Alternative Theories of the Crime

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INTