradict those made by a jury,"[68] a risk which the Due Process Clause must be understood to prohibit.[69]

In support of its conclusion that the jury need not agree on the means of establishing the *mens rea* element of first-degree murder, the *Schad* plurality relied on a wide range of authority. Some authority was related directly either to the question of jury specificity[70] or to the question of the equivalent blameworthiness of premeditated murder and felony murder.[71] Much of it, however, was analogously related to the question of the constitutional limits on the states' power to define criminal conduct. Vagueness cases and burden-shifting cases, for example, focused on this question at one level or another. Understanding how these analogies and the jury specificity and equivalent blameworthiness issues affected the plurality's decision requires a careful examination of those cases that both the plurality and the dissent discussed. It also requires an examination of the Arizona laws the jury used to convict Schad.

Like most states, Arizona constitutionally guarantees a unanimous verdict in criminal trials.[72] Arizona also requires that the jury consist of twelve jurors when the potential sentence is death or imprisonment for

---

68. *Id.* (White, J., dissenting).

69. Justice White also took issue with the plurality's application of the *Beck* standard to *Schad*. *Id.* (White, J., dissenting). Justice White noted that the plurality considered Arizona's actions to be in compliance with *Beck* because the jury instruction was not limited to an all-or-nothing choice between first-degree murder and acquittal: second-degreee murder also was charged. *Id.* at 2512 (White, J., dissenting). But this instruction failed to provide a realistic third option, the dissent pointed out, because second-degree murder is not a lesser-included offense of felony murder, and is not a charge on which the jury could legitimately convict if it believed the defendant had only committed the robbery and not the murder. *Id.* (White, J., dissenting).

Furthermore, the dissent declared, a straightforward application of logic will reveal that felony murder necessarily must embody a lesser-included felony offense. *Id.* (White, J., dissenting). By the explicit terms of the Arizona statute the defendant could not commit robbery-murder without also having committed either robbery or attempted robbery. *Id.* (White, J., dissenting). Therefore, "as a matter of law," robbery or attempted robbery was a lesser-included offense of robbery-murder even though Arizona did not recognize it as such, *id.* (White, J., disssenting), and the Due Process Clause, as understood through *Beck*, required that it be charged, *id.* at 2513 (White, J., dissenting). The instruction on second-degree murder as a lesser-included offense of premeditated murder was simply insufficient, the dissent concluded, where the State itself had chosen to proceed on alternate theories, each of which necessarily contained lesser-included offenses. *Id.* (White, J., dissenting).

70. *See infra* notes 77-82 and accompanying text.

71. *See infra* notes 129-39 and accompanying text.

72. "In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict." ARIZ. CONST. art. II, § 23.

thirty years or more.[73] The Arizona first-degree murder statute under which Schad was convicted provides that

> [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.[74]

The Arizona courts frequently have read this statute, in its various forms, to mean that the commission or attempted commission of one of the enumerated felonies is the legal equivalent of the premeditation requirement.[75] Indeed, the Arizona Supreme Court relied on these prior

---

73. *Id.*

74. ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1973) (repealed 1978); *see also id.* § 13-451A ("Murder is the unlawful killing of a human being with malice aforethought.") (repealed 1978). The language of the current Arizona homicide law differs slightly from that under which Schad was convicted. At present, a person is guilty of first-degree murder if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation." *Id.* § 13-1105.A (1989). Felony murder continues to constitute first-degree murder. *Id.* Arizona has ceased, however, using the term "malice aforethought." *Id.* § 13-1101.

75. *See, e.g.*, State v. McLoughlin, 139 Ariz. 481, 485-85, 679 P.2d 504, 508-09 (1984) ("[T]he *mens rea* necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony."); State v. Encinas, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) ("[F]irst-degree murder is only one crime regardless [of] whether it occurs as a premeditated murder or a felony murder . . . [and therefore] the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." (citations omitted)); State v. Serna, 69 Ariz. 181, 188, 211 P.2d 455, 459 (1949) (The "felony . . . takes the place of and amounts to the legal equivalent of . . . deliberation, premeditation, and design."), *cert. denied*, 339 U.S. 973 (1950).

Interestingly, the Arizona courts not only have construed the commission of a felony as the legal equivalent of premeditation but also as the legal equivalent of malice aforethought (which is the element that turns the killing of a human being into murder). "The specific intent for the felony . . . supplies the necessary element of malice or premeditation." State v. Ferrari, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975) (en banc); *see also* State v. Collins, 111 Ariz. 303, 306, 528 P.2d 829, 832 (1974) (holding that a felony murder conviction only requires that the victim be killed during the felony, not that he be killed with malice aforethought). This has not always been the case: in Eytinge v. Territory, 12 Ariz. 131, 100 P. 443 (1909), the Arizona Supreme Court held that *killing* by poison was not necessarily first-degree murder, because before murder could be proven, malice aforethought also had to be independently proven. *See id.* at 140-41, 100 P. at 446. Presumably, the court's unwillingness to read malice out of the murder statute not only applied to murder by poison or premeditated murder, but also to felony murder. But now that *Eytinge* "has in effect been overruled," *Ferrari*, 112 Ariz. at 328, 541 P.2d at 925, malice aforethought is an unnecessary component of felony murder:

"[I]f a human being is *killed* by another person while such person is engaged in the

rulings when it affirmed Schad's conviction over the argument that due process mandates separate verdict forms for premeditated and felony murder: "The defendant's arguments on this issue have all been previously decided by this Court and rejected."[76]

According to the *Schad* plurality, these arguments also had been rejected by a number of other state courts,[77] with the leading case on this issue being *People v. Sullivan*.[78] In *Sullivan* the New York Court of Appeals considered the same issue raised in *Schad:* namely, whether a defendant prosecuted for first-degree murder on theories of premeditated murder and felony murder was entitled to a verdict specifically limited to one of the two theories.[79] It concluded that the defendant was not entitled to such a verdict.[80] Relying on the premise that an indictment need not specify which of several theories the prosecution will proceed upon, and on the notion that a defendant who uses multiple means to kill should not escape conviction because of the jury's inability to agree on which of the means actually caused the death, the court found the general verdict permissible.[81] "[I]t was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute."[82]

---

perpetration of, or attempt to perpetrate the crime of robbery, such person doing the *killing* under such circumstances is guilty of murder of the first degree, regardless of whether the *killing* is intentional or unintentional."

State v. Hitchcock, 87 Ariz. 277, 287, 350 P.2d 681, 687 (1960) (quoting jury instructions) (emphasis added), *cert. denied*, 365 U.S. 609 (1961). But if the killing can be intentional or unintentional, it makes no sense to presume that the felony supplies premeditation because it would be meaningless to describe a killing as premeditated and unintentional. Thus the legal equivalence of premeditation and the commission of a felony is dubious if the commission of a felony also supplies malice aforethought; if it does not also supply malice aforethought, unintentional killing in the course of a felony should not be murder in Arizona because it occurs without the requisite malice.

76. State v. Schad, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989), *aff'd sub nom.* Schad v. Arizona, 111 S. Ct. 2491 (1991).

77. *See* People v. Milan, 9 Cal. 3d 185, 194-95, 507 P.2d 956, 961-62, 107 Cal. Rptr. 68, 73-74 (1973); People v. Travis, 170 Ill. App. 3d 873, 890-92, 525 N.E.2d 1137, 1147-48 (1988), *cert. denied*, 489 U.S. 1024 (1989); State v. Fuhrmann, 257 N.W.2d 619, 623-24 (Iowa 1977); State v. Wilson, 220 Kan. 341, 344-45, 552 P.2d 931, 935-36 (1976); Commonwealth v. Devlin, 335 Mass. 555, 565-66, 141 N.E.2d 269, 274-75 (1957); People v. Embree, 70 Mich. App. 382, 383, 246 N.W.2d 6, 7 (1976); State v. Buckman, 237 Neb. 936, 940-42, 468 N.W.2d 589, 591-93 (1991); James v. State, 637 P.2d 862, 865-66 (Okla. 1981); State v. Tillman, 750 P.2d 546, 562-68 (Utah 1987).

78. 173 N.Y. 122, 65 N.E. 989 (1903).

79. *Id.* at 127, 65 N.E. at 989.

80. *Id.*

81. *Id.* at 128-29, 65 N.E. at 990.

82. *Id.* at 127, 65 N.E. at 990. The dissenting judge, of course, viewed the case quite differently:

More that eighty-five years after *Sullivan*, the Oregon Supreme Court reached the opposite conclusion in *State v. Boots*.[83] In Oregon "aggravated murder"—which carries with it a possible death sentence—is defined as a murder committed with any one of several enumerated aggravating factors.[84] Boots was charged with murder either in the course of a robbery or for the purpose of concealing the identity of robbers, both of which constitute aggravated murder.[85] The jury returned a general guilty verdict, but the Oregon Supreme Court overturned the conviction.[86] The court examined decisions from a number of other states but found them unpersuasive.[87] More importantly, the court rejected the general jury verdict on the principle that "the instruction relieves the jury from seriously confronting the question whether they agree that any factual requirement of aggravated murder has been proved beyond a reasonable doubt, so long as each juror is willing to pick one theory or another."[88] Such a disjointed jury would not comprise a unani-

---

> I am unable to appreciate the force of the reasoning in support of this proposition. If it be correct it must follow that the chances of a conviction are very much improved by the introduction of various theories in support of a single charge. If, for instance, it were possible for the prosecutor to try the case upon a dozen theories and a single juror could be induced to assent to each theory, the whole body could unite in a verdict of guilty although no one theory could command the assent of more than a single juror.

Id. at 145, 65 N.E. at 996 (O'Brien, J., dissenting).

83. 308 Or. 371, 780 P.2d 725 (1989) (en banc). While neither the *Schad* plurality nor the dissent referred directly to *Boots*, the plurality did point to State v. Murray, 308 Or. 496, 782 P.2d 157 (1989), as evidence of the fact that the *Sullivan* rationale had not been unanimously adopted. *Schad*, 111 S. Ct. at 2502 (plurality opinion). But in *Murray* the Oregon Supreme Court relied on *Boots* for its holding. *Murray*, 308 Or. at 497, 782 P.2d at 157.

Like Oregon, the State of Washington also has rejected the *Schad* rationale. In State v. Golladay, 78 Wash. 2d 121, 470 P.2d 191 (1970), the defendant was charged with first-degree murder committed either with premeditation or in the course of a felony. *Id.* at 122, 470 P.2d at 193. The Washington Supreme Court first declared that the two "means of committing the crime [were] but alternative constituents of the same statutory offense; they [did] not constitute separate and distinct offenses." *Id.* at 134, 470 P.2d at 200. Nevertheless, the court held that the jury instructions

> must clearly distinguish the alternative theories and require the necessity for a unanimous verdict on either of the alternatives. When such is the case, the prosecutor need not be forced to elect, for fear that half of the jury will find the defendant guilty on one theory and half on another theory.

Id. at 137, 470 P.2d at 201; *cf. infra* notes 141-46 and accompanying text (suggesting that it would be appropriate to find murder committed with premeditation or in the course of a felony viable alternatives for establishing first-degree murder, while nevertheless requiring jury unanimity to convict under *one* of the alternatives).

84. *Boots*, 308 Or. at 373-74, 780 P.2d at 726 (en banc).

85. *Id.* at 374, 780 P.2d at 727 (en banc).

86. *Id.* at 381, 780 P.2d at 731 (en banc).

87. *Id.* at 377-80, 780 P.2d at 729-30 (en banc).

88. *Id.* at 375, 780 P.2d at 728 (en banc).

mous jury, as required by the state constitution.[89]

Although prior to *Schad* the Supreme Court had not addressed the problem raised by *Boots* and *Sullivan*—whether the availability of alternative means of establishing a crime requires the jury to agree specifically on one of the alternatives—several of the federal courts of appeals had done so.[90] In *United States v. Gipson*[91] the defendant was convicted under a federal statute that prohibited the "receiving, concealing, storing, bartering, selling, or disposing" of a stolen vehicle in interstate commerce.[92] Finding that the prohibited actions fell into the two distinct "conceptual groupings" of keeping the vehicle versus marketing it,[93] the United States Court of Appeals for the Fifth Circuit held that a jury verdict which did not specify that the conviction was based on actions in one group or the other was unconstitutional.[94] In what became known as the "*Gipson* test," the court held that

> the two conceptual groupings are sufficiently different so that a jury finding of the actus reus element of the offense would not be 'unanimous' if some of the jurors thought the defendant committed only an act in the first conceptual grouping while others believed he committed an act only in the second.[95]

---

89. *Id.* at 377, 780 P.2d at 729 (en banc).

90. *See, e.g.*, United States v. North, 910 F.2d 843, 875 (D.C. Cir. 1990) (The "trial court erred in refusing to instruct that in order to return a unanimous verdict of guilty on a count involving multiple distinct underlying acts, jurors are required to be unanimous as to the specific act by which the defendant violated the law."); United States v. Beros, 833 F.2d 455, 462 (3d Cir. 1987) ("When the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury."); United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979) ("[Defendant's] request for a special verdict was properly denied, since the trial court instructed that the jurors must unanimously agree on at least one of the factual allegations charged.").

91. 553 F.2d 453 (5th Cir. 1977).

92. *Id.* at 458.

93. *Id.*

94. *Id.* at 459. The court admitted that at a superficial level the mere finding of guilt by each individual juror would constitute a "unanimous" verdict. *Id.* at 457. Nevertheless, the court believed that such a result would belie the important policy considerations underlying the unanimity requirement. *Id.* In particular, the general jury verdict would negate the essential jury function of " 'reaching a subjective state of certitude on the facts in issue.' " *Id.* (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

95. *Id.* at 458. Because the *Schad* plurality believed that "conceptual groupings" could be constructed at any of several levels of generality, it rejected this test as too indeterminate. *Schad*, 111 S. Ct. at 2499 (plurality opinion). *But cf.* Mark A. Gelowitz, *Jury Unanimity on Questions of Material Fact: When Six and Six Do Not Equal Twelve*, 12 QUEEN'S L.J. 66, 96 (1987) ("The *Gipson* approach . . . is at least a reasoned, principled response . . . and is to be preferred to a blind adherence to the intention of the legislature."); Note, *Right to Jury Unanimity on Material Fact Issues:* United States v. Gipson, 91 HARV. L. REV. 499, 505 (1977) ("[T]he *Gipson* rule is essential to insure that the prosecution has met its full burden of estab-

Gipson thus established a test for measuring whether the alternative means of committing a crime are so different that they must be treated as separate offenses. The alternatives must be examined to determine whether they are "conceptually distinct," which would require them to be treated as separate offenses, or if distinguishing between them would present "characterization problems" for the jury, which would allow them to be treated as the same offense.[96]

The Supreme Court has never addressed directly the *Gipson* issue. It has, however, addressed a number of "analogous" issues.[97] In *Andersen v. United States*,[98] for example, the defendant was accused of murder on the high seas.[99] Because Andersen was alleged to have shot the ship's mate and thrown his body overboard,[100] the indictment charged two causes of death: shooting and drowning.[101] The defendant objected to the indictment on the grounds that it was duplicitous and uncertain,[102] but the Court rejected the argument because "the indictment charged the transaction as continuous, and that two lethal means were employed co-operatively by the accused to accomplish his murderous intent, and whether the vital spark had fled before the riddled body struck the water, or lingered till extinguished by the waves, was immaterial."[103] Because it was undisputed that the defendant had caused the mate's death, the Court's holding essentially turned on a question of timing; the Court was unwilling to require the prosecution to specify the exact moment the vic-

---

lishing guilt beyond a reasonable doubt."); Sally Wellman, Note, *Jury Instructions and the Unanimous Jury Verdict*, 1978 WIS. L. REV. 339, 349 ("The *Gipson* rationale should be applied with respect to any statute which . . . defines different methods of committing the same generic crime.").

96. *Gipson*, 553 F.2d at 458.

97. The plurality suggested that analogies to criminal indictments, to state efforts at burden-shifting, and to statutes challenged on vagueness grounds would be helpful to an understanding of the issues raised in *Schad*. *But see infra* notes 154-60 and accompanying text (arguing that the analogies are inappropriate).

98. 170 U.S. 481 (1898).

99. *Id.* at 483-84.

100. *Id.*

101. *Id.* at 492-93.

102. *Id.* at 500. Apparently, in the *Schad* plurality's view, this claim of uncertainty was analogous to Schad's claim that Arizona was depriving him of a unanimous jury by charging alternative ways of committing first-degree murder but allowing a general verdict. *Schad*, 111 S. Ct. at 2496-97 (plurality opinion).

103. *Andersen*, 170 U.S. at 500. Implicit in this holding, however, must be the understanding that the defendant caused the death, because causing a death is an essential element of murder. Thus, *Andersen* permits a jury to find that the defendant *either* shot and killed the victim *or* drowned the victim, where he clearly attempted to do both, so long as the jury finds that the defendant in fact killed the victim. The either/or option does not extend to the question of whether the defendant caused the death.

tim died during a murderous assault.[104]

Lanzetta v. New Jersey[105] called into question another analogous issue of state criminal law: the level of specificity with which a state must define criminal conduct.[106] Under a New Jersey statute, any unemployed person who belonged to a "gang" of two or more persons and who had been convicted of being a disorderly person at least three times, or had been convicted of any crime, was declared a "gangster."[107] This "crime" carried with it a possible fine of $10,000, imprisonment for up to twenty years, or both.[108] The Court found the statute to be "repugnant to the due process clause of the Fourteenth Amendment"[109] because citizens would be left to guess at the meaning of its vague terms.[110] The statute was not saved by the fact that the New Jersey courts had specifically interpreted it, because the interpretation itself was framed to convict the particular defendants then under indictment.[111]

While *Lanzetta* provided the *Schad* plurality with an example of the

---

104. *Id.* at 500-01. The *Schad* plurality contended that this unwillingness to require indictment specificity also has manifested itself in the Court's considerations of verdict specificity, as in McKoy v. North Carolina, 110 S. Ct. 1227 (1990). *Schad*, 111 S. Ct. at 2497 (plurality opinion). Yet, *McKoy* concerned the question of whether juries must be unanimous in their findings of mitigating circumstances (they need not be) rather than whether they must be unanimous in their guilty verdicts. *McKoy*, 110 S. Ct. at 1229. In fact, to support its position, the plurality quoted from Justice Blackmun's concurrence in *McKoy*, but omitted a telling footnote. *Schad*, 111 S. Ct. at 2497 (plurality opinion). That footnote stated:

> [T]here is one significant exception to this principle [that juries need not agree on all the preliminary factual issues underlying a verdict]. . . . In federal criminal prosecutions, where a unanimous verdict is required, the Courts of Appeals are in general agreement that "[u]nanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense."

McKoy, 110 S. Ct. at 1237 n.5 (Blackmun, J., concurring) (quoting United States v. Ferris, 719 F.2d 1405, 1407 (9th Cir. 1983)).

105. 306 U.S. 451 (1939).

106. *Id.* at 452-53. The *Schad* plurality pointed to *Lanzetta* as an example of the way in which the Due Process Clause can constrain state efforts to define criminal conduct when those efforts conflict with notions " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Schad*, 111 S. Ct. at 2497 (plurality opinion) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)). Ostensibly, this constraint also would apply to Arizona's practice if it conflicted with such "fundamental" notions.

107. *Lanzetta*, 306 U. S. at 452. The *Lanzetta* Court focused its attention in particular on the statute's use of the word "gang" and the absence of any settled definition of that term. *Id.* at 453-57.

108. *Id.* at 452.

109. *Id.* at 458.

110. *Id.* at 453.

111. *Id.* at 457. "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it." *Id.* at 453.

constraints that due process imposes on state efforts to define criminal conduct, *Patterson v. New York*[112] provided an example of judicial restraint in the face of state burden-shifting.[113] Patterson was convicted of second-degree murder, defined in New York as causing the death of another person with intent to kill.[114] New York also allowed for an affirmative defense if the defendant acted under the influence of extreme emotional disturbance, in which case the crime would be reduced to manslaughter.[115] Because the burden of proving extreme emotional disturbance fell on the defendant,[116] Patterson argued that the statute violated due process.[117] The Supreme Court rejected this argument and declared the burden-shifting constitutionally valid because it neither placed the burden of disproving any essential element of the crime on the defendant, nor created any presumption of guilt that the defendant was forced to rebut.[118] By contrast, two years earlier in *Mullaney v. Wilbur*,[119] the Court struck down a Maine statute which stated that if the prosecution proved the defendant had committed an intentional and un-

112. 432 U.S. 197 (1977).

113. *Schad*, 111 S. Ct. at 2500 (plurality opinion).

114. *Patterson*, 432 U.S. at 205.

115. *Id.* at 206.

116. *Id.* at 198.

117. *Id.* at 201.

118. *Id.* It should be noted, however, that the *Patterson* decision was hardly unanimous. The Court split on the issue five-to-three (with one Justice not taking part in the decision), and Justice Powell wrote a lengthy dissenting opinion, in which he took issue with the majority for allowing New York to shift to the defendant the burden of proving the key factor distinguishing murder from manslaughter:

> The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. . . .
>
> . . . .
>
> [T]his type of constitutional adjudication is indefensibly formalistic. A limited but significant check on possible abuses in the criminal law now becomes an excercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship.

Id. at 223-24. (Powell, J., dissenting); *see also* Mark R. Adams, Note, *Affirmative Criminal Defenses—The Reasonable Doubt Rule in the Aftermath of* Patterson v. New York, 39 OHIO ST. L.J. 393, 400 (1978) ("The *Patterson* opinion leaves a void in which the exercise of state autonomy in the area of criminal procedure is virtually unrestrained by constitutional limitations."); Celia Goldwag, Note, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 COLUM. L. REV. 655, 656 (1978) (arguing that "the decision fails to provide a rational basis for assessing the constitutionality of affirmative defenses"); Lee Ann Johnson, Note, *Recent Cases—Evidence*—Patterson v. New York, 11 AKRON L. REV. 386, 398 (1977) (criticizing *Patterson* because it allows courts to avoid serious examination of defendants' substantive rights).

119. 421 U.S. 684 (1975).

lawful homicide, malice aforethought was conclusively implied unless disproved by the defendant.[120] The Court found that Maine's practice denigrated the defendant's due process protections because it further "increase[d] . . . the likelihood of an erroneous murder conviction."[121]

Mullaney and *Patterson* established *who* bore the burden of proof of certain facts in a criminal prosecution; the *Schad* dissent argued that *In re Winship*[122] established *which facts* had to be proven.[123] In *Winship* a juvenile was convicted in a New York family court of an act that, if committed by an adult, would have constituted larceny.[124] The conviction was based on proof by a preponderance of the evidence, as allowed by statute.[125] The Supreme Court declared the statute unconstitutional,[126] and explicitly held for the first time that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime* with which he is charged."[127]

The *Schad* dissent argued that *Winship* required Arizona to prove premeditation or the commission of a felony beyond a reasonable doubt; the plurality, on the other hand, declared that *Winship* was not on point

---

120. *Id.* at 703-04.

