Catholic University Law Review

Volume 42
Issue 2 *Winter 1993*

Article 7

1993

Schad v. Arizona: Jury Unanimity on Trial

Elizabeth R. Carty

NOTES

SCHAD v. ARIZONA: JURY UNANIMITY ON TRIAL

The Fourteenth Amendment's Due Process Clause[1] guarantees every defendant the right to a fair trial.[2] Accordingly, government prosecutions must follow criminal procedures that allow a defendant to defend himself adequately against the pending charges.[3] The due process protections required to ensure a fair trial, however, vary in relation to the nature of the charges that a defendant faces.[4] For example, in the context of state criminal trials for death penalty offenses,[5] the Supreme Court of the United States

1. The Due Process Clause reads, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

2. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI. However, the Fourteenth Amendment's Due Process Clause does not incorporate each specific guarantee of the Sixth Amendment. Betts v. Brady, 316 U.S. 455, 461-62 (1942), *overruled on other grounds by* Gideon v. Wainwright, 372 U.S. 335 (1963). Since "trial by jury in criminal cases is fundamental to the American scheme of justice," the Due Process Clause applies this particular Sixth Amendment right to the states. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). However, "due process" does not guarantee a defendant the right to a unanimous jury verdict for all state criminal cases. *See infra* note 6.

The Supreme Court of the United States, in applying the Due Process Clause to the states, has held that the majority of the rights guaranteed by the Bill of Rights are also properly incorporated into the Fourteenth Amendment's concept of due process. *See Gideon*, 372 U.S. at 342 (applying to the states the Fifth Amendment right to counsel); Ker v. California, 374 U.S. 23, 34 (1963) (adjudicating state "searches" by the Fourth Amendment standard for "searches"); Robinson v. California, 370 U.S. 660, 667 (1962) (applying the Cruel and Unusual Punishments Clause of the Eighth Amendment to the states); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying to the states the Fourth Amendment right to exclude all evidence from trial that authorities obtained in "unreasonable . . . searches and seizures").

3. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6 (2d ed. 1992) (discussing the fact that although the criminal penal system requires fair procedures, it must also apply these procedures to gain public approval).

4. *See infra* notes 8, 13. *See generally* United States v. Maybury, 274 F.2d 899, 903 (2d Cir. 1960) (explaining that due process ignores inconsistencies of a jury verdict in a criminal setting, but not in a civil case).

5. In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the Supreme Court restructured capital sentencing, holding that the death penalty imposed by unchecked discretion in the sentencing phase constitutes a "cruel and unusual punishment" under the Eighth and Fourteenth Amendments. *Id.* at 240.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *See*

requires that the jury reach a unanimous verdict.[6] In a death penalty case, therefore, all jury members must agree that the defendant committed the major aspects of the crime as defined by the state statute, provided that the statute falls within the parameters of the Constitution.[7]

The Court imposes stricter procedures in death penalty cases because the seriousness of the offense threatens a defendant's very existence.[8] There is no remedy for error in sentencing a defendant to death.[9] In order to reduce the possibility of irreversible error, the jury as a whole, must confront and overcome the doubts of each individual juror before announcing a guilty

---

Michael J. Crowley, Comment, *Jury Coercion in Capital Cases: How Much Risk Are We Willing to Take?*, 57 U. CIN. L. REV. 1073, 1075-76 (1989) (discussing death penalty statutes in the wake of *Furman*). As a result of *Furman*, thirty-seven states either enacted or revised their death penalty statutes. *Id.*

6. Schad v. Arizona, 111 S. Ct. 2491, 2496 (1991). However, the Supreme Court has held that it does not require unanimity in state non-capital criminal trials. Apodaca v. Oregon, 406 U.S. 404, 411 (1972) (rejecting the argument that the Sixth Amendment mandates that the jury must attain unanimity in non-capital cases); Johnson v. Louisiana, 406 U.S. 356, 363 (1972) (upholding the Louisiana law that allows a jury to convict a defendant based upon a non-unanimous verdict in non-capital cases). The *Apodaca* and *Johnson* decisions abridged "an accepted feature of the common-law jury"—unanimity. *Apodaca*, 406 U.S. at 407-08. *See* Andres v. United States, 333 U.S. 740, 748 (1948) (holding that Sixth Amendment cases require a unanimous jury verdict); American Publishing Co. v. Fisher, 166 U.S. 464, 468 (1897) (holding that the court erred in accepting a non-unanimous verdict in a civil case). Furthermore, some states allow a defendant to waive his right to a unanimous jury. *See* Elizabeth F. Loftus & Edith Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 COLUM. L. REV. 1425, 1427-28 & n.8 (1984) (reviewing REID HASTIE ET AL., INSIDE THE JURY (1983) (discussing various modifications to the unanimity rule on both the state and federal levels)). In contrast, the Court requires unanimity for all federal criminal cases, a right that a defendant cannot waive. *Id.* at 1427, n.6; FED. R. CRIM. P. 31(a).

7. *See Andres*, 333 U.S. at 748 (requiring jury unanimity on all issues—the degree of the crime, the defendant's guilt, as well as the punishment); *see also supra* note 6. However, even if the prosecutor succcessfully proves each element of the crime, the conviction is void if the state statute deprives the defendant of his constitutional rights as incorporated by the Due Process Clause. *See, e.g.*, LAFAVE & ISRAEL, *supra* note 3, § 2.5.

8. *See* Crowley, *supra* note 5, at 1073; *see also* Spaziano v. Florida, 468 U.S. 447, 467-70 & n.3 (1984) (Stevens, J., concurring in part, dissenting in part). In *Spaziano*, Justice Stevens emphasized the gravity of death penalty cases as follows:

> In the 12 years since *Furman* v. *Georgia*, every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Id. at 468 (citation and footnote omitted). *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978) (noting that individual treatment is essential in death penalty cases because of the unavailablity of parole, probation, or work furloughs once a defendant is executed). *See also infra* note 215.

9. *See Spaziano*, 468 U.S. at 468.

verdict.[10] This requirement protects defendants in death penalty cases from excessive and random aggression by the prosecutors.[11]

As an additional safeguard for avoiding error in criminal prosecutions, the Court in *In re Winship*[12] required that the prosecutor bear the burden of proving every element of the crime beyond a reasonable doubt,[13] including the *actus reus*, or the guilty act,[14] and the mental component known as the *mens rea*.[15] Thus, in order to convict a defendant of premeditated first-degree murder,[16] the prosecutor must prove that the defendant had the requisite *mens rea* of intending to kill the victim,[17] that the defendant harbored malice in reflecting upon his desire to kill the victim,[18] and that he physically performed the *actus reus* of killing the victim.[19]

---

10. *See* Loftus & Greene, *supra* note 6, at 1429. "[N]onunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required by Oregon or by Louisiana even though the dissident jurors might, if given the chance, be able to convince the majority." *Id.* (quoting Johnson v. Louisiana, 406 U.S. 356, 388 (1972) (Douglas, J., dissenting)). The absence of a full and complete deliberation increases the risk of an incorrect conviction.

11. *See* United States v. Maybury, 274 F.2d 899, 903 (2d Cir. 1960). The law requires the jury to speak together in one voice as "the opinion of the country." *Id.* (quoting 2 FREDERICK POLLOCK & FREDERICK W. MAITLAND, THE HISTORY OF ENGLISH LAW FROM THE TIME OF EDWARD I 624 (London, Cambridge University Press 1968) (1st ed. 1895). *See supra* note 6.

12. 397 U.S. 358 (1970).

13. *Id.* at 368. This is a more demanding standard than required to prove liability in a civil action. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 38 (5th ed. 1984); EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 339 (3d ed. 1984). In tort law, the plaintiff generally bears the burden of proof by the preponderance of the evidence. In contrast, the prosecutor has the higher burden of proof in a criminal trial to prove the elements beyond a reasonable doubt. The law presumes the innocence of the accused unless the prosecutor can prove otherwise. Coffin v. United States, 156 U.S. 432, 452-53 (1895), *overruled on other grounds by* Agnew v. United States, 165 U.S. 36 (1897).

14. The United States Court of Appeals for the Fifth Circuit has also required that state legislatures draft the *actus reus* element of a statute with sufficient specificity to enable a jury to be in "substantial agreement" as to the precise act of the defendant. United States v. Gipson, 553 F.2d 453, 457-58 & n.7 (5th Cir. 1977). *See infra* text accompanying *infra* notes 97-106.

15. BLACK'S LAW DICTIONARY 36 (6th ed. 1990). "The *actus reus* [guilty act] is the physical aspect of a crime, whereas the *mens rea* (guilty mind) involves the intent factor." *Id.*

16. *See, e.g.*, WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.7 (2d ed. 1986) (setting forth the concept of multiple categories or degrees of murder).

17. *See* Schad v. Arizona, 111 S. Ct. 2491, 2508 (1991) (White, J., dissenting) (quoting the prosecutor's closing arguments to the jury).

18. *Id.*

19. *Id.* In contrast, second-degree murder lacks premeditation, but includes the intent to create serious bodily injury, or extremely negligent conduct. LAFAVE & SCOTT, *supra* note 16, § 7.7(e). It sometimes encompasses felony murder where the felony is not " 'inherently dangerous.' " *Id.* § 7.5(b). *See also* State v. Lacquey, 571 P.2d 1027, 1030 (Ariz. 1977) (quoting Arizona Revised Statute § 13-451(B) in holding that murder with an " 'abandoned and malignant heart' " constitutes second-degree murder); People v. Washington, 402 P.2d 130, 133

In contrast to the *Winship* requirement that the prosecutor prove a defendant's guilt beyond a reasonable doubt,[20] the concept of felony murder allows the prosecutor to avoid proving every element of the crime.[21] To convict a defendant of felony murder, the jury must agree that the defendant participated in a felony[22] and that someone was killed during the course of that felony.[23] The felony murder doctrine automatically assumes that if a defendant had the requisite *mens rea* to commit the underlying felony, then he also had the necessary *mens rea* for first-degree murder.[24] Felony murder does not require a defendant to commit the *actus reus* of physically killing the victim.[25] Instead, the *actus reus* is his participation in the underlying felony.[26] The law holds the felon strictly responsible for the fatal conse-

(Cal. 1965) (holding that if a felony is "inherently dangerous," the felony murder doctrine assumes that the defendant had the malice aforethought necessary for first-degree murder).

20. *In re* Winship, 397 U.S. 358, 364 (1970).

21. *See* LAFAVE & SCOTT, *supra* note 16, § 7.7(b). *See also*, Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1919 (1986) (asserting that felony murder defendants receive less procedural protections than defendants in wrongful death cases). Some courts reason that the intent to commit the felony supplies the intent to kill, resulting in premeditated murder. *See, e.g.*, Simpson v. Commonwealth, 170 S.W.2d 869, 869 (Ky. 1943) (holding that the intent to perpetrate the felony supplied the elements of malice and intent to murder, even though the accused did not contemplate death); People v. Olsen, 22 P. 125, 126 (Cal. 1889) (explaining that if the killing took place during the commission or attempt of a felony and as a result of conspiracy, felonious intent attached to the killing).

Many courts, however, view felony murder as separate from premeditated murder. *See, e.g.*, Guam v. Root, 524 F.2d 195 (9th Cir. 1975) (holding that felony murder does not unconstitutionally presume intent), *cert. denied*, 423 U.S. 1076 (1976); State v. Crump, 654 P.2d 922, 926-27 (Kan. 1982) (rejecting constitutional attacks on the felony murder doctrine).

22. *See, e.g.*, LAFAVE & SCOTT, *supra* note 16, § 7.5. In *State v. McLoughlin*, 679 P.2d 504, 508-09 (Ariz. 1984), the Arizona Supreme Court held that the state legislature could impose the same criminal charges upon a defendant who participated in any one of certain named felonies as one who committed premeditated murder. *Id.* The state, however, must prove the *mens rea* for the underlying felony, even if the defendant did not have a specific intent to kill. *Id. See also* State v. Arias, 641 P.2d 1285, 1288 (Ariz. 1982) (holding that first-degree murder is only *one* crime, regardless of whether it occurs as premeditated murder or felony murder).

23. LAFAVE & SCOTT, *supra* note 16, § 7.5.

24. *Id.* The *mens rea* to commit the underlying felony transfers to the *mens rea* for premeditated first-degree murder. *Id.* As a matter of strict liability, the crime consists only of an *actus reus*; the *mens rea* is not part of the offense. *Id.* This type of crime gained widespread acceptance in recent years for such matters as traffic tickets, drug and alcohol laws, and food regulation. *Id.* The Supreme Court has imposed very few due process limitations on strict liability crimes, which in turn has encouraged state legislatures to create such crimes. *See* Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CAL. L. REV. 391, 397 (1988) (discussing why legislatures created the concept of strict liability).

25. *See* Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (holding that the Eighth Amendment allows states to impose the death penalty if the defendant possesses a mental state of reckless indifference to life but not the intent to kill, provided that the defendant was a major participant); *see also infra* text accompanying notes 129-37.

26. *Id.* In essence, society judges the felon to be a "bad person" because of his involvement in the underlying felony. *See* LAFAVE & SCOTT, *supra* note 16, § 7.5(h).

quences that he may not have foreseen, committed, or even desired.[27] The only element that felony murder and premeditated murder share is that someone was killed.[28] Otherwise, both the *mens rea* and *actus reus* are different.[29]

Nevertheless, a number of states, including Arizona, currently have first-degree murder statutes that encompass both premeditated murder and felony murder as alternative theories for the crime of first-degree murder.[30] These statutes, which do not require the jury to agree unanimously upon either theory, result in a unanimous generic verdict of either guilty or not guilty.[31] Until recently, the Supreme Court had not questioned the constitu-

27. *See Tison*, 481 U.S. at 157. When the British originally created the felony murder doctrine in the seventeenth and eighteenth centuries, *mens rea* was not as developed a concept as it is now. As such, the focus of criminal litigation was on the resulting harm, not the defendant's original intent. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 448 n.12, 458 (1985); Case Comment, *Criminal Law—Homicide—Felony Murder—Felons Can Be Held Responsible Under the New Jersey Murder Statute for the Death of An Innocent Party Killed by Police Attempting to Apprehend the Felons*, 24 RUTGERS L. REV. 591, 593-96 (1970) (describing a New Jersey statute that holds felons responsible for a third party killed in police pursuit); *see infra* note 112.

28. *See* Schad v. Arizona, 111 S. Ct. 2491, 2509 (1991).

29. *Id.*

30. This trend began with the landmark case of People v. Sullivan, 65 N.E. 989, 989-90 (N.Y. 1903) (holding that "it was not necessary that all jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one"). In fact, the drafting of first-degree murder statutes to encompass both theories has actually become commonplace in most jurisdictions. *See Schad*, 111 S. Ct. at 2502.

One rationale for this trend is the desire to avoid a situation in which a defendant, although guilty of first-degree murder, is found innocent because the jury was unable to agree upon the defendant's specific act. *See* Holland v. State, 280 N.W.2d 288, 293 (Wis. 1979), *cert. denied*, 445 U.S. 931 (1980). "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." *Id.*

31. *See* People v. Milan, 507 P.2d 956, 961-62 (Cal. 1973) (holding that there is no error in instructing the jury on both theories if there is sufficient evidence that the defendant committed first-degree murder as defined); People v. Travis, 525 N.E.2d 1137, 1148 (Ill. App. Ct.) (stating that the jury must be unanimous on the ultimate question of guilt or innocence, not the theory applied), *appeal denied*, 5 N.E.2d 260 (Ill. 1988), *cert. denied*, 489 U.S. 1024 (1989); State v. Fuhrmann, 257 N.W.2d 619, 626 (Iowa 1977) (holding that first-degree murder is one crime, although defendant can commit the crime in several ways); State v. Wilson, 552 P.2d 931, 936 (Kan. 1976) (holding that accused cannot impeach a verdict because the jury could not agree upon the theory of first-degree murder), *overruled on other grounds by* State v. Quick, 597 P.2d 1108 (Kan. 1979); Commonwealth v. Devlin, 141 N.E.2d 269, 275-76 (Mass. 1957) (holding that a homicide conviction is acceptable even if the jury does not specify a theory); People v. Embree, 246 N.W.2d 6, 7 (Mich. 1976) (holding that when the evidence shows that the defendant is guilty of premeditated and felony murder, jury instruction on unanimity is irrelevant); State v. Buckman, 468 N.W.2d 589, 594 (Neb. 1991) (holding that the jury must only agree that the defendant committed first-degree murder, not on the theory by which they

tionality of these statutes.[32] In *Schad v. Arizona*,[33] the Supreme Court considered an Arizona statute[34] that permitted the jury to find a defendant guilty of first-degree murder without specifying felony murder or premeditated murder.[35]

After discovering a strangled body on the side of an Arizona highway, police arrested Edward Schad, Jr., for parole violation and possession of the victim's Cadillac.[36] In searching the Cadillac, police discovered the victim's wallet, two of his credit cards, and other personal items identified as belonging to the victim.[37] The grand jury indicted Schad for first-degree murder based on both premeditated murder and felony murder.[38] A unanimous jury

---

reached that verdict); James v. State, 637 P.2d 862, 865-66 (Okla. Crim. App. 1981); State v. Tillman, 750 P.2d 546, 563-65 (Utah 1987) (holding that the jury need not agree upon either theory if there is sufficient evidence to support either); *see also* Brown v. State, 473 So. 2d 1260, 1265 (Fla. 1985) (rejecting argument that the court should have distributed special verdict forms to the jury to indicate the theory of first-degree murder upon which they agreed), *cert. denied*, 474 U.S. 1038 (1985). However, not all state courts have agreed to this statutory construction. *But see* State v. Murray, 782 P.2d 157 (Or. 1989) (holding that trial court erred in jury instructions which offered alternative theories of murder); State v. Boots, 780 P.2d 725, 728-29 (Or. 1989) (holding that the jury must only agree upon the means by which the defendant committed the murder).

With regard to second-degree murder, the Utah Supreme Court ruled in State v. Russell, 733 P.2d 162, 166-67 (Utah 1987), that a defendant still received a unanimous verdict even if the jury did not agree upon the *mens rea* or the *actus reus* of the crime. *See Recent Developments in Utah Law*, 1988 UTAH L. REV. 149, 196.

32. On June 21, 1991, the Supreme Court handed down its first decision on the constitutionality of such first-degree murder statutes with alternative theories. *See* Schad v. Arizona, 111 S. Ct. 2491 (1991).

33. 111 S. Ct. 2491 (1991).

34. ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1973) (*quoted in Schad*, 111 S. Ct. at 2495 n.1), *repealed by* 1977 Ariz. Sess. Laws ch. 142, § 15 (effective Oct. 1, 1978). The statute read:

> 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.

Schad, 111 S.Ct. at 2495 n.1 (quoting § 13-452). The Arizona legislature revised the statute but retained premeditated murder and felony murder as alternative theories of first-degree murder. *Id.*; *see* ARIZ. REV. STAT. ANN. § 13-1105.A (1989).

35. Although Arizona's current first-degree murder statute offers only premeditated murder and felony murder as possible theories, the earlier statute at issue in *Schad v. Arizona* offered a third option: "committed in avoiding or preventing lawful arrest or effecting an escape from legal custody." *Schad*, 111 S. Ct. at 2495 n.1 (quoting § 13-452).

36. State v. Schad, 633 P.2d 366, 370-71 (Ariz. 1981) (en banc), *cert. denied*, 455 U.S. 983 (1982).

37. *Id.* at 371. The police also discovered other items belonging to the victim inside the petitioner's abandoned rental car. *Id.*

38. The felony murder theory was based on robbery or kidnapping. State v. Schad, 691 P.2d 710, 711 (Ariz. 1984), *rev'd*, 788 P.2d 1162 (Ariz. 1989).

found Schad guilty, and the trial court sentenced him to death.[39] On defendant's post conviction petition,[40] the Arizona Supreme Court reversed his conviction on the grounds of improper jury instructions and remanded the case.[41] On remand, the jury again convicted Schad of first-degree murder based on the alternative theories of premeditated and felony murder, with robbery as the underlying felony.[42] For a second time, Schad appealed his conviction to the Arizona Supreme Court, claiming that due process required the jury to agree upon one particular theory of first-degree murder.[43] Finding no due process violation, the Arizona Supreme Court affirmed the conviction and did not require the jury to agree upon one specific theory of first-degree murder.[44] The court also rejected Schad's second argument that due process required the judge to instruct the jury on robbery as a lesser included offense of felony murder, even though the judge issued instructions on second-degree murder as a lesser included offense of premeditated murder.[45]

The Supreme Court granted certiorari[46] and, in a five to four plurality opinion,[47] affirmed Schad's conviction, refusing to require the jury to agree

39. *Schad*, 633 P.2d at 383.

40. *Schad*, 691 P.2d at 711.

41. *Id.* at 711-12. The judge failed to instruct the jury on the definitions of robbery and kidnapping as the underlying felonies. *Id.* at 711. The Arizona Supreme Court found that this omission constituted a "[f]undamental error," occurring when the trial judge fails to instruct the jury on issues that are crucial to a proper evaluation of the evidence. *Id.* at 711. The court felt that since neither robbery nor kidnapping were ever defined, the jury was unable to properly evaluate the evidence for the felony murder charge. *Id.* at 711-12. *But see* State v. Laughter, 625 P.2d 327, 330 (Ariz. Ct. App. 1980) (holding that even if there is "fundamental error," reversal is only appropriate when the error has a prejudicial effect on the defendant).

42. *See* State v. Schad, 788 P.2d 1162, 1164 (Ariz. 1989), *aff'd*, 111 S. Ct. 2491 (1991).

43. *Id.* at 1168. Schad asserted that the evidence obtained by the Arizona police "proved at most that he was a thief, not a murderer." Schad v. Arizona, 111 S. Ct. 2491, 2495 (1991).

44. *Schad*, 788 P.2d at 1168.

45. *Id.* (quoting State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982)). In death penalty cases, the judge must instruct the jury on a lesser included offense that is non-capital in nature so that the jury does not have to make an all-or-nothing choice of death or acquittal. *See* Beck v. Alabama, 447 U.S. 625, 627 (1980) (holding that due process forbids the imposition of the death penalty for a capital offense if the trial court did not give the jury the option of convicting the defendant of a lesser included offense). The judge must not present the jury with the impermissible "all-or-nothing choice" of either convicting a defendant of a death penalty offense or completely acquitting him. *Schad*, 111 S. Ct. at 2505 (quoting Spaziano v. Florida, 468 U.S. 447, 455 (1984)). The Court does not want to render a guilty verdict merely because a defendant committed a serious crime which society should punish. *See Beck*, 447 U.S. at 633-34; Keeble v. United States, 412 U.S. 205, 208 (1973) (advocating that a jury instruction on a non-capital offense allows a defendant to enjoy the reasonable doubt standard to the fullest extent). At the other extreme, the jury should not acquit a defendant because his criminal actions do not merit the death penalty. *See Beck*, 447 U.S. at 642-43.

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

47. *Id.* at 2494 (plurality opinion). Chief Justice Rehnquist and Justices O'Connor and Kennedy joined Justice Souter to form the plurality opinion. Justice Scalia issued a concur-

upon one of the alternative theories.[48] Writing for the plurality, Justice Souter stated that due process did not require the jury to agree on a theory of conviction based either upon felony murder or premeditated murder.[49] Accordingly, the Court held that the jury must only unanimously agree that the defendant committed first-degree murder.[50] As such, the plurality considered the theories to be alternative means to prove the *mens rea* necessary for first-degree murder.[51] Justice Souter reasoned that since due process does not require the jury to agree upon one particular *actus reus*, the law should not require it to select unanimously one *mens rea*.[52] Moreover, Justice Souter recognized that the Court has an obligation to defer to the states on issues of statutory construction, provided that the statute is constitutional.[53] Finally, the plurality acknowledged that in trials for capital crimes, due process requires the judge to instruct the jury on at least one lesser included offense carrying a non-capital sentence.[54] However, Justice Souter found that if a statute offers alternative theories, the judge may satisfy this due process requirement by instructing the jury on a lesser included offense of only one theory of first-degree murder.[55]

---

rence, and Justice White led the dissent, accompanied by Justices Marshall, Blackmun, and Stevens. *Id.*; *see infra* note 54.

48. *Id.* at 2494-95. The Court has held, however, that a charge may not join separate offenses. *See* United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976) (holding that if a count joins two or more separate and distinct offenses, it is "duplicitous"), *cert. denied*, 430 U.S. 966 (1977). Furthermore, statutes that group radically different crimes as alternatives under one statute violate due process. For example, a jury may not convict a defendant of a crime based on a statute that offers the alternatives of embezzling, reckless driving, tax evasion, littering, or burglary; these crimes do not contain similar elements. *See Schad*, 111 S. Ct. at 2497-98.

49. *Schad*, 111 S. Ct at 2501-04. Instead, premeditated murder and felony murder satisfy the *mens rea* element of the offense; they are not separate elements of the crime. *Id.* at 2500.

50. *Id.* at 2496-97.

51. *Id.* at 2497.

52. *See id.*; *see also* United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (holding that the jury does not have to agree upon the specific *actus reus*).

53. *Schad*, 111 S. Ct. at 2500-01. Justice Souter emphasized the Court's obligation to defer to each state legislature's statutory construction out of respect for the longevity of the first-degree murder statutes and their frequent usage. *Id.* at 2501. Only when states pass laws that transgress constitutional limits may the Court call a statute defining the elements of a criminal offense into question. Patterson v. New York, 432 U.S. 197, 210 (1977).

54. *Schad*, 111 S. Ct. at 2504. With regard to this second issue, Justice Scalia agreed with Justice Souter's analysis, casting the fifth vote to create a majority opinion. *Id.* at 2507; *see supra* note 45.

55. Justice Souter announced that due process does not require the judge to instruct the jury on a lesser included offense for each theory of first-degree murder. *Schad*, 111 S. Ct. at 2504-05. The Court reasoned that since the judge instructed the jury on second-degree murder, which is a lesser included non-capital offense of premeditated murder, the trial court did not present the jury with an impermissible "all or nothing choice" of either convicting the defendant of a death penalty offense or completely acquitting him. *Id.* As such, due process

Justice Scalia wrote a concurring opinion,[56] agreeing that due process does not require the jury to agree unanimously upon one theory of first-degree murder.[57] He wrote separately, however, to emphasize that since first-degree murder statutes such as Arizona's have been the established norm for over two centuries,[58] the Court does not have the authority to subject their construction to the rigors of a due process review.[59]

In his dissent,[60] Justice White asserted that the plurality decision contradicted *Winship*'s requirement that the prosecutor prove every element of a crime beyond a reasonable doubt.[61] As felony murder and premeditated murder have no common element except for the fact that someone was killed, Justice White reasoned that the two theories criminalize two different types of conduct.[62] Since the conduct is neither similar in act nor in mental state, Justice White argued that it defies due process to treat them as interchangeable equivalents.[63] Justice White declared that a general verdict of

---

did not require the judge to instruct on robbery as a lesser included offense of felony murder. *Id.*; *see supra* note 45. Further analysis of this issue exceeds the scope of this Note.

56. *Id.* at 2505-07 (Scalia, J., concurring).

57. *Id.* at 2507. Other than the fact that this statutory construction has been used throughout history, the plurality's only other argument is that the *mens rea* necessary for felony murder and premeditated murder may have the same "moral equivalence," which was not the petitioner's complaint. *Id.* Although moral equivalence is necessary, it is only one of many conditions which must be met. *Id.* Furthermore, Justice Scalia pointed out that the plurality omitted the other conditions that must be satisfied for constitutionality. *Id.*

58. *Id.* at 2506. The common law had only one crime of murder, a crime for which the law imposed the death penalty in all cases. *See, e.g.*, *id.*; FRANCIS WHARTON, LAW OF HOMICIDE 147 (3d ed. 1907); ROY MORELAND, LAW OF HOMICIDE 199 (1952). However, the nation grew increasingly dissatisfied with this common law construction. *See* McGautha v. California, 402 U.S. 183, 198 (1971) (describing the "rebellion" against common law that required mandatory death for all murderers). In 1794, Pennsylvania led the nation in dividing the concept of murder into two statutory degrees as follows:

> [A]ll murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate, or premeditated killing; or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree.

Schad, 111 S. Ct. at 2506 (quoting 1794 Pa. Laws, ch. 1766, § 2).

59. *Schad*, 111 S. Ct. at 2507. "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." Patterson v. New York, 432 U.S. 197, 201 (1977) (citation omitted).

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

61. Justice White asserted that the plurality was incorrect in finding that the statute afforded due process. *Id.*; *see* text accompanying *supra* notes 12-19 (discussing the holding in *Winship*).

62. Since the murder of Larry Grove, adjustments to the Arizona first-degree murder statute have further clarified the fact that premeditated murder and felony murder are composed of different elements and *mens rea*. *Id.* at 2508-09 & n.1.

63. *Id.* at 2508-09. In State v. Smith, 774 P.2d 811, 817 (Ariz. 1989) (en banc), the Arizona Supreme Court acknowledged that lack of disclosure regarding the jury's vote on alterna-

" 'guilty of first-degree murder' "[64] fails to communicate the crime of which the defendant was found guilty.[65] Justice White concluded that the Arizona statute violates due process because it deprives the accused of a unanimous jury verdict.[66]

This Note analyzes whether a guilty verdict under the Arizona first-degree murder statute deprives the accused of due process. This Note examines the relationship between jury unanimity and the evolution of the reasonable doubt standard. Next, this Note compares and contrasts the felony murder doctrine with the premeditated murder doctrine as alternative theories of first-degree murder and analyzes the judicial trend regarding due process guarantees of jury unanimity. This Note then reviews the plurality, concurring, and dissenting opinions in *Schad v. Arizona* and concludes that the plurality decision in *Schad* conflicts with the due process requirement of a unanimous verdict for all state capital cases. Finally, this Note suggests that the result of *Schad* will be an erosion of jury unanimity and a devalued right to due process. The Court's refusal to require a jury to agree upon one of the two theories of first-degree murder, despite the fact that they are inherently different crimes, renders a jury's unanimous verdict as to a defendant's guilt meaningless.

I. JURY UNANIMITY AND THE EVOLUTION OF REASONABLE DOUBT

Dating back to the Middle Ages,[67] the jury was used to prevent government harassment and unfounded conviction of the innocent.[68] Royal interference with the jury trial in colonial times reinforced the importance of this

---

tive theories of first-degree murder may introduce doubt into the validity of a general jury verdict. *See infra* note 211.

64. *Schad*, 111 S. Ct. at 2509.

65. *Id.* The reality is that the jury may not have unanimously agreed upon one theory of first-degree murder. *See id.* In that sense, the jury did not find the defendant guilty of any specified crime. *See* text accompanying *supra* note 193.

66. *Id.* at 2509-10. This is the same " 'guilty of crime' " mentality, Justice White reasoned, as a jury verdict that pronounces the accused guilty based on a statute with alternative theories of reckless driving or embezzlement. *Id.*; *see supra* note 48.

67. However, it is unclear when exactly the English jury evolved. *See* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 5 (1989) (discussing the development of the role of the jury throughout the Middle Ages).

68. White, *supra* note 67, at 3 (discussing the history of trial by jury). In instilling the practice of a jury trial, the Framers intended to protect the accused from dishonest prosecutors and unfair judges. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The Framers sought to counter the imbalance of power between the government and an accused by requiring the community to participate in the judicial process. White, *supra* note 67, at 3. However, the Fourteenth Amendment does not guarantee a defendant the right to a unanimous jury verdict for all state criminal cases. *See supra* note 6.

concept in American criminal law.[69] The crucial feature of a jury is the power of an ordinary group of laymen to act as a buffer betweeen an accused and his accusers.[70] The prosecution must overcome the burden of proving a defendant's guilt not only to the judge, but to a group of the defendant's peers.[71]

Although the Constitution requires jury unanimity for death penalty cases, the United States Supreme Court has rarely issued guidelines setting forth the exact facts upon which the jury must unanimously agree.[72] However, the Court held in *Winship*[73] that the Due Process Clause guarantees each criminal defendant the right to a jury verdict on all "facts" that are elements of the offense.[74] The Court further required the prosecutor to prove each such fact beyond a reasonable doubt.[75] As with jury unanimity, the Court created the reasonable doubt standard to prevent potential abuse and the possibility of erroneous conviction.[76] The Court held that due process requires the prosecutor to prove every fact of an alleged crime beyond a reasonable doubt before a jury may convict a criminal defendant.[77]

---

69. LAFAVE & ISRAEL, *supra* note 3, § 21.1.

70. *Id.* § 21.1(e).

71. Thus, the jury provides the defendant with additional protection against random aggression by overzealous prosecutors. White, *supra* note 67, at 3 n.21 (quoting *Duncan*, 391 U.S. at 156); *see supra* note 68.

72. Thus, the Court has only been specific in its requirement of unanimity. *See* White, *supra* note 67, at 14-21. Like the concept of the jury, the requirement of jury unanimity arose in England, as did the practice of a twelve-person jury. *See* Apodaca v. Oregon, 406 U.S. 404, 407-08 & n.2 (1972).

73. *In re* Winship, 397 U.S. 358 (1970).

74. *See id.* at 364. The Court had thus begun to describe the facts upon which the jury must agree. *See id.*

75. *Id.*

76. *Id.* at 363-64. The Court referred to the reasonable doubt standard as "a prime instrument" to protect the presumption of innocence which is the bedrock of our criminal justice system. *Id.*; *see supra* notes 68, 78. Moreover, the requirement of unanimity implements the reasonable doubt standard. Note, *Right to Jury Unanimity on Material Fact Issues:* United States v. Gipson, 91 HARV. L. REV. 499, 501 n.19 (1977); United States v. Gipson, 553 F.2d 453, 457 & n.7 (5th Cir. 1977).

77. *Winship*, 397 U.S. at 364. There should be no reasonable doubt in the minds of the jurors that an innocent man was charged with the crime. *Id.*

Although some courts have attempted to define the concept of reasonable doubt,[78] others have assumed that the words speak for themselves.[79] The *Winship* requirement that the jury reach a " 'subjective state of certitude of the facts in issue' " before announcing a verdict reduces the danger of a jury mistakenly finding an innocent man guilty.[80] *Winship* predicted that as a result of the extensive deliberations required of the jury, the public would have increased confidence in the convictions delivered by unanimous juries.[81] *Winship* asserted that if the standard of proof were lower than reasonable doubt, it would dilute the strength of the criminal justice system.[82]

Following *Winship*, the Supreme Court qualified the specific "facts" that the prosecutor must prove beyond a reasonable doubt to a unanimous jury in state death penalty cases.[83] In *Mullaney v. Wilbur*,[84] the Court considered the constitutionality of Maine's murder statute,[85] which presumed malice aforethought.[86] The statute placed the burden on the defendant to rebut this

78. *See* LAFAVE & SCOTT, *supra* note 16, § 1.8(f). The most well-known attempt to define reasonable doubt was undertaken by Chief Justice Shaw when he gave the following jury instructions:

> [R]easonable doubt . . . is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Id. § 1.8(f) (quoting Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850), *overruled on other grounds by* Commonwealth v. McLeod, 326 N.E.2d 905 (Mass. 1975)).

79. *See, e.g.*, Miles v. U.S., 103 U.S. 304, 312 (1881) (stating that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury"); State v. Sauer, 38 N.W. 355, 356 (Minn. 1888) (stating that "[t]he term 'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply"). *See generally* 9 JOHN H. WIGMORE, EVIDENCE § 2497 (Chadbourn rev. 1981); MCCORMICK ON EVIDENCE § 341 (Edward W. Cleary ed., 3d ed. 1984 & Supp. 1987); J.P. MCBAINE, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 264-68 (1944) (offering various jury instructions on proof beyond a reasonable doubt). Even the Model Penal Code refuses to define "reasonable doubt" because the term is best left to explain itself. MODEL PENAL CODE § 1.12 Cmt. 2, at 190 (1985).

80. *In re* Winship, 397 U.S. 358, 364 (1970) (quoting Norman Dorsen & Daniel A. Rezneck, *In re Gault and the Future of Juvenile Law*, 1 FAM. LAW Q. 1, 26 (1967)).

81. *Winship*, 397 U.S. at 364.

82. The possibility that a jury might convict an innocent man would rise because the jury could attain unanimity based on a lower standard of proof. *See id.*

83. *See* State v. Parker, 592 A.2d 228, 231 (N.J. 1991) (citing to Schad v. Arizona, 111 S. Ct. 2491, 2497 (1991) for the proposition that the definition of "fact" is unclear even when jury unanimity is unquestionably required); White, *supra* note 67, at 15.

84. 421 U.S. 684 (1975).

85. *See id.* at 691-92.

86. "Malice aforethought" is also known as "malice prepense," which is an intention to kill or seriously injure, knowledge that an act or failure to act would cause death or serious

presumption by raising the defense of provocation or heat of passion.[87] The Court found that the statute violated the due process requirement of *Winship* because it forced the defendant affirmatively to prove provocation.[88] The Court reasoned that because provocation directly relates to the statutory element of malice, the prosecutor must prove that element beyond a reasonable doubt.[89] The *Mullaney* Court thus ruled that the states cannot shift the burden of proof to the defendant on any element of a crime.[90]

The Court limited *Mullaney* in *Patterson v. New York*,[91] holding that a New York murder statute requiring a defendant to prove the affirmative defense of extreme emotional disturbance did not unfairly shift the burden of proof to the defendant.[92] Since malice was not an element of the crime of first-degree murder, the fact that the statute required the defendant to raise the defense of extreme emotional disturbance did not offend due process.[93] If a statute does not specify a "fact" as an element of a crime, it may shift the burden of raising and proving that fact to the defendant.[94] Thus, despite

---

bodily injury, or intent to commit a felony or resist lawful arrest. *See Schad*, 111 S. Ct. at 2506.

87. *Mullaney*, 421 U.S. at 703. The heat of passion or provocation defense removes the presumption of malice aforethought and reduces murder to manslaughter. *See id.* at 686-87; White, *supra* note 67, at 15-16.

88. *Mullaney*, 421 U.S. at 703-04.

89. *Id.* at 702. *See* Leary v. United States, 395 U.S. 6, 32-36 (1969) (rejecting a statute that requires a possessor of marijuana to prove that it was not illegally imported); Tot v. United States, 319 U.S. 463, 469 (1943) (discussing the evils of presuming a defendant's guilt of an offense based on a fact that is not relevant to the defendant's guilt).

90. *Mullaney*, 421 U.S. at 703-04. *See* Mark Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U. L. REV. 775, 776 (1975) (interpreting *Mullaney* as asserting that due process limits the legislatures' ability to draft crimes as they please); *see generally In re* Winship, 397 U.S. 358, 364 (1970) (asserting that the government bears the burden of proving the defendant's guilt beyond a reasonable doubt to the jury).

91. 432 U.S. 197 (1977).

92. *Id.* at 206-07, 216. Patterson shot and killed his estranged wife after observing her in a "state of semiundress" with a former lover. *Id.* at 198. The effect of this affirmative defense, if accepted by the jury, would be to reduce the severity of the offense from second-degree murder to manslaughter. *See id.* at 198-99. *But see* Mark R. Adams, Case Comment, *Affirmative Criminal Defenses—The Reasonable Doubt Rule in the Aftermath of* Patterson vs. New York, 39 OHIO ST. L.J. 393, 413 (1978) (asserting that the *Patterson* decision does not protect an accused from an erroneous conviction because innocence is not presumed); Celia Goldwag, Note, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 COLUM. L. REV. 655, 656 (1978) (arguing that *Patterson* does not rationally prove the constitutionality of affirmative defenses).

93. *Patterson*, 432 U.S. at 198, 215-16.

94. *Id.* at 201. The New York homicide statute did not unfairly shift the burden of proof to defendants because the New York homicide statute did not employ the concept of malice. *Id.* at 198, 215-16. The Court held that it was not unconstitutional to require the defendant to prove extreme emotional disturbance as an affirmative defense. Thus, the defendant has a right to jury trial on facts which the statute specifies as elements of the offense. Constitutional

Mullaney, the Court reiterated that a defendant's due process right to a unanimous jury determination in state capital cases extends only to those facts that the state statute specifies as essential elements of an offense.[95]

Until recently, the Supreme Court had not determined which facts the prosecutor must prove beyond a reasonable doubt when the statute offers an option of different acts sufficient for the *actus reus* of a crime.[96] In *United States v. Gipson*,[97] the United States Court of Appeals for the Fifth Circuit confronted the due process requirements of such a situation.[98] In *Gipson*, the federal prosecutors charged the defendant under a federal statute that grouped six acts under the umbrella of one crime: "storing, receiving, selling, bartering, concealing, or disposing" of a vehicle into interstate commerce when that vehicle is known to be stolen.[99] The trial judge instructed the jury

---

limits, however, do preclude a guilt presumption based merely on identification of the accused or an indictment. *See* White, *supra* note 67, at 16-17 & n.133.

95. *Patterson*, 432 U.S. at 215. *See* White, *supra* note 67, at 16-17; 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, 37 (1977) (arguing that *Patterson* resurrected the true meaning of *Winship* after *Mullaney* incorrectly stretched it beyond its holding); Stephen D. Brandt, Comment, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828, 859 (1975) (advocating that sanity is an element of *every* crime, which the prosecutor must prove beyond a reasonable doubt, not an affirmative defense to be borne by a defendant).

However, the defendant does not have a right to a jury trial on capital sentencing, only the verdict of guilt or innocence. Spaziano v. Florida, 468 U.S. 447, 465 (1984). In *Spaziano*, the Court held that the judge, in addition to the jury, can properly assess the individual circumstance of each defendant and deliver a death sentence. Prevailing Florida law allowed the jury to recommend a penalty which the judge was not required to implement. *Id.* at 451. On appeal from the Florida Supreme Court, the Court distinguished between the guilt and the sentencing phases, declaring the law constitutional. *Id.* at 457-59. *See* White, *supra* note 67, at 17-18.

The Court has also ruled that the state can require the defendant to prove self-defense, provided that it is not an element of the offense and that the prosecutor proves all elements of the offense beyond a reasonable doubt. Martin v. Ohio, 480 U.S. 228, 236 (1987). Applying the same logic, the Constitution does not require the prosecution to prove the sanity of a defendant who claims that he is not guilty because of insanity. *Id.* However, the presumption of criminal intent violates *Winship*'s requirement that the prosecutor prove all elements of a crime beyond a reasonable doubt if intent is an element of the crime. Francis v. Franklin, 471 U.S. 307, 318 (1985).

96. Statutes that can be violated by several distinct acts such that the jury must only agree that the defendant is guilty of illegal activity have been termed "patchwork" verdicts. Note, *supra* note 76, at 499. Until the first federal court addressed patchwork verdicts in United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), the majority of state courts held that these patchwork verdicts were constitutional because a defendant does not have right to a unanimous jury verdict for state criminal cases. *Id.* at 499 & n.1; *see supra* note 6. The Court did, however, address that issue in Schad v. Arizona, 111 S. Ct. 2491 (1991). See *infra* part IIIA & note 195.

97. 553 F.2d 453 (5th Cir. 1977).

98. *Id.* at 456-57.

99. *See* 18 U.S.C. § 2313 (1988).

that due process did not require the jury to agree unanimously upon which specific act was committed.[100]

The Fifth Circuit reversed the district court decision, holding that in addition to agreeing unanimously upon the accused's guilt of the crime, due process also requires "substantial agreement" among the jurors as to the defendant's specific course of action that constitutes the *actus reus* of the crime.[101] The court held that since the *actus reus* is an element of the crime, acts organized under a "grouping" must have sufficient similarities in order to meet the due process requirement articulated in *Winship* that the prosecutor prove every element of a crime beyond a reasonable doubt.[102] If a court finds that the acts within a statutory grouping are not sufficiently similar, the statute violates due process because the prosecutor is unable to prove the *actus reus* element of the crime beyond a reasonable doubt.[103] In *Gipson*, the statute should have divided the six acts into two "distinct conceptual groupings"[104] of similar acts, requiring the jury to attain unanimity within each grouping.[105] However, the Fifth Circuit did not require the jury to agree unanimously upon material facts if the statute did not explicitly delineate them as elements of the crime.[106]

II. THEORIES IN CONFLICT: FELONY MURDER AND PREMEDITATED MURDER

When the felony murder doctrine originally developed at common law, long before *Winship* required the prosecutor to prove every element of a crime beyond a reasonable doubt, every felony was punishable by death.[107]

---

100. *Gipson*, 553 F.2d at 455-56.

101. *Id.* at 457-58.

102. *Id.* at 458. *See generally In re* Winship, 397 U.S. 358 (1970).

103. *Gipson*, 553 F.2d at 453. The Court found that the jury in the trial below did not achieve a unanimous verdict as the Due Process Clause requires. *Id.*

104. *Id.* The first grouping would be "housing" which includes receiving, concealing, and storing stolen vehicles; the second would be "marketing" which encompasses bartering, selling, and disposing of stolen vehicles. *Id.* Thus, each grouping contains acts that are inherently different from the acts within the other grouping. *Id.*

105. *Id. See* Sally Wellman, Note, *Jury Instructions and the Unanimous Jury Verdict*, 1978 WIS. L. REV. 339, 349 (asserting that *Gipson* does not overburden the prosecutor as it only requires him to prove the offense charged).

106. Note, *supra* note 76, at 505 (arguing that the *Gipson* decision ensures that the jury attained a meaningful unanimity on the criminal acts committed by the defendant). However, it has yet to be determined what constitutes a material fact. *Id.* at 502 n.26. Although the Sixth Amendment requires the jury to agree upon a fact if it is material before conviction, the jury need *only* agree upon those material facts. *Id.*

107. Roth & Sundby, *supra* note 27, at 450. In contrast, in modern times, the Court has held that the death penalty for a crime as severe as rape constitutes a "cruel and unusual punishment" under the Eighth Amendment. U.S. CONST. amend VIII; *see supra* note 5. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 599 (1977) (stating that the death penalty is an excessive

Since all felonies were punished alike, the doctrine had very little practical effect.[108] It made no difference whether the accused was hanged for the underlying felony or the resulting murder.[109] The due process principle established in *Winship* reflected the desire of the Court to restrict the harshness of this common law doctrine.[110] Since most felonies are now punishable by lesser penalties than those for first-degree murder, the need for a limitation on the felony murder doctrine arose.[111]

The common limitation imposed by states upon the doctrine of felony murder is that the statute enumerate the underlying felonies that are inherently dangerous to human life.[112] Other states have limited the scope of the doctrine to common law felonies.[113] In addition, jurisdictions have nar-

---

punishment for the rape of an adult woman if the rape did not take human life); Weems v. United States, 217 U.S. 349, 368 (1910) (stating that the Eighth Amendment requires that the punishment for a crime be proportional to the offense committed).

108. LAFAVE & SCOTT, *supra* note 16, § 7.5(a) n.4. *See* Powers v. Commonwealth, 61 S.W. 735, 741 (Ky. 1901) (advocating limitations upon the common law felony murder doctrine because society has grown more selective in administering the death penalty).

109. LAFAVE & SCOTT, *supra* note 16, § 7.5(a) n.4.

110. *Id.* at 621. The three states of Hawaii, Kentucky, and Michigan have abolished this law outright, either by statute or by judicial order. *See* HAW. REV. STAT. §§ 707-701 (1988); KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs-Merrill 1985); People v. Aaron, 299 N.W.2d 304, 321-22 (Mich. 1980) (reasoning that since the judiciary created the felony murder doctrine, it can also abrogate it); *see also* Tamu Sudduth, Comment, *The* Dillon *Dilemma: Finding Proportionate Felony-Murder Punishments*, 72 CAL. L. REV. 1299, 1307 (1984) (discussing the growing dissatisfaction with the felony murder rule). Ohio has a felony-involuntary manslaughter rule, rather than felony murder. OHIO REV. CODE ANN. § 2903.04 (Baldwin 1982).

111. *See generally* Powers v. Commonwealth, 61 S.W. 735, 741-42 (Ky. 1901) (holding that when a common law felony is reduced to a misdemeanor, an unlawful killing in the perpetration of that crime is manslaughter, not murder); State v. Harrison, 564 P.2d 1321, 1324 (N.M. 1977) (referring to the felony murder rule as "legal fiction"); LAFAVE & SCOTT, *supra* note 16, at 623-25; H.L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 4 (1973) (characterizing the felony murder rule as "an unsightly wart on the skin of the criminal law").

112. *E.g.*, People v. Washington, 402 P.2d 130, 133 (Cal. 1965) (requiring that the felon must kill in the perpetration of an inherently dangerous felony for the felony murder doctrine to apply); People v. Pavlic, 199 N.W. 373, 374 (Mich. 1924) (finding that although the sale of liquor was a felony, it was "not in itself directly and naturally dangerous to life"). The English, the creators of this controversial rule, chose to abandon it as a legal concept in 1957. *See* Roth & Sundby, *supra* note 27, at 448 n.12.