121. *Id.* at 701; *see* Stephen D. Brandt, Comment, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828, 835-36 (1975) (arguing that *Mullaney* correctly places on the prosecution the burden of proving all "issues that bear upon the degree and type of criminal culpability of the defendant," but admitting that the determination of which issues are relevant is problematic). *But cf.* Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 63 (1977) (contending that *Patterson* was correctly decided, while *Mullaney* was incorrectly decided).

122. 397 U.S. 358 (1970).

123. *Schad*, 111 S. Ct. at 2508 (White, J., dissenting).

124. *Winship*, 397 U.S. at 359. The juvenile was placed in a training school for an 18-month period, with the possibilty of extending the commitment for up to six years. *Id.* at 360. The nature and extent of the punishment were central to the Court's decision. *Id.* at 363-66.

125. *Id.* at 360.

126. *Id.* at 364. The Court grounded its holding upon both the impact of the criminal conviction on the accused and society's confidence in the criminal justice system:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . . Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

Id. at 363-64.

127. *Id.* at 364 (emphasis added). While *Winship* was concerned expressly with the constitutionally necessary *level* of proof, the *Schad* dissent apparently understood *Winship* to mean that each essential element ("every fact necessary to constitute the crime") must be proven individually beyond a reasonable doubt. *Schad*, 111 S. Ct. at 2509 (White, J. dissenting).

since premeditation and the commission of a felony were not essential elements of first-degree murder but instead were legally equivalent means to a *mens rea* element.[128] As such, the plurality was concerned with whether these legally equivalent means represented equivalently blameworthy mental states. To answer this question, the plurality looked to *Tison v. Arizona*.[129] In *Tison*, the Supreme Court examined the culpability associated with felony murder by considering whether the death penalty is constitutionally permissible for defendants who are convicted of felony murder but who did not commit the actual killing.[130] The Court had ruled earlier, in *Enmund v. Florida*,[131] that a convicted felony murderer who did not actually kill but who intended to kill could be sentenced to death.[132] The Court also had ruled that a felony murderer whose participation in the crime was relatively minor and whose culpable mental state was no greater than reckless indifference to human life could not be sentenced to death.[133] *Tison* presented an intermediate problem.[134] In *Tison*, the petitioners helped their father and another inmate escape from prison, and heavily armed the two; during the escape, the pair killed a family of four.[135] The petitioners themselves, however, did not take part in the killing and did not intend that the family be killed;[136] they played a major role in the underlying felony, but had mental states of only reckless indifference to human life.[137] On these facts, the Court found the death penalty to be constitutionally permissible.[138] In the Court's opinion, the difference between the intent to kill and reckless

128. *Schad*, 111 S. Ct. at 2499-500 (plurality opinion).

129. 481 U.S. 137 (1987).

130. *Id.*

131. 458 U.S. 782 (1982).

132. *Id.* at 798-801.

133. *Id.*; *see also* John H. Wickert, *Eighth Amendment—the Death Penalty and Vicarious Felony Murder: Nontriggerman May Not Be Executed Absent a Finding of Intent to Kill*, 73 J. CRIM. L. & CRIMINOLOGY 1553, 1568 (1982) (finding *Enmund* to be correct but suggesting that intent to kill, rather than actual commission of the killing, should be key factor determining death penalty imposition); Nancy A. McKerrow, Note, *Mens Rea as an Element Necessary for Capital Punishment*, 48 MO. L. REV. 1063, 1071 (1983) (arguing that *Enmund* is important because it stresses necessity of intent to kill for death penalty sentences).

134. *Tison*, 481 U.S. at 150.

135. *Id.* at 139.

136. *Id.* at 140.

137. *Id.* at 152.

138. *Id.* at 157-58. *But see* Andrew H. Friedman, Note, Tison v. Arizona: *The Death Penalty and the Non-Triggerman: The Scales of Justice Are Broken*, 75 CORNELL L. REV. 123, 124 (1989) (arguing that the Court failed to apply the Eighth Amendment properly and decided *Tison* incorrectly); Lynn D. Wittenbrink, Note, *Overstepping Precedent?* Tison v. Arizona *Imposes the Death Penalty on Felony Murder Accomplices*, 66 N.C. L. REV. 817, 837 (1988) (questioning whether the rationale of *Tison* is consistent with *Enmund* and arguing that *Tison* arbitrarily allows the death penalty to be imposed on nontriggermen).

indifference to human life was not always a significant or telling one, particularly where the underlying felony involved an inherently high risk of death.[139]

Against this backdrop of cases on equivalent culpability, on jury unanimity, and on many analogous issues of a state's power to define criminal conduct, the *Schad* plurality performed its due process analysis. Ultimately, the analysis led to the central question, never before asked by the Court, of "what constitutes an immaterial difference as to mere means [of committing a single crime] and what constitutes a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings."[140] It is not clear, however, that this is the question which the plurality requires be posed. Moreover, even if it was the correct question, the plurality's answer provides little self-justification and even less direction for the future.

Examining the *Schad* opinion requires at the outset an assessment of whether the plurality asked the right question. Early in its opinion, the plurality noted Schad's contention that Arizona's practice of not requiring the jury to agree on either premeditated murder or felony murder was unconstitutional. The plurality then recharacterized this claim:

> Petitioner's first contention is that his conviction under instructions that did not require the jury to agree on one of the alternative theories of premeditated and felony murder is unconstitutional. . . .
>
> In other words, petitioner's real challenge is to Arizona's characterization of first-degree murder as a single crime as to which a verdict need not be limited to any one statutory alternative, as against which he argues that premeditated murder and felony murder are separate crimes as to which the jury must return separate verdicts.[141]

In rephrasing the issue, the plurality allowed for a slight shift in terminology that is of central importance. As the plurality accurately pointed out, "the petitioner's real challenge is to Arizona's characterization of first-degree murder as a single crime *as to which a verdict need not be*

139. *Tison*, 481 U.S. at 157-58. The Court reasoned that there were occasions when the intent to kill would actually be less reprehensible than reckless indifference to human life. *Id.* at 157. For example, those who intend to kill, but who do so in self-defense, are not criminally liable. By contrast, a nonintentional killer who tortures his victim to death, or who shoots his victim during the course of a robbery, utterly indifferent to the grave risks of the robbery itself, "may be among the most dangerous and inhumane murderers of all." *Id.* Of course, this rationale hardly justifies the *Tison* result, because neither of the defendants in *Tison* actually killed the victims as the Court's hypothetical torturer and robber did. *See infra* note 176.

140. *Schad*, 111 S. Ct. at 2498 (plurality opinion).

141. *Id.* at 2496 (plurality opinion).

limited to any one statutory alternative."[142] But from this challenge it does not necessarily follow, as the plurality concluded, that the only alternative is to find that "premeditated murder and felony murder *are separate crimes* as to which the jury must return separate verdicts."[143] While much of the subsequent analysis in *Schad* focused on whether premeditated murder and felony murder were separate crimes, it is quite clear that Schad's challenge to Arizona's practice would succeed if the Court merely found that the *verdict* had to be limited to one statutory alternative.[144] Premeditated murder and felony murder could both be characterized as first-degree murder, but the jury would have to convict on one theory or the other. This would simply amount to an admission that the alternative ways of establishing first-degree murder involve different essential elements.[145] Because of the alternatives the plurality posited, the issue shifted from one of jury unanimity—that is, defining a unanimous jury—to one of the permissible limits of defining criminal conduct.[146] As such, a crucial problem was almost entirely ignored: Is a jury unanimous when different jurors are convinced of the existence of completely different, and perhaps even inconsistent, facts?