The Model Penal Code does not adopt the felony murder doctrine per se but states that a defendant has committed murder when the killing was performed recklessly. MODEL PENAL CODE § 210.2 (1980). Recklessness is presumed if: "the actor is engaged or is an accomplice in the commission of . . . robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape." *Id.* § 210.2(1)(b); *see* Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1968) (discussing the classifications of homicide).

113. *See also* Commonwealth v. Exler, 89 A. 968, 969-70 (Pa. 1914) (stating that since statutory rape is not a common law felony, death from shock of statutory rape is not murder); LAFAVE & SCOTT, *supra* note 16, § 7.5(b) (explaining that common law felonies are usually rape, sodomy, burglary, arson, mayhem, and larceny).

rowly construed the common law requirement that the killing take place "in the commission of a felony" by limiting the time that may elapse between the homicide and the commission of the felony.[114] A more stringent causal connection between the felony and the death presents yet a further limitation to the scope of the doctrine.[115]

Although felony murder and premeditated murder can both lead to the same conviction of first-degree murder, the courts treat convictions on each theory differently for sentencing purposes.[116] Only a small minority of states allows the imposition of the death penalty for felony murder.[117] In those particular jurisdictions, the prosecutor must prove that additional aggravating circumstances outweigh any mitigating factors before a defendant may be considered for the death penalty.[118] Juries have shown a reluctance to sentence a defendant to death based solely on accomplice liability in felony murders.[119]

The Supreme Court also treats felony murder and premeditated murder differently for sentencing purposes. In *Enmund v. Florida*,[120] the Court required that in a felony murder case, a defendant individually harbor an intent to kill as a prerequisite for the death penalty.[121] Although involved in the robbery that instigated the killings, the defendant in *Enmund* did not himself kill, was not present when the victims were killed, and did not even

114. The time of the killing is when the fatal blow was struck, not when the victim died. LAFAVE & SCOTT, *supra* note 16, § 7.5(f)(1) n.84. The time of killing is only one factor that must be considered along with causation. *Id.* § 7.5(f)(1)-(2).

115. *Id.*

116. In the 1970s, the Supreme Court invalidated state death penalty statutes that led to either mandatory or arbitrary imposition of the death penalty after conviction. *See* Furman v. Georgia, 408 U.S. 238, 240 (1972); Gregory M. Stein, Note, *Distinguishing Among Murders When Assessing the Proportionality of the Death Penalty*, 85 COLUM. L. REV. 1786 (1985) (asserting that the constitutionalty of the death penalty should be considered separately for each type of capital murder).

117. Enmund v. Florida, 458 U.S. 782, 794-95 (1982) (noting that "[t]he evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as [felony murder]"). The Court found that only 8 to 17 jurisdictions would allow the death penalty for a defendant who did not kill, attempt to kill, or intend to kill, but was a major participant in an armed robbery that resulted in the deaths of two people. Stein, *supra* note 116, at 1796-97; *see Enmund*, 458 U.S. at 789-90; *see also* text accompanying *infra* notes 120-28.

118. *Enmund*, 458 U.S. at 791. The Court has recognized that first-degree murder with an aggravating circumstance present is a more serious crime than other first-degree murders, and that some murders may be sufficiently heinous to support an automatic death sentence. Stein, *supra* note 116, at 1801.

119. The Court noted that juries have overwhelmingly rejected the death penalty for *Enmund*-type felony murders. *Enmund*, 458 U.S. at 794. *See* Stein, *supra* note 116, at 1797.

120. 458 U.S. 782 (1982).

121. *Id.* at 801. *See* Nancy A. McKerrow, Note, *Mens Rea as an Element Necessary for Capital Punishment*: Enmund v. Florida, 48 MO. L. REV. 1063, 1071 (1983) (endorsing the *Enmund* decision because it established intent as a factor in death penalty decisions).

intend that the victims be killed.[122] However, the defendant did commit the felony of robbery.[123] Because two people were killed in the course of that robbery, the jury also found him guilty of first-degree murder.[124] Since he was only an accomplice and not the actual "triggerman," however, the Supreme Court declared that he was ineligible for the death penalty.[125] The Court ruled that the Cruel and Unusual Punishments Clause of the Eighth Amendment[126] bars the death penalty in the context of felony murder, unless the defendant actually killed, attempted to kill, or otherwise intended to aid or contribute to the murder.[127] Thus, the Court recognized that the Constitution requires the distribution of punishments based upon personal culpability, responsibility, and guilt, rather than punishment based on a generalized criminal charge.[128]

In *Tison v. Arizona*,[129] another felony murder case based on robbery, the Supreme Court modified the restrictions of *Enmund*.[130] The petitioners in *Tison* helped their father and his fellow inmate to escape from prison, armed and aided the two convicts in robbing a family of four, and then watched them murder the entire family.[131] Although the defendants did not possess an actual intent to kill,[132] the Court found that they were major participants in the prison escape and did not attempt to separate themselves from the murders.[133] The Court reasoned that the mental state of reckless indifference to human life rose to the level of culpability deserving of the death penalty.[134] Notwithstanding *Enmund*, in order to qualify for the death penalty based on felony murder, a defendant does not specifically have to intend to kill.[135] The Eighth Amendment allows the death penalty for felony murder if the defendant merely exhibits a reckless indifference to human life.[136] In contrast, premeditated murder requires a specific intent to kill.[137]

---

122. *Enmund*, 458 U.S. at 788.
123. *Id.* at 785.
124. *Id.*
125. *Id.* at 797.
126. For the text of the Eighth Amendment, see *supra* note 5.
127. *Enmund*, 458 U.S. at 797.
128. *Id.* The unique nature of the death penalty requires a court to give each death penalty candidate individualized consideration. *See* Stein *supra* note 116, at 1789; MODEL PENAL CODE § 210.6 (detailing sentencing provisions for the death penalty according to aggravating and mitigating factors).
129. 481 U.S. 137 (1987).
130. *Id.* at 137.
131. *Id.* at 139-41.
132. *Id.* at 137.
133. *Id.*
134. *Id.* at 137-38.
135. *Id.*
136. *Id.*
137. *Id.*

Despite the dissimilarities between premeditated murder and felony murder in *mens rea*, *actus reus*, and sentencing provisions, the majority of states have long treated felony murder and premeditated murder as alternative theories of one crime, first-degree murder.[138] In *Schad v. Arizona*, the Supreme Court confronted Arizona's first-degree murder statute, which, like numerous other states, combined the theories of felony murder and premeditated murder under one statute as the single crime of first-degree murder.[139]

III. *SCHAD V. ARIZONA:* DUE PROCESS OF ALTERNATIVE MURDER THEORIES

In *Schad*, the issue was whether the Arizona first-degree murder statute treating first-degree murder as a single crime denied due process.[140] While the plurality held that due process allows the statute to group felony murder and premeditated murder together as a single crime,[141] the dissent contended that due process requires state legislatures to treat each theory as a separate offense.[142] The source of the disagreement lay in determining the point at which the state must treat alternative theories of a crime as separate offenses because of their inherent disparity.[143]

A. The Plurality: A Single Mens Rea

In writing the plurality opinion, Justice Souter questioned whether premeditated murder and felony murder are such inherently separate crimes that the Arizona legislature went beyond the acceptable limits of defining criminal conduct by grouping them together as one crime.[144] The plurality held that the grouping of the two types of murder under one statute did not violate due process.[145] Justice Souter reasoned that premeditated murder and felony murder are merely alternative means of proving the *mens rea* necessary to convict a defendant of first-degree murder.[146] Justice Souter declared that the jury must unanimously decide whether the accused com-

138. Schad v. Arizona, 111 S. Ct. 2491, 2502 (1991).

139. *Id.* at 2496.

140. *Id.* at 2493.

141. *Id.* at 2504.

142. *Id.* at 2511 (White, J., dissenting). There is an additional argument that the felony murder should be abandoned altogether. *See* LAFAVE & SCOTT, *supra* note 16, § 7.6(h); Roth & Sundby, *supra* note 27, at 446 (discussing the abundant criticisms of the felony murder doctrine as a legal principle).

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

144. *Id.*

145. *Id.* at 2504.

146. *See id.*; State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982) (holding that since the judge instructed the jury on felony murder and premeditated murder which are one crime, the charge was not duplicitous); State v. Axley, 646 P.2d 268, 277 (Ariz. 1982) (asserting that each offense must be charged in a separate count).

mitted the crime of first-degree murder,[147] not whether the prosecutor proved each element of that crime.[148] Moreover, Justice Souter stated that the jury was not required to agree upon either the defendant's specific act or mental state at the time of the offense.[149]

The plurality in *Schad* contended that the jury reached a unanimous verdict under Arizona's first-degree murder statute.[150] Justice Souter framed the issue as one not of jury unanimity regarding the *mens rea* of the crime, but of the constitutionality of the statute itself.[151] He reasoned that since due process does not require an indictment to specify one particular act[152] or acts incident to commission,[153] the jury should not have to agree upon a specific *mens rea* element of the crime.[154] Furthermore, the jury does not have to agree upon preliminary factual issues leading to the verdict.[155] Accordingly, due process also should require the jury to specify its finding of *mens rea* among statutory alternatives.[156]

---

147. *See Schad*, 111 S. Ct. at 2504; State v. Counterman, 448 P.2d 96, 101-02 (Ariz. 1968) (holding that although the defendant is entitled to a unanimous verdict as to whether a criminal act occurred, he is not also entitled to a unanimous verdict on the precise manner in which it was committed).

148. *Schad*, 111 S. Ct. at 2497.

149. *Id.*

150. *Id.* at 2496.

151. *Id.* The plurality disagreed with the petitioner's argument that the Arizona statute denied his constitutional right to a unanimous jury verdict as guaranteed by the Sixth, Eighth, and Fourteenth Amendments for all state capital cases. *Id.*

152. *Id.*; *see* Borum v. United States, 284 U.S. 596 (1932) (allowing the conviction of three co-defendants for murder although the count did not specifically allege that any one of the co-defendants physically committed the murder); Andersen v. United States, 170 U.S. 481, 500 (1898) (holding that it was immaterial whether death occurred by drowning or shooting as alleged in the indictment); St. Clair v. United States, 154 U.S. 134, 145 (1894) (stating that since the alleged assault could have been committed by one or more of the defendants, the indictment need not specify one defendant as the alleged perpetrator of the crime). Federal Rule of Criminal Procedure 7(c)(1) codified this principle, providing that "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." FED. R. CRIM. P. 7(c)(1).

153. *Schad*, 111 S. Ct. at 2496-97; FED. R. CRIM. P. 7(c)(1); see McKoy v. North Carolina, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring) (noting that "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line").

154. *Schad*, 111 S. Ct. at 2497.

155. *Id.*

156. *See id.* at 2496-97; State v. Serna, 211 P.2d 455, 459 (Ariz. 1949) (stating that Arizona law considers robbery to be "the legal equivalent of . . . deliberation, premeditation, and design"), *cert. denied*, 339 U.S. 973 (1950); *see, e.g.*, Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 926 (1939) (noting that an intentional killing is not murder if sufficiently provoked, while an unintentional and even accidental killing may be murder if the death occurs during the course of a felony); Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 702-703 (1937) (discussing conceptual problems with the *mens rea* for felony murder which arose at English common law and spread to the United States).

The Court conceded that due process limits the ability of a state to offer alternative courses of conduct as a means to establish the commission of an offense.[157] Justice Souter noted that the statute must not be so overly broad or vague that a reasonably intelligent defendant would not understand the legal charges filed against him.[158] Justice Souter further asserted that the state has the power to punish a defendant only for specific illegal conduct.[159] Justice Souter explained that if "material differences" exist between statutory alternatives, due process requires state legislatures to treat them as separate offenses in order to prevent a generic jury verdict.[160]

Although the Court admitted that it had yet to define a "material difference," the Court did assess *Gipson*,[161] in which the Fifth Circuit introduced the "distinct conceptual groupings" test.[162] The Court rejected the *Gipson* standard of materiality as too amorphous and impracticable for consistent application. Thus, the plurality left "material difference" undefined.[163] The Court abstained from issuing new guidelines that would avoid such inappropriate groupings and require the jury to attain the proper level of verdict specificity.[164] Regardless of application problems, Justice Souter charged that the dissent would also reject *Gipson*'s standard of materiality because it

157. *Schad*, 111 S. Ct. at 2496-97.