If the facts are inconsistent, the obvious answer seems to be "no," even in states that otherwise accept general verdicts based on alternative theories.[147] The more difficult problem arises when the jurors find the existence of different but not inconsistent facts. Many states approve of this type of general verdict on the theory that since the defendant is charged with only one crime, the prosecution need prove only that the statutorily defined crime *was* committed, not *how* it was committed:

> "It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evi-

142. *Id.* (plurality opinion) (emphasis added).

143. *Id.* (plurality opinion) (emphasis added).

144. Interestingly, the Court began by considering "what the jury must be unanimous about":

> Petitioner's jury was unanimous in deciding that the State had proved what, under state law, it had to prove: that petitioner murdered either with premeditation or in the course of committing a robbery. The question still remains whether it was constitutionally acceptable to permit the jurors to reach one verdict based on any combination of the alternative findings.

Id. (plurality opinion). As previously noted, however, this is not the question that the *Schad* plurality answered.

145. The dissent based its analysis upon this argument. *See supra* notes 61-62 and accompanying text.

146. *Schad*, 111 S. Ct. at 2496 (plurality opinion).

147. *See, e.g.*, Gavin v. State, 425 N.W.2d 673, 678 (Iowa Ct. App. 1988) ("[T]he jury need not be unanimous on a particular means of commission of the crime if . . . those alternative modes are not repugnant or inconsistent with each other.").

> dence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other."[148]

This approval frequently is grounded in the rationale employed by the *Schad* plurality; namely, that one way of committing a crime is effectively equivalent to another.[149] And, of course, the general verdict improves the likelihood of conviction and facilitates judicial efficiency.[150]

But increased likelihood of conviction and greater judicial economy are not the ends of the judicial system—justice is.[151] And justice must be grounded upon reliability, something that a general verdict, with its possibility of "patchwork" jury agreement, cannot guarantee:

> A patchwork jury will, of course, always agree on the legal conclusion that the statute has been violated, and, if the patchwork

---

148. People v. Chavez, 37 Cal. 2d 656, 671, 234 P.2d 632, 641 (1951) (quoting People v. Sullivan, 173 N.Y. 122, 127, 65 N.E. 989, 989 (1903)).

149. *Schad*, 111 S. Ct. at 2503 (plurality opinion); *see also* State v. Wilson, 220 Kan. 341, 345, 552 P.2d 931, 935-36 (1976) (holding that underlying felony provides the mental state necessary to establish first-degree murder).

150. *See* Holland v. State, 91 Wis. 2d 134, 144, 280 N.W.2d 288, 293 (1979) ("To require unanimity as to the manner of participation would be to frustrate the justice system, promote endless jury deliberations, encourage hung juries, and precipitate retrials in an effort to find agreement on a nonessential issue."), *cert. denied*, 445 U.S. 931 (1980); Hayden J. Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues*, 36 OKLA. L. REV. 473, 549-50 (1983).

151. In *Holland* the Wisconsin Supreme Court expressed concerns that requiring unanimity as to alternative theories regarding "the manner in which the defendant participated in the crime" could "permit the guilty defendant to escape accountability under the law because jurors could not unanimously choose beyond a reasonable doubt which of several alternative ways the defendant actually participated, even though all agree he was, in fact, a participant." *Holland*, 91 Wis. 2d at 143, 280 N.W.2d at 293. These concerns are grounded problematically on the assumption that the defendant is guilty even though the jury has not been convinced unanimously of any specific alternative theory of the crime. As the Oregon Supreme Court cautioned,

> [i]t seems questionable to characterize a person as "the guilty defendant" who will "escape accountability" when the issue for the jury is whether every element of the person's guilt has been proved. And "accountability under the law" is provided when a person is prosecuted; if a jury does not convict, one would not refer to a "guilty defendant" who "escape[s] accountability." Nor is the question whether a jury could "choose" between different ways in which a defendant participated in the crime. It is not a matter of "chooosing" but of factfinding. If more than one way is charged and proved to the jury's unanimous satisfaction, the jury need not "choose" and there is no difficulty. The problem arises precisely when none of the alternative ways has been proved to the satisfaction of all jurors, when one or more jurors is in doubt about each of the alternatives charged. We are not speaking here of factual details, such as whether a gun was a revolver or a pistol and whether it was held in the right or the left hand. We deal with facts that the law (or the indictment) has made essential to a crime.

State v. Boots, 308 Or. 371, 379, 780 P.2d 725, 730 (1989) (en banc).

> verdict is arguably proper, one will always find that the jury has also agreed on at least one concrete historical fact relating to the crime. Thus the *actus reus* and *corpus delicti* requirements will be formally satisfied. However, such minimal compliance does not satisfy the reasonable doubt standard. The jury is valued not only as a community buffer between the accused citizen and oppressive, overzealous law enforcers, but also as a guarantor that the stigma of conviction will not be attached except on clear proof of specific conduct.[152]

Moreover, the frequently reiterated assertion that a jury need only agree on the ultimate fact of guilt rather than on specific ways of establishing guilt is merely a circular form of answer to the question of what a jury must agree upon in order to find the defendant guilty. To find a defendant guilty, the reasoning seems to go, the jury must find him guilty. This cannot be the basis for permitting the general verdict.

Nor can moral equivalence be the basis. While it might be true on occasion that, for example, the premeditated murderer and the rapist have committed equally heinous crimes, it would be absurd to conclude that the rapist could therefore be convicted of murder. Something more must be shown: namely, that the rapist also committed murder. Once the murder has been proven, one could argue that the two crimes are the same because they have the same *actus reus* (the unlawful killing of a person) and the same *mens rea* (malice plus premeditation and malice plus the commission of rape). But this scenario establishes only that there are two ways of committing one *crime*, not that there are now two ways of reaching one *verdict*. In fact, just the opposite conclusion should be true. If a state is allowed to prosecute under the theory that premeditated intent to kill and the commission of certain enumerated felonies are always morally equivalent—clearly an overinclusive generalization—then in order to prove first-degree murder on a felony murder theory a state should be required to prove to the satisfaction of all twelve jurors that the underlying felony was actually committed. If twelve jurors have not been convinced that the felony was committed, or that premeditation was present, then the defendant has not committed an act that can be termed first-degree murder. The mere fact that all twelve jurors believe

152. Trubitt, *supra* note 150, at 530-31. Trubitt further suggested, however, that where a "single offense" is involved, the patchwork verdict is permissible. *Id.* at 534. But it is not clear that Arizona's definition of first-degree murder would comply with Trubitt's "single offense" criteria, because premeditated intent to kill and the commission of a felony are conceptually distinct; the defendant could presumably be subjected to double punishment because the felony is not a lesser-included offense of felony murder in Arizona. *See id.* at 535. Where a statute is ambiguous as to whether it actually defines a "single offense" or "separate offenses," the "separate offenses" prohibition against patchwork verdicts should apply. *Id.* at 536.

that first-degree murder has been committed is insufficient, because "[t]he jury is in no position to detemine whether the liability imposed for first degree murder attaches unless they first determine what the defendant did."[153]

Assuming for the sake of argument that the plurality's framing of the issue in *Schad* is accurate, it is questionable whether the ensuing opinion offers carefully reasoned justification or clear-sighted guidance for the future. As a rationale for the opinion, the plurality repeatedly turned to "analogous" problems of the permissible limits in defining criminal conduct embodied in the vagueness and burden-shifting cases.[154] The sufficiency of these analogies is at best problematic.

In Justice White's view, the vagueness cases are inappropriate analogies to the situation in *Schad* because the Arizona statute under which Schad was convicted was anything but vague: it established specific statutory alternatives for proving criminal conduct but allowed the jury to return a generalized verdict that failed to settle on any one of the alternatives.[155] On another level, however, Justice Souter's argument that the vagueness cases apply has merit. Just as, in the vagueness cases, the Constitution places limits on a state's power to define a crime in nebulous or incomprehensible terms, so too, in this jury unanimity case, the Constitution places limits on the state's power to define two different acts as the same crime. But the parallel limitation only makes sense if one considers it at this broad level of generality. For instance, *Lanzetta v. New Jersey*,[156] the leading case that the plurality cited on the issue of vagueness, gives serious consideration to the interrelationship between state legislative and state judicial action. According to *Lanzetta*, if a state criminal statute is unconstitutionally vague, it cannot be rehabilitated by the fact that the state court gives specific meaning to its terms when it is

153. Barbara L. Lauer, Comment, *Jury Agreement and the General Verdict in Criminal Cases*, 19 LAND & WATER L. REV. 207, 214 (1984).

154. The plurality similarly drew an analogy to the fact that criminal indictments need not specify which of the alleged acts the defendant actually committed. *Schad*, 111 S. Ct. at 2496 (plurality opinion); *see supra* notes 98-104 and accompanying text. This analogy also was used by the New York Court of Appeals to justify its decision in People v. Sullivan, 173 N.Y. 122, 128, 65 N.E. 989, 990 (1903), discussed *supra* notes 78-82 and accompanying text. But the criminal indictment differs substantially from the jury verdict. Flexibility at the indictment stage makes intuitive sense—until the State has presented its case and elicited all the relevant facts available, it cannot realistically be expected to settle on one interpretation of the evidence. Factfinding is the jury's role. But once the State has presented all of its evidence and argued to the jury that the evidence supports a criminal conviction (on one or possibly several theories), the jury must decide which facts have been proved. Therefore, the general verdict does not necessarily flow from, and perhaps even contradicts, the theory of indictment flexibility.

155. *Schad*, 111 S. Ct. at 2509 (White, J., dissenting).

156. 306 U.S. 451 (1939).

applied to a particular defendant; rather, the specific meaning must be "generally applicable."[157] One could argue that the plurality opinion in *Schad* condones precisely what *Lanzetta* prohibits. Under *Lanzetta*, if the state legislature drafts a statute criminalizing conduct in terms so vague that individuals of common intelligence would be unable to determine what conduct is prohibited, that statute is unconstitutional; under *Schad*, if the state legislature criminalizes specifically enumerated actions but the state's courts allow defendants to be convicted through generalized verdicts that fail to specify the particular act found to have been committed, the general verdict is permissible. *Schad* seems to validate vagueness so long as it emanates from the judiciary rather than the legislature. Thus, the plurality's vagueness analogy is highly questionable.

Likewise, the burden-shifting cases can be understood as analogous to *Schad* only if one considers them at the level of generality specified by the plurality.[158] Justice Souter said of these cases: "In each case, the defendant argued that the excluded fact was inherently 'a fact necessary to constitute the offense' that required proof beyond a reasonable doubt under *Winship*, even though the fact was not formally an element of the offense with which he was charged."[159] Similarly, according to the plurality, Schad was requesting that the prosecution be forced to prove a fact—either premeditation or the underlying felony—which was not properly an element of the crime. But in *Mullaney* the Supreme Court held that a state statute could not shift the burden of proving an essential element of a crime to the defendant.[160] Thus, at least one of the burden-

157. *Id.* at 457.

158. See *supra* notes 112-21 and accompanying text for a discussion of burden-shifting cases.

159. *Schad*, 111 S. Ct. at 2501 (plurality opinion). Justice Souter implied that the defendant was wrong in each of these cases, apparently to support the plurality's argument that Schad was wrong in this case. This is not true. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 697-99 (1975). In Martin v. Ohio, 480 U.S. 228 (1987), and McMillan v. Pennsylvania, 477 U.S. 79 (1986), the states' burden-shiftings were affirmed narrowly by five-to-four votes in the Supreme Court. And as previously noted, the *Patterson* holding has received far from unanimous praise. *See supra* note 118. While the plurality was correct that the state has broad discretion in burden-shifting, and therefore presumably also has broad discretion in defining criminal conduct, that discretion is not unlimited. Thus, even if a fact is not formally an element of an offense as defined by the state legislature, the definition may be unconstitutional. For instance, a state legislature could not define murder in such a way that the death of a person was not an element of the offense or that the burden was on the defendant to disprove that a death had occurred. Thus, the mere fact that the state has excluded a particular fact from the definition of a crime does not lead necessarily to the conclusion that the state has no burden of proving that fact.

160. *Mullaney*, 421 U.S. at 703-04; *cf.* Mark Tushnet, *Constitutional Limitations of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U. L. REV. 775, 776 (1975) (arguing that under *Mullaney* "the due process clause limits governmental power to define crime in whatever manner desired").

shifting cases could be read as stating that statutory definitions of a crime are not always dispositive. Instead, the court must search beneath the black-letter meaning to discover the essential elements of the criminal act, the elements that must be proved beyond a reasonable doubt. Again, the burden-shifting analogy fails to persuade.

Beyond the question of whether the cited precedent actually supports the plurality opinion lurks another significant problem: specifically, the notion that the commission of a felony and premeditation are merely *means* of satisfying the *mens rea* element of first-degree murder, rather than essential elements themselves. The plurality asserted that "under Arizona law neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a *mens rea* element of high culpability."[161] But while the plurality repeatedly suggested ways in which the *mens rea* element may be satisfied, it neglected to discuss the *mens rea* requirement itself. Under the plurality's reading, the Arizona first-degree murder statute paradoxically contains no *mens rea* element, only the means to satisfy it.[162]

Mens rea is the mental element of a crime.[163] It is possible, there-

---

161. *Schad*, 111 S. Ct. at 2501 (plurality opinion).

162. The distinction between the means to the *mens rea* and the *mens rea* itself is not merely a semantic one, for the plurality based its analysis on the presumption that the jury must agree on the essential elements of a crime but not on the means of establishing those elements. *Id.* at 2496-97 (plurality opinion). The dissent, on the other hand, argued that the plurality

> misse[d] the mark in attempting to compare this case to those in which the issue concerned proof of facts regarding the particular means by which a crime was committed. In the case of burglary, for example, the manner of entering is not an element of the crime; thus, *Winship* 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. It would, however, 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."

Id. at 2510 (White, J., dissenting) (quoting *In re* Winship, 397 U.S. 358, 364 (1970)). One commentator considerd it a "startlingly clear proposition" that a jury must agree on one alternative in order to be unanimous. Lauer, *supra* note 153, at 207. Lauer also suggested that using terms such as "means" provides courts with a way to rationalize nonunanimous verdicts:

> Some statutes provide that a single offense may be committed in more than one way. In such cases, the courts tend to decide that jury agreement is not necessary. The courts which have adopted this view have variously described the alternatives such statutes present as "ways," "methods," "means," "elements," "modes," "theories of the participation," o[r] "views of the transaction." The terminology is unimportant. The judgment the terminology expresses is important, for it removes these alternatives from the realm of necessary jury agreement.

Id. at 212 (footnotes omitted).

163. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 27, at 192 (1972).

fore, to conceive of the commission of a felony as a *means* of satisfying the *mens rea* element, because the underlying felony can only be proved if its requisite *mens rea* is proved. It is not the least bit clear, however, that premeditation provides a *means* to that end.