158. *Id.*; *see* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (holding that "[a]ll are entitled to be informed as to what the State commands or forbids"); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (holding that fair play requires that a new offense explicitly inform those subject to it of liability and penalties); United States v. UCO Oil Co., 546 F.2d 833 (9th Cir. 1976) (holding that separate offenses cannot be joined under one charge), *cert. denied*, 430 U.S. 966 (1977).

159. *See Schad*, 111 S. Ct. at 2497; Speiser v. Randall, 357 U.S. 513, 523 (1958) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964), in holding that a state may regulate procedures " 'unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' ").

In *United States v. Jones*, the court held that a defendant could not be convicted for possession of cocaine with intent to distribute when the defendant only possessed drug preparation equipment. The court relied upon *Schad* for the proposition that a defendant may not suffer criminal punishment unless the government has proven *specific* illegal conduct. United States v. Jones, 945 F.2d 747, 749 (4th Cir. 1991).

160. *Schad*, 111 S. Ct. at 2497-98.

161. 553 F.2d 453 (5th Cir. 1977).

162. *Id.* at 458.

163. *See Schad*, 111 S. Ct. at 2498-99; Manson v. State, 304 N.W.2d 729, 741 (Wis. 1981) (Abrahamson, J., concurring) (suggesting that one could feasibly put all six acts in one group as "trafficking in stolen vehicles"); *see, e.g.*, Rice v. State, 532 A.2d 1357, 1365 (Md. 1987) (declaring that the *Gipson* test lacks specificity); 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, 548-49 (1983) (putting forth the same criticisms).

164. *Schad*, 111 S. Ct. at 2499.

involved statutory alternatives that the law did not treat as individual crimes.[165]

Next, Justice Souter stressed the Court's obligation to defer to a state court's interpretation of its own criminal statute, provided that the interpretation is constitutional.[166] Justice Souter noted that the Arizona Supreme Court had already presumptively ruled that the statutory option of either theory of premeditated or felony murder did not unconstitutionally group two separate crimes under one statute.[167] Instead, the statutory alternatives determined only the single element of *mens rea*.[168] The plurality stated that the Court's only role in shaping Arizona's murder statute was to determine whether it was "fundamentally fair" and rational under the Due Process Clause.[169] History and widespread practice, argued the plurality, guide the Court in determining what is fundamentally fair.[170]

In exercising judicial restraint, the Court noted that it traditionally defers to the states on the interpretation of their criminal statutes and allows them to exclude certain facts necessary to prove a crime from the stringent standard of reasonable doubt.[171] Out of respect for state legislatures, Justice

---

165. *Id.*

166. *Id.*; *see also* Mullaney v. Wilbur, 421 U.S. 684, 690-91 (1975) (holding that "state courts are the ultimate expositors of state law"); Winters v. New York, 333 U.S. 507, 510 (1948) (noting that when a state court interprets and "cure[s]" an allegedly vague statute, the Court will uphold that interpreted meaning); Fox v. Washington, 236 U.S. 273, 277 (1915) (upholding the state's interpretation of a statute as not unconstitutionally vague); United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909) (holding that courts should interpret statutes to avoid constitutional questions).

167. *Schad*, 111 S. Ct. at 2499-500.

168. *Id.*

169. *Id.* at 2500; *see, e.g.*, Dowling v. United States, 493 U.S. 342, 352-53 (1990) (noting that the Due Process Clause has limited application beyond the Bill of Rights); United States v. Lovasco, 431 U.S. 783, 790 (1977) (discussing whether nonconstitutional methods such as the Federal Rules of Evidence should be applied to evaluate evidence or whether to evaluate such evidence according to basic justice); Rochin v. California, 342 U.S. 165, 170 (1952) (explaining that judges cannot go beyond their judicial scope and implement their own version of fairness), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (advocating that judges must evaluate matters for basic justice).

In interpreting the Due Process Clause, the Court has applied 3 theories: (1) total incorporation in which due process incorporates *all* of the Bill of Rights to the states, (2) fundamental fairness in which the Court protects all rights that are " 'so rooted in the traditions and conscience of our people as to be ranked fundamental,' " and (3) selective incorporation which emphasizes the fundamental nature of due process as a whole, not one requirement. *See* LAFAVE & ISRAEL, *supra* note 3, §§ 2.2-2.5. Since the 1960s, the Court has favored the selective incorporation doctrine, although the Court applied a fundamental fairness analysis in *Schad*. *See Schad*, 111 S. Ct. at 2500; *supra* note 2.

170. *Schad*, 111 S. Ct. at 2500.

171. *See id.* at 2500-01; Martin v. Ohio, 480 U.S. 228 (1987) (discussing self-defense as an affirmative defense); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (discussing whether the state can introduce evidence of possession of a firearm in the sentencing phase, rather than as an element of the offense which the prosecution must prove beyond a reasonable doubt); Pat-

Souter stressed that the Court must avoid "second-guessing" a state's interpretation of its statute.[172]

Applying deference to long-standing statutory construction, Justice Souter and the plurality found that the Arizona legislature did not abuse its discretion in defining the *mens rea* for first-degree murder as an option between premeditated murder and felony murder.[173] Continuing the English common law tradition which treated both premeditated and felony murder as having " 'malice aforethought,' " the Court noted that most American jurisdictions also group the alternative means together to satisfy the *mens rea* element.[174] Justice Souter conceded that although not every jurisdiction accepts this principle, a large number of state courts have ruled as the Court did in *Schad*, finding that due process does not require the jury to decide unanimously whether its theory of first-degree murder was premeditated murder or felony murder.[175]

Justice Souter contended that the issue in *Schad* was whether felony murder and premeditated murder could ever be morally equal, not whether they must always be so.[176] Based upon *Tison*,[177] Justice Souter contended that some individuals could hypothetically find such equivalence between the two theories of first-degree murder.[178] Furthermore, the plurality explained that although it prefers greater specificity in a jury verdict, the Court may only pass judgment on the constitutionality of a given statute.[179]

Justice Scalia concurred in the Court's opinion, agreeing that due process does not require the jury to agree unanimously upon premeditated murder or felony murder as a first-degree murder theory.[180] Justice Scalia, however, wrote a separate opinion to emphasize his belief that traditional statutes cannot defy due process because they define the concept.[181] Justice Scalia also expressly stated that the Court only has the power to review deviant proce-

terson v. New York, 432 U.S. 197, 207-09 (1977); Mullaney v. Wilbur, 421 U.S. 684, 701 (1975); *In re* Winship, 397 U.S. 358, 364 (1970).

172. *Schad*, 111 S. Ct. at 2501. "Decisions about what facts are material and what are immaterial . . . represent value choices more appropriately made in the first instance by a legislature than by a court. Respect for legislative competence counsels against judicial second guessing . . . ." *Id.* at 2500. *Cf.* Rostker v. Goldberg, 453 U.S. 57, 65 (1981). Past usage is not per se controlling. *Schad*, 111 S. Ct. at 2503.

173. *Schad*, 111 S. Ct. at 2501.

174. *Id.*; *see* JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 21-22 (New York, Garland 1980) (3d ed. 1883).

175. *Schad*, 111 S. Ct. at 2502. For various state cases supporting that proposition, see *supra* note 31.

176. *Id.* at 2503.

177. 481 U.S. 137 (1987); *see supra* notes 129-37 and accompanying text.

178. *Schad*, 111 S. Ct. at 2503.

179. *Id.* at 2504.

180. *Id.* at 2506 (Scalia, J., concurring).

181. *Id.* at 2506-07.

dures for due process violations, not long accepted practices.[182] Justice Scalia declared that the Court's duty is to interpret the Constitution as it presently exists, not to create a new one.[183]

B. The Dissent: Violation of Jury Unanimity

Justice White, writing for the dissent in *Schad*,[184] asserted that the plurality's holding denies a defendant his due process guarantee that requires the prosecution to prove beyond a reasonable doubt every element of the crime charged.[185] The Justice criticized the plurality because, although it deferred the ability to structure the crime to the states, it ignored the fact that, with the exception than an individual is unlawfully killed, premeditated murder and felony murder have entirely unrelated elements.[186] Justice White reasoned that a first-degree murder conviction based on alternative theories that contain different elements, results in a hollow jury verdict, albeit unanimous.[187]

Justice White noted that the felony murder doctrine requires a finding that an accused intended to and did participate in a felony that resulted in death.[188] In contrast, premeditated murder requires proof of a defendant's premeditated intent to kill.[189] Thus, Justice White concluded that the differences in conduct between the two theories were so pronounced that due process would not allow the *mens rea* of the one theory to act as the substitute for the *mens rea* of the other.[190] Justice White asserted that an intent to rob is not equivalent to a premeditated intent to kill.[191]

As a result of the disparate elements, Justice White noted that in *Schad* six members of the jury could have found the accused guilty of first-degree murder based on felony murder, whereas the other half could have found him guilty due to premeditation.[192] The dissent asserted that since felony

182. *Id.*

183. *Id.*

184. *Id.* at 2507-13.

185. *Id.* at 2508 (White, J., dissenting) (relying on *Winship* for the proposition that due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." 397 U.S. 358, 364 (1970)).

186. *See Schad*, 111 S. Ct. at 2508; *see supra* notes 20-29 and accompanying text.

187. *Id.* at 2510.

188. *Id.* at 2508.

189. *Id.* at 2509.

190. *See id.*; State v. Serna, 211 P.2d 455, 459 (Ariz. 1949), *cert. denied*, Serna v. Walters, 339 U.S. 973 (1950).

191. *Schad*, 111 S. Ct. at 2509 (implying that the plurality's reasoning in *Schad* drew this equation).

192. *Id. But see* State v. Boots, 780 P.2d 725, 728 (Or. 1989) (en banc) (stating that "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").

murder and premeditated murder contain materially different elements, a unanimous jury verdict may mean nothing more than that the jury agreed that an unlawful killing occurred.[193] Justice White asserted that the Arizona statute and similar state statutes create a "generic verdict," such that one is only "guilty of crime," not of any specified conduct.[194]

Justice White accused the plurality of confusing the *Winship* requirement of proof of the elements of a crime beyond a reasonable doubt with the lesser standard of proof required for the factual details of commission of a crime.[195] The Justice criticized the plurality for upholding a statute that did not require specific proof of premeditation or a felony to sustain a first-degree murder conviction based on premeditated or felony murder.[196] Once a statute establishes the elements of a crime, the Justice continued, the prosecution cannot shirk its duty to prove each of those elements.[197] Furthermore, Justice White argued that if a state legislature improperly defines a statute, due process does not allow the judiciary to rectify the problem through judicial interpretation.[198]

After noting that a premeditated murder conviction, in contrast to a conviction for felony-murder, requires that the accused be the actual killer and harbor intent to kill, the dissent pointed out that the unanimous jury verdict did not specify which of the two alternative theories the jury endorsed.[199]

---

193. *Schad*, 111 S. Ct. at 2509 (explaining that the verdict in such a situation fails to disclose whether the jury believed that the prosecution proved the two elements of felony murder or the three elements of premeditated murder beyond a reasonable doubt).

194. *Id.* at 2510.

195. *Id.* (distinguishing, for example, that the prosecution must prove the elements of burglary beyond a reasonable doubt, not the factual details of which tool the defendant used to break and enter). Under this view, the jury is not required to agree upon the basic factual issues which lead to the verdict. McKoy v. North Carolina, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring). *See* United States v. Horton, 921 F.2d 540, 546 (4th Cir. 1990) (holding that the jury does not have to agree whether a defendant was the principle or an accomplice), *cert. denied*, 111 S. Ct. 2860 (1991); United States v. Peterson, 768 F.2d 64, 67 (2d Cir.) (same), *cert. denied*, 474 U.S. 923 (1985); State v. Smith, 563 A.2d 671, 674 (Conn. 1989) (same); State v. Johnson, 545 N.E.2d 636, 645 (Ohio 1989) (disallowing a patchwork verdict because the acts were not conceptually different), *cert. denied*, 494 U.S. 1039 (1990).

196. *Schad*, 111 S. Ct. at 2510.

197. *See id.*; Evitts v. Lucey, 469 U.S. 387, 401 (1985) (holding that the Due Process Clause applies to discretionary state action); Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that when a homicide statute requires that a defendant have performed a crime knowingly or intentionally, the state cannot shift to the defendant the burden of proving lack of necessary intent); *supra* text accompanying notes 83-95.

198. *Schad*, 111 S. Ct. at 2511 (explaining that by tolerating such judicial interpretation, states could "escape federal constitutional scrutiny even when its actions violate rudimentary due process").

199. *See id.*; Tison v. Arizona, 481 U.S. 137, 158 (1987) (explaining that *Enmund* is satisfied when the defendant was a significant player in the underlying felony and exhibited reckless indifference to human life); Enmund v. Florida, 458 U.S. 782, 797 (1982) (prohibiting the

Despite this lack of disclosure, the sentencing judge in *Schad* assumed that Schad committed premeditated murder.[200] Since intent to kill satisfies the threshold requirement for a death penalty sentence, the judge was able to sentence the petitioner to death.[201]

Justice White explained, however, that the sentencing judge may have imposed the death penalty based upon a theory of premeditated murder even with no jurors believing that the prosecution had proven premeditation beyond a reasonable doubt.[202] Justice White argued that if the jury had convicted Schad because a murder occurred in the midst of a felony, *Enmund v. Florida*[203] required proof that the petitioner killed, intended to kill, inflicted deadly force upon, or attempted to kill the victim before the judge could deliver a death sentence.[204] Furthermore, under *Tison v. Arizona*,[205] a felony murderer may receive the death penalty if he played a significant role in the crime sequence and exhibited a reckless indifference for human life.[206] Yet, the jury's general verdict of guilty of first-degree murder offered no hint of such specific findings.[207] Thus, the judge's unfounded presumption of premeditated murder denied Schad his due process right to the procedural protections that the Court has developed to accompany death penalty sentencing.[208]

IV. JURY UNANIMITY AFTER *SCHAD*

A. Lack of Jury Unanimity Is Fundamentally Unfair

The issue in *Schad v. Arizona*[209] was whether a state legislature violates due process when it offers felony murder and premeditated murder as statu-

---

imposition of the death penalty unless the defendant killed, attempted to kill, intended that a killing occur, or used deadly force); text accompanying *supra* notes 120-37.

200. The sentencing judge announced, " 'The court finds beyond a reasonable doubt that the defendant attempted to kill Larry Grove, intended to kill Larry Grove and that defendant did kill Larry Grove.' " *Schad*, 111 S. Ct. at 2511 (quoting Transcript of Sentencing 8-9 (Aug. 29, 1985)).

201. The sentencing judge explained:

> "[T]here is not evidence to indicate that this murder was merely incidental to robbery. The nature of the killing itself belies that . . . . The victim was strangled to death by a ligature drawn very tightly about the neck and tied in a double knot. No other reasonable conclusion can be drawn from the proof in this case, notwithstanding the felony murder instruction."

Id. (quoting Transcript of Sentencing 8-9 (Aug. 29, 1985)).

202. *Id.*

203. 458 U.S. 782, 797 (1982); *see supra* notes 120-28 and accompanying text.

204. *Id.* at 797.

205. 481 U.S. 137 (1987). *See supra* notes 129-37 and accompanying text.

206. *Id.* at 158.

207. Schad v. Arizona, 111 S. Ct. 2491, 2511 (1991).

208. *Id. See* MODEL PENAL CODE § 210.2; *supra* notes 112-15 and accompanying text.

209. 111 S. Ct. 2491 (1991).

tory alternatives for a first-degree murder conviction.[210] If a jury must only agree unanimously that an unlawful killing occurred to convict a defendant of first-degree murder then the *Winship* requirement that the prosecution prove each element of the offense beyond a reasonable doubt becomes meaningless.[211] The plurality refused to recognize that murder in the midst of a felony and premeditated murder involve radically different patterns of conduct and mental states, each with distinct sentencing considerations.[212] In the plurality opinion, Justice Souter justified the decision in *Schad* by analogizing to indictments, which also allow multiple allegations and do not require the jury to agree upon the specific act performed.[213] However, an indictment only formally charges a defendant with a crime; it does not deprive him of his life.[214] As such, the death penalty holds a unique concern

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

211. *Id.* at 2509. In a similar Arizona case, the state prosecuted on three theories: premeditated murder, felony murder based on robbery, and felony murder based on kidnapping. State v. Smith, 774 P.2d 811, 817 (Ariz. 1989) (emphasizing the seriousness of the death penalty and the desirability of verdict forms for the jury to indicate its chosen theory of first-degree murder). The Arizona Supreme Court in *Smith* found fundamental error in that the trial judge did not instruct on either of the underlying felonies. *Id.* As a result, the court reversed the petitioner's conviction because the general jury verdict did not specify whether the jury based its verdict on premeditated murder or felony murder, for which the jury instructions were insufficient. *Id.* at 712.

General jury instructions on unanimity are not always sufficient. State v. Parker, 592 A.2d 228, 232 (N.J. 1991), *cert. denied*, 112 S. Ct. 1483 (1992); *see* United States v. North, 910 F.2d 843 (D.C. Cir.) (refusing Oliver North's request for specific instructions from the trial court because he was charged under one count with destroying, altering, and removing official documents), *vacated in part and rev'd in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991); United States v. Echeverry, 719 F.2d 974, 975 (9th Cir. 1983) (holding that the trial court must issue jury instructions requiring specific unanimity if there is a risk of jury confusion or if the jurors may split on the acts committed by a defendant); People v. Melendez, 224 Cal. App. 1420, 1433-34 (1990) (noting the insufficiency of a general unanimity charge when an act can be proven by relying upon different theories and it is probable that jurors will not agree upon one theory); *supra* notes 96-106 and accompanying text. The trial court must issue jury instructions on specific unanimity if there is a probability of fragmentation among the jury. *North*, 910 F.2d at 875.

212. *Schad*, 111 S. Ct. at 2510-11. *See also* Tison v. Arizona, 481 U.S. 137, 158 (1987) (declaring that reckless indifference to human life satisfied the *mens rea* for felony murder and justifies the imposition of the death penalty if the defendant was a major participant in the events leading to the murder); Enmund v. Florida, 458 U.S. 782, 797 (1982) (requiring intent to kill as a prerequisite for the death penalty); United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (concerning the types of action which can be grouped as one *actus reus*); *supra* notes 96-106, 120-37 and accompanying text.

213. *Schad*, 111 S. Ct. at 2496-97. *See supra* notes 152-53 and accompanying text. *But see* United States v. Beros, 833 F.2d 455, 462 (3d Cir. 1987) (holding that the government must prove at least one of the multiple theories of an indictment beyond a reasonable doubt to the jury).

214. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES & CONCEPTS § 23.02(a) (2d. ed. 1986). The law requires less proof for an

within the criminal justice system that one cannot accurately compare with pre-trial stages of prosecution.[215]

Justice Souter's treatment of the *mens rea* as equivalent to the *actus reus* is illogical.[216] Although several different acts may constitute the *actus reus* for a particular crime, it does not follow that a variety of mental states, each composed of separate elements, can satisfy the necessary *mens rea* requirement.[217] The *mens rea* is more specific and the most decisive element in modern day criminal justice.[218] The law cannot procedurally interchange one mental state with another.[219] Assuming sufficient proof of the requisite *actus reus* of a crime, a jury can convict a defendant only upon sufficient proof of the necessary intent, unless a strict liability crime such as felony murder is at issue.[220] As Justice White asserted in his dissent, the intent to rob does not reflect the same culpability as the intent to kill.[221] The *mens rea* to commit robbery is *not* the same *mens rea* for first-degree murder;[222]

---

indictment than to convict a defendant. Some jurisdictions require a probable cause standard for indictment, whereas others require a prima facie case. *Id.*

215. Capital cases are on a "different footing" than other crimes because it is the difference "between life and death." Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) (arguing that more "process" is "due" to a capital defendant than to a defendant on a non-capital crime). Furthermore, the death penalty is "unique in its severity and irrevocability." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (holding that the death penalty is not too severe a punishment for murder). When the life of the accused hangs in the balance, the Court is extremely careful to ensure that every procedural safeguard is properly administered. *Id.*

216. Except for strict liability offenses, proof of the specific *mens rea* is a prerequisite to guilt. LAFAVE & ISRAEL, *supra* note 3, § 3.5(e). The plurality relied upon State v. Serna, 211 P.2d 455, 459 (Ariz. 1949) (holding that the attempt to commit robbery involves the same level of culpability as premeditation), *cert. denied*, Serna v. Walters, 339 U.S. 973 (1950). *Schad*, 111 S. Ct. at 2497 (plurality opinion).

217. The dangers of substituting *mens rea* is further complicated by the various subdivisions of intent which courts have created—" 'criminal,' " " 'constructive,' " " 'general,' " and " 'specific,' "— each of which has a unique meaning. LAFAVE & ISRAEL, *supra* note 3, § 3.5(e) (quoting some of the many words that courts have used to qualify "intent"). Furthermore, even within the *actus reus* element, the Court rejected the *Gipson* "groupings" test because it sought a more specific verdict. *Schad*, 111 S. Ct. at 2498-99.

218. A jury cannot convict an accused of an offense which he indisputably committed if he did not have the necessary *mens rea*, unless it was a strict liability offense. *See* Hopkins, *supra* note 24, at 397.

219. *Schad*, 111 S. Ct. at 2509. The Court looked "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," as opposed to retaining "a degree of flexibility in defining the 'fact[s] necessary to constitute the crime' under *Winship*." *Id.* (alteration in original) (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

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

221. Justice Souter declared, however, that "[i]t is particularly fanciful to equate an intent to do no more than rob with a premeditated intent to murder." *Schad*, 111 S. Ct. at 2509.

222. *Id.* at 2508. Justice White elaborated on this dichotomy:

> Here, the prosecution set out to convict petitioner of first-degree murder by either of two different paths, premeditated murder and felony murder/robbery. Yet while

the *mens rea* for premeditated murder reflects a more culpable state of mind.[223] The felonist who kills while robbing may not bear malice, intend to kill, or reflect upon a desire to kill.[224] Typically, he merely has a desire to rob—a profoundly different *mens rea* than that of premeditated murder.[225]

The plurality admitted that legislatures must not draft overly broad or vague statutes that fail to inform people of average intelligence of the conduct that the law forbids.[226] The plurality, however, did not discount the *Gipson* " 'distinct conceptual groupings' " test as a method for conceptualizing similar acts to satisfy the *actus reus*.[227] Rather, the plurality found the *Gipson* test too impractical and abstract for a trial court to apply.[228] The plurality conceded that although it found the Arizona first-degree murder statute to be constitutional, the statute was unnecessarily broad, vague, and general.[229] In contrast, the dissent does not oppose all statutes that offer alternative theories, only those statutes that criminalize materially different types of conduct.[230]

---

these two paths both lead to a conviction for first-degree murder, they do so by divergent routes possessing no elements in common except the fact of a murder.

Id. *See also* LAFAVE & SCOTT, *supra* note 16, § 7.5. *But see* State v. Serna, 211 P.2d 455, 459 (Ariz. 1949) (equating the mental state in robbery with premeditation in murder), *cert. denied*, Serna v. Walters, 339 U.S. 973 (1950).

223. *See supra* note 222.

224. The *mens rea* for first-degree murder is imputed to him, however, by his "intent to commit . . . the underlying felony." *Schad*, 111 S. Ct. at 2508.

225. *Id.* Punishing a desire to rob as a desire to kill violates the accused's right to a unanimous jury verdict on elements of a crime that the prosecutor must prove beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 364 (1970); Crowley, *supra* note 5.

226. *Schad*, 111 S. Ct. at 2497 (plurality opinion). However, vagueness principles do not limit generic verdicts.

> Although our vagueness cases support the notion that a requirement of proof of specific illegal conduct is fundamental to our system of criminal justice, the principle is not dependent upon or limited by concerns about vagueness. A charge allowing a jury to combine findings of embezzlement and murder would raise identical problems regardless of how specifically embezzlement and murder were defined.

Id. at 2498 n.4.

227. *Id.* at 2498 (quoting United States v. Gipson, 553 F.2d 453, 456-59 (5th Cir. 1977)). The Court described groupings as "too indeterminate to provide concrete guidance to courts." *Id.*

228. *Id.* Thus, the Court did not reject the idea of such "groupings," but found them to be unworkable in practice. *Id.* at 2498-99.

229. Justice Souter noted that the plurality did not "suggest that jury instructions requiring increased verdict specificity are not desirable." *Id.* at 2504.

230. Justice White declared, "[t]he problem is that the Arizona statute, under a single heading, criminalizes several alternative patterns of conduct." *Id.* at 2509 (White, J., dissenting).

In *Schad*, the plurality played an unduly passive role in reviewing the state's statutory construction.[231] First, the Court asserted that it must defer to a state's initial interpretation of its statutes.[232] Then, the Court declared that a state statute's longevity entitles it to further deferential construction.[233] The Court's reasoning seems circular. A statute does not automatically satisfy due process solely by virtue of its longevity.[234] Indeed, the statute's longevity might be a factor simply because the Court deferred in ruling on its initial constitutionality.[235] By necessity, due process and its requirements must evolve with the changing values of society.[236] Accordingly, the Court must periodically evaluate statutes—and modify them

---

231. Perhaps the original Pennsylvania statute in 1794 violated due process but was implemented because the Court refused to intervene. *Id.* at 2502 (plurality opinion); *see supra* note 58.

232. *See supra* note 172.

233. The Court elaborated on the significance of historical support:

> Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

Schad, 111 S. Ct. at 2501 (footnote omitted).

234. As stated in the frequently quoted lines from Justice Holmes:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver W. Holmes, *Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

In contrast, the plurality insisted that historical or widespread acceptance is a "concrete indicator [ ] of what fundamental fairness and rationality require." *Schad*, 111 S. Ct. at 2501 (plurality opinion). Justice Scalia argued that "[i]t is precisely the historical practices that *define* what is 'due.' 'Fundamental fairness' analysis may appropriately be applied to *departures* from traditional American conceptions of due process." *Id.* at 2507 (Scalia, J., concurring).

235. *Id.* at 2500 (plurality opinion). Such an inference finds support from the Court's historical hesitancy to "intrude upon the administration of justice by the individual States." Patterson v. New York, 432 U.S. 197, 201 (1977); *cf.* Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

236. "Due process, as th[e] Court often has said, is a flexible concept that varies with the particular situation." Zinermon v. Burch, 494 U.S. 113, 127 (1990). Despite argument that the procedural reach of due process originally protected only those "rights recognized by historical usage," the Court has consistently interpreted the requirement of due process with "flexibility and breadth." LAFAVE & ISRAEL, *supra* note 3, 2.4(a).

For example, prior to 1868, the Fourteenth Amendment did not exist. In *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833), the Court ruled that the Bill of Rights did not apply to the states. Instead, each state must establish a constitution of its own. *Id.* If the Framers had intended that a constitutional provision apply to the states, it was so noted. *See* LAFAVE & ISRAEL, *supra* note 3, § 2.2. The ratification of the Fourteenth Amendment also reflected the changing values of society by granting citizenship to all blacks previously denied citizenship because they were slaves. *See id.*; *see also* Scott v. Sanford, 60 U.S. 393, 397 (1857).

where appropriate—in order for society to progress.[237] The Court in *Schad* upheld the grouping of felony murder and premeditated murder under one statute, reasoning that a defendant guilty of either crime could in some circumstance have achieved the same level of culpability.[238] The plurality, however, did not assert that the crimes are always equal, and state legislatures should not treat them as such.[239] Rather than drafting its statutes with alternative theories based upon theoretical possibilities and speculations, state legislatures should group together only those acts that customarily rise to the same level of culpability.[240]

B. The Resounding Echo of Schad*'s Hollow Unanimity*

Due process as espoused in *Winship* requires that the prosecutor prove *every* fact necessary to constitute the alleged crime beyond a reasonable doubt.[241] Thus, when a single statute authorizes the death sentence for both premeditated murder and felony-murder, it reduces due process, jury unanimity, and the reasonable doubt standard to mere rhetoric.[242]

The strict liability of felony murder automatically transfers the *mens rea* from the underlying felony to the more serious felony of first-degree murder.[243] Although the law derives the *mens rea* for felony murder and premeditated murder from different sources,[244] it is the grouping of these mental states together as one crime that defeats the due process protections offered by jury unanimity and reasonable doubt.[245] Since murder in the

237. If, as Justice Scalia asserted in his concurrence, historical practice defines due process, the Court's inquiry ends. *See Schad*, 111 S. Ct. at 2506-07; text accompanying *supra* notes 180-83. *But see supra* note 234. The Court defines infractions that violate "fundamental fairness" very narrowly. Dowling v. United States, 493 U.S. 342, 352-53 (1990) (defining the categories).

238. *Schad*, 111 S. Ct. at 2503. The plurality also admits that everyone need not agree that the *mens rea* for premeditated murder and the *mens rea* for felony murder are moral equivalents. Such equivalence need only be reasonably found. *Id.* at 2503-04.

239. *Id.*

240. As such, the legislature should punish alternative patterns of conduct according to separate statutes. *Id.* at 2509 (White, J., dissenting).

241. *Id.* at 2508; *In re* Winship, 397 U.S. 358, 364 (1970).

242. *See Schad*, 111 S. Ct. at 2508-11; *see also supra* notes 78-82 and accompanying text.

243. *See* Sudduth, *supra* note 110, at 1326-27 (1984) (arguing that felony murder is unconstitutional because the punishment is not proportional to the criminal act); *supra* note 24.

244. *See supra* note 24. Both theories lead to a conviction of the crime of first-degree murder, but they do so by different routes because the elements are objectively different. *Schad*, 111 S. Ct. at 2508.

245. *Id.* at 2509. The concurrence admits that the plurality offered no reason why the two theories need to be joined under one statute. *See id.* at 2507 (Scalia, J., concurring). Acts which go under one "label" can be one offense and not violate the Constitution. If, however, there is no way to group generically the two theories, they are not acceptable. *See generally* Trubitt, *supra* note 163, at 559 (providing a background on jury theory, one's constitutional right to trial by jury, and the validity of patchwork verdicts).

midst of a felony and intentional murder are inherently different crimes with dissimilar sentencing considerations,[246] due process should treat the two as separate offenses and require the state to prosecute them as such.[247] However, where treated as one crime, the Court should not allow generic jury verdicts because, although unanimous, they devalue jury verdicts and the penal system as a whole.[248] Instead, due process should require the jury to attain unanimity upon the specific offense that the prosecution has proven beyond a reasonable doubt.[249] Furthermore, because of the severity of capital punishment, it should be subject to a more rigorous standard of proof.[250] By allowing state legislatures to combine alternative theories of first-degree murder that share little in similarity, the Court dilutes this stringent standard of proof because the jury is not required to achieve a truly unanimous verdict.[251]

The plurality in *Schad* intimated a desire for greater specificity in unanimous jury verdicts[252] and noted that at a minimum, a defendant has a due process right to know the crime of which a jury has convicted him.[253] However, under *Schad*, even after an appeal to the Supreme Court, a defendant may still be unsure of which theory the jury supported when it delivered its generic unanimous verdict: murder in the midst of robbery or cold-blooded

246. *See Schad*, 111 S. Ct. at 2510-11.

247. *See id.* at 2509 (White, J., dissenting); *see also* Stein, *supra* note 116, at 1786. If the defendant is guilty of premeditated murder, the prosecutor should have to prove it as a separate offense from felony murder, and the jury should have to agree unanimously upon that offense. *See Schad*, 111 S. Ct. at 2508-09. This would be another way to effectuate the modern trend to limit the felony murder doctrine. *See supra* notes 112-15 and accompanying text. If the prosecutor is unable to prove the *mens rea* for premeditated murder, due process should require him to focus upon proving the separate crime of felony murder upon which the jury must unanimously agree. The verdict would not properly inform the defendant of the crime of which a jury convicted him. *See Schad*, 111 S. Ct. at 2509.

248. A jury that unanimously agrees that someone was killed carries no impact. *See Schad*, 111 S. Ct. at 2497-98 (plurality opinion) (stating that a person cannot be generically charged with "[c]rime;" due process requires that the prosecution allege a more specific infraction). In criminal cases, patchwork verdicts should only be tolerated where a single offense is charged. *See* Trubitt, *supra* note 163, at 559; *supra* note 96.

249. *See Schad*, 111 S. Ct. at 2509 (White, J., dissenting); *In re* Winship, 397 U.S. 358 (1970).

250. *See* Crowley, *supra* note 5, at 1073. Before the death penalty becomes a viable option, the law creates an additional threshold requirement of aggravating circumstances that must be satisfied. *Schad*, 111 S. Ct. at 2511; *see* MODEL PENAL CODE § 7.7 (discussing premeditated and felony murders); LAFAVE & SCOTT, *supra* note 16, § 7.7 (discussing premeditated and felony murders); *supra* note 110 and text accompanying notes 116-37.

251. The Arizona legislature exceeded the confines of due process by combining the two offenses under one statute. *See Schad*, 111 S. Ct. at 2511.

252. *See id.* at 2504 (plurality opinion).

253. *Id.* at 2497-98.

premeditated murder.[254] Accordingly, a defendant who wishes to appeal his death sentence based on a first-degree murder statute such as Arizona's would have to defend himself against both theories, each containing disparate elements.[255] Even more frightening is the possibility that, as in *Schad*, the sentencing judge may make the assumption that one theory prevailed in the jury's generic unanimous verdict, although in reality it may not have received any such support.[256] Due to the shroud covering jury deliberations, a defendant and the general public will never know the true vote of the jury.[257]

V. CONCLUSION

Due process requires that the prosecutor prove every element of a crime beyond a reasonable doubt before a unanimous jury may convict an accused of a capital offense. Because of the value of human life and the material differences that exist between felony murder and premeditated murder, due process should require the jury to agree unanimously upon the specific offense. When the two theories are used as interchangeable alternatives, the

254. The petitioner in *Schad* fell into this category. When a jury delivers a general verdict, the law presumes that it is based upon any charge to which the proof applies. People v. Lymore, 185 N.E.2d 158, 159 (Ill. 1962), *cert. denied*, 372 U.S. 947 (1963); People v. Feagans, 457 N.E.2d 459, 465 (Ill. App. Ct. 1983); *see* People v. Travis, 525 N.E.2d 1137, 1149 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 260 (Ill. 1988), *cert. denied*, 489 U.S. 1024 (1989). However, the sentencing judge decided that the jury had convicted Schad based on the theory of premeditated murder. *Schad*, 111 S. Ct. at 2511 (1991) (White, J., dissenting). *See* text accompanying *supra* note 187.

255. *See Schad*, 111 S. Ct. at 2495 (plurality opinion); Stein, *supra* note 116, at 1789 (declaring that "the unique nature of the death penalty requires that every death penalty candidate be given individual consideration").

256. *See Schad*, 111 S. Ct. at 2511 (White, J., dissenting); *supra* note 200 and accompanying text. This situation runs contrary to the due process requirement espoused in *Winship* that the prosecutor prove each element of the crime beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 364 (1970). Furthermore, with respect to the Cruel and Unusual Punishments Clause of the Eighth Amendment, "[a] penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1969) (asserting that the death penalty violates the Eighth Amendment). *See* Coker v. Georgia, 433 U.S. 584, 591-92 (1977) (holding that the Eighth Amendment rejects the death penalty for the crime of rape of an adult woman because it is "excessive"); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion) (holding the sentencing judge must consider any mitigating evidence that the defendant wishes to present). A majority of the Court adopted the *Lockett* plurality opinion. Eddings v. Oklahoma, 455 U.S. 104, 117 (1982).

257. United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977). The secrecy of jury deliberations prevents any investigation to inform the accused of how the jurors cast their votes. *Id.* The public may only question the jury on matters related to outside influences affecting the deliberations. FED. R. EVID. 614. *See* Stein, *supra* note 116, at 1806 (concluding tht "[t]he death penalty cases of the 1970s demonstrate that the Supreme Court will not accept a statute that allows the death penalty be be imposed arbitrarily").

resultant jury unanimity lacks significance as the jury may have agreed only that a killing took place. In *Schad v. Arizona*, the plurality held that due process is satisfied when a jury reaches a unanimous verdict based on a statute that groups felony murder and premeditated murder together. Such statutes, offering alternative theories composed of materially different elements, deny due process because they do not require the prosecutor to prove *each* element beyond a reasonable doubt. As a result, the jury achieves a generic unanimity that is not only undecipherable to the defendant but ambiguous in the appeal process as well.

In contrast to earlier stages of criminal prosecution, the death penalty is too final a punishment to be based on a generic verdict. Due process must require the prosecutor to meet a more stringent standard in a death penalty case, not a lighter burden of proof. Since the crucial element of culpability is most often defined as intent, the law should not transfer, substitute, or derive intent based upon alternative theories. Due process requires that a defendant is innocent until proven guilty. Thus, for a death sentence, due process requires that the jury unanimously agree upon the *mens rea* as well as the *actus reus*. Without such unanimity on the elements of a crime, jury unanimity is a due process sham.

Elizabeth R. Carty