" 'Premeditation' is the process simply of *thinking* about a proposed killing before engaging in the homicidal conduct."[164] It is the mental component, or *mens rea*, of the crime. Hence, premeditation must be proven as an essential element, not as a means to satisfying an essential element, in order to prove first-degree murder.[165] The plurality repeatedly stated that neither premeditation nor the underlying felony was an independent element of the charged crime; but the plurality surely must accept the notion that in order to convict for premeditated murder, premeditation must be proved beyond a reasonable doubt, and in order to convict for felony murder, the underlying felony—made up of its constituent *mens rea* and *actus reus* elements—must be proved beyond a reasonable doubt.[166] If premeditation and the underlying felony are not essential elements, it is hard to conceive what role they could possibly play in the statutory scheme.[167]

---

164. CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 140, at 181 (14th ed. 1979) (emphasis added); *see also* ROLLIN M. PERKINS, CRIMINAL LAW ch. 2, § 2, at 92 (2d ed. 1969) (" 'Premeditation means "*thought* of beforehand" for some length of time.' ") (quoting State v. Chavis, 231 N.C. 307, 311, 56 S.E.2d 678, 681 (1949)) (emphasis added).

165. Similarly, the felonies listed in Arizona's first-degree murder statute are elements of the crime of first-degree murder, not means of satisfying the *mens rea* element. It would obviously be preposterous to assume that the state could prove first-degree murder by proving to three jurors that the defendant committed rape and murder, to three others that he committed robbery and murder, to three others that he committed arson and murder, and to the final three that he committed kidnapping and murder. But this is precisely the conclusion compelled by the plurality's analysis. If each of the felonies merely provides the means to satisfy the *mens rea* element, then the patchwork verdict just suggested is valid.

166. *See, e.g.*, State v. Boots, 308 Or. 371, 780 P.2d 725 (1989) (en banc). In *Boots* the Oregon Supreme Court observed that

> [t]here is no basis for distinguishing between jury agreement on the act required for criminal liability and on the mental element that makes the act culpable. The act and the culpable mental state are equally essential for any crime that requires a culpable mental state. Of course jurors cannot convict a defendant if they unanimously agree that he intended to kill a person but only half believe he did so. No more can they convict if they unanimously agree that a defendant's act caused a person's death but only half believe that he acted intentionally. The same is true if jurors agree that a defendant's act caused a person's death but do not agree that the defendant committed a felony, or vice versa.

Id. at 376-77, 780 P.2d at 728 (en banc) (citations omitted).

167. The possibility that premeditation and the commission of a felony might simply establish equivalently culpable mental states does not solve the problem. It could be argued that if the two mental states are equivalently culpable, and if the purpose of a *mens rea* requirement for a crime is merely to establish a culpability level necessary to constitute the crime, then it would seem permissible to convict a defendant of first-degree murder so long as all twelve

Even if premeditation and the commission of a felony are simply ways of satisfying the *mens rea* element of murder, the plurality's "fundamental fairness"[168] analysis provides little direction in determining

---

jurors agree that his mental state was sufficiently culpable, regardless of why they believe this. But why they believe the defendant to be culpable is of the utmost significance. The finding of premeditation in no way negates the possibility that the underlying felony also was committed. Thus, the verdict would stand if all twelve jurors could agree that the defendant acted with premeditation, and six of them additionally believe that he committed the underlying felony. The dilemma arises when some of the jurors believe the defendant acted with premeditation but did not commit the underlying felony, and the rest believe that he committed the underlying felony but did not otherwise act with premeditation. Suppose, for example, that eleven jurors believe the defendant acted with premeditation but only one believes he committed the felony. To allow this divided jury to return a "unanimous" first-degree murder conviction would be to permit an untenable paradox. The defendant would be guilty of first-degree murder *because* of the felony murder rule (otherwise there would be a hung jury), and yet he would not be guilty of the felony itself (the jury could not reach unanimous agreement on it). What this means is that the legal conclusion of one juror—unsustained by jury consensus or support—that the defendant committed a felony, would establish the defendant's guilt.

168. *Schad*, 111 S. Ct. at 2500 (plurality opinion). The plurality derived its understanding of fundamental fairness and the way in which the requirement of fundamental fairness both colors the Court's "concrete judgments about the adequacy of legislative determinations," *id.* (plurality opinion), and compels its judicial restraint, from Dowling v. United States, 493 U.S. 342, 352-53 (1990). *Schad*, 111 S. Ct. at 2500 (plurality opinion). In *Dowling*, the Court upheld the admission of testimony in a bank robbery trial about the defendant's presence in the house of a burglary victim, despite the fact that the defendant had been acquitted of burglarizing the house in a previous trial. The prior acquittal had exonerated the defendant of burglary, the Court reasoned, but not of being present in the house, and therefore the admission of this testimony was not a violation of the fundamental fairness guaranteed by the Due Process Clause. *Id.* (plurality opinion). The *Dowling* Court derived its notion of fundamental fairness from United States v. Lovasco, 431 U.S. 783 (1977), in which the Supreme Court held that a 17-month delay between the initial investigation of a crime and the indictment of the defendant did not violate the due process guarantee of fundamental fairness, even though the defendant contended that material defense testimony had been lost during the delay. *Id.* at 796. The *Lovasco* Court interpreted fundamental fairness to mean that the Court could not substitute its notions of fairness for those of the state's law enforcement officials. This definition of fairness came from Rochin v. California, 342 U.S. 165 (1952). In *Rochin*, the Court overturned the defendant's conviction for narcotics possession because the narcotics were secured from the defendant by forcibly pumping his stomach. *Id.* at 166. While *Rochin* ackowledged the importance of judicial restraint, it did not command absolute deference in the face of legislative decisionmaking.

> To practice the requisite detachment [required of judges] and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power. . . . The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

whether those ways are materially different from each other and therefore constitutionally prohibited from being equated. Apparently, the plurality contemplated the fundamental fairness analysis as based upon a two-pronged inquiry:

> [W]e look both to history and wide practice as guides to fundamental values, as well as to narrower analytical methods of testing the moral and practical equivalence of the different mental states that may satisfy the *mens rea* element of a single offense. The enquiry is undertaken with a threshold presumption of legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime.[169]

In other words, the first prong requires a court to ask whether history and current state practice treat the two means under consideration in the same manner that Arizona does. Under the second prong a court must determine whether the two means are morally and practically equivalent. If Arizona's practice passes both of these tests it will survive constitutional scrutiny because it will "not fall beyond the constitutional bounds of fundamental fairness and rationality."[170]

Under the first prong, the plurality found that defining first-degree murder as a crime that can be committed with premeditation or in the course of committing a felony was a practice that had received "historical and contemporary acceptance."[171] Thus, while the plurality claimed

---

Id. at 171-72 (citations omitted). The *Schad* plurality's reliance on historical precedent and deference for legislative decisionmaking, *see infra* notes 169-72, 174-77 and accompanying texts, seems a far cry from *Rochin*'s mandate that judges be "duly mindful of . . . change[s] in a progressive society." *Rochin*, 342 U.S. at 172.

169. *Schad*, 111 S. Ct. at 2500 (plurality opinion).

170. *Id.* at 2504 (plurality opinion).

171. *Id.* at 2502 (plurality opinion). "[T]here is sufficiently widespread acceptance [of the practice] . . . to persuade us that Arizona has not departed from the norm." *Id.* (plurality opinion). Despite this broad acceptance by the states, the felony murder doctrine has been widely criticized by commentators as

> essential[ly] illogic[al]. . . . Punishment for homicide obtains only when the deed is done with a state of mind that makes it reprehensible as well as unfortunate. Murder is invariably punished as a heinous offense and is the principal crime for which the death penalty is authorized. Sanctions of such gravity demand justification, and their imposition must be premised on the confluence of conduct and culpability. Thus, . . . murder occurs if a person kills purposely, knowingly, or with extreme recklessness. Lesser culpability yields lesser liability, and a person who inadvertently kills another under circumstances not amounting to negligence is guilty of no crime at all. The felony-murder rule contradicts this scheme. It bases conviction of murder not on any proven culpability with respect to homicide but on liability for another crime.

MODEL PENAL CODE § 210.2 cmt., at 36 (1980); *cf.* LAFAVE & SCOTT, *supra* note 163, § 71, at 560 ("[I]t is arguable that there should be no such separate category [as felony murder]."); PERKINS, *supra* note 164, ch. 2, § 1, at 44 ("At the present time . . . the reason for the rule has ceased to exist.").

that neither historical nor current acceptance was "dispositive,"[172] the first prong would seem to be satisfied whenever a practice is or has been in common use.

For example, after returning again to the burden-shifting analogy, the plurality noted that where a state has placed the burden of proof of a particular issue on the defendant, and burden-shifting "has a long history, or is in widespread use" in that state, the defendant will be hard pressed to overcome the presumption of fundamental fairness.[173] Conversely, if burden-shifting is highly unusual in terms of history or current practice, the defendant's task will be significantly lighter. In either case, however, the plurality provided no indication of how the defendant might demonstrate a lack of fundamental fairness other than through the history/current-practice analysis.

The second prong of the analysis—whether the means are morally and practically equivalent—is equally unenlightening.[174] "The question . . . [was] whether felony murder may ever be treated as the equivalent of murder by deliberation, and in particular whether robbery murder as

172. *Schad*, 111 S. Ct. at 2502 (plurality opinion).

173. *Id.* at 2501 (plurality opinion).

174. The analysis of whether the Due Process Clause, as understood through *Beck v. Alabama*, requires an instruction on every lesser-included offense of a capital offense is similarly perfunctory. In the plurality's view, the *Beck* standard is a mechanical one:

> Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all. . . . We repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented. . . . This central concern of *Beck* simply is not implicated in the present case.

Id. at 2504-05 (plurality opinion). According to the plurality, the *Beck* concern was not implicated in this case because the jury was instructed on a third option—second-degree murder—thereby eliminating the all-or-nothing approach. *Id.* at 2505 (plurality opinion). But *Beck* is not quite so simple as the plurality suggested because in *Beck* there also was a third option: the jury was instructed that if it could not agree on a verdict, a mistrial would be declared. Beck v. Alabama, 447 U.S. 625, 643-44 (1980). The *Beck* Court rejected this as a viable third option: "We are not persuaded by the State's argument that the mistrial 'option' is an adequate substitute for proper instructions on lesser-included offenses." *Id.* at 644. In other words, *Beck* not only requires that there be a third option when a lesser-included offense is implicated, but also that the third option be a rational one. The plurality in *Schad* simply swept this concern away by stating that it would be irrational to assume that a jury which was convinced the defendant had only committed robbery would nevertheless convict of first-degree murder rather than second-degree murder. *Schad*, 111 S. Ct. at 2505 (plurality opinion).

But there are at least two problems with this response. First, merely because the jury in this hypothetical convicted the defendant of first- rather than second-degree murder (apparently rejecting the notion that the defendant had only committed robbery) does not mean that the instruction was constitutionally proper. Indeed, the jury's vote means that the instructions are questionable only if the jury brought in a *second-degree* murder verdict, because only in that situation would it be apparent that the jury might have chosen the robbery option, had it been included. One can easily foresee, however, the Court declaring that it would be irrational

charged in this case may be treated as thus equivalent."[175] The plurality answered "yes," because in *Tison v. Arizona* the Court had already found that there are times when a felony murderer who did not specifically intend to kill can be sentenced to death.[176] Like the history/current-practice inquiry, this analyis is historically based: if the Court can find other cases in which the two acts in question were considered equally reprehensible, then they must be morally equivalent.[177] The plurality's

---

for the jury to convict on second-degree murder when the jurors believed the defendant was guilty only of robbery, because the two crimes have no elements in common.

Second, the plurality took for granted that a jury instructed on the elements of premeditated murder, robbery-murder, second-degree murder, and on the possibility of acquittal, yet believing that the defendant had only committed robbery, would either convict on second-degree murder or acquit. But because robbery-murder is the only crime bearing any resemblance to robbery, it is not absolutely clear that a jury would do this. The plurality should have looked more closely at the "logic" that might play a role in the jury's decisionmaking process.

Moreover, the fact that the plurality upheld Arizona's practice of requiring only a general guilty verdict when both premeditated and felony murder are charged compounds the problem of not requiring instructions on a lesser-included offense. *Beck* appears to require that if Arizona prosecutes a defendant only on a felony murder theory, Arizona courts must instruct on a lesser-included offense. Arizona law, however, specifically forbids this instruction by holding that there are no lesser-included offenses of felony murder. Because *Schad* declared that the jury need not agree on either premeditated murder or felony murder, the State will always prosecute on both theories and charge second-degree murder as the "third option" required by *Beck*. Furthermore, the charge of premeditated murder will always seem legitimate because the *Schad* plurality declared premeditation and the commission of a felony to be morally equivalent means to an end, rather than distinct elements of the crime of first-degree murder.

175. *Schad*, 111 S. Ct. at 2503 (plurality opinion).

176. Tison v. Arizona, 481 U.S. 137, 158 (1987). The plurality in *Schad* pointed out that in *Tison* the Court had declared that " 'the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents . . . a highly culpable mental state.' " *Schad*, 111 S. Ct. at 2503 (plurality opinion) (quoting *Tison*, 481 U.S. at 157). Moreover, the plurality "accepted the proposition that this disregard occurs, for example, when a robber 'shoots someone in the course of a robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property.' " *Id.* (plurality opinion) (quoting *Tison*, 481 U.S. at 157). Unfortunately, this analysis assumes that a reckless disregard for human life is implicit in certain criminal activities rather than assuming that the disregard must be proven in order to establish a highly culpable mental state, and also implies that any individual convicted of felony murder actually caused the victim's death himself. This implication is unjustified because a felony-murder defendant can be convicted for a killing that actually was caused by a cofelon. In fact, Schad's defense at trial was that he robbed the victim but did not kill him. *Id.* at 2505 (plurality opinion). If this were true and a cofelon actually had killed the victim (something Schad did not claim), Schad could still be convicted under Arizona's first-degree murder statute. It is not clear, however, that he would be as culpable as a "robber [who] 'shoots someone in the course of a robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property.' " *Id.* (plurality opinion) (quoting *Tison*, 481 U.S. at 157).

177. But as Justice Scalia pointed out in his concurrence,

> the petitioner here does not complain about lack of moral equivalence: he complains that, as far as we know, only six jurors *believed* he was participating in a robbery, and

fundamental fairness test might occasionally invalidate a new state criminal procedure, but it is hard to imagine how the plurality could ever really test the intrinsic fairness of a well-entrenched historical practice.

At first glance, the *Schad* decision appears not to work a great change in the law of criminal procedure. After all, the practice of permitting general verdicts in combined felony murder/premeditated murder prosecutions is widespread. But the *Schad* plurality squandered an opportunity to set forth the meaning of jury unanimity in a cogent manner, and by so doing, effectively declared that verdict specificity is never essential. Unfortunately, the plurality went even further by grounding the due process guarantee of fundamental fairness so deeply in historical practice that "fairness" cannot be understood realistically to have either an intrinsic or an evolving meaning. Without admitting it, the plurality essentially adopted Justice Scalia's view that "[i]t is precisely the historical practices that *define* what is 'due.' "[178] In light of *Schad*, the future of due process, like that of verdict specificity, looks remarkably like the past.

JAMES J. MCGUIRE

---

only six *believed* he intended to kill. Perhaps moral equivalence is a *necessary* condition for allowing such a verdict to stand, but surely the plurality does not pretend that it is *sufficient*. (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.) Thus, the plurality approves the Arizona practice in the present case because it meets *one* of the conditions for constitutional validity. It does not say what the *other* conditions are, or why the Arizona practice meets them.

Schad, 111 S. Ct. at 2507 (Scalia, J., concurring in part and concurring in the judgment).

178. *Id.* (Scalia, J., concurring in part and concurring in the judgment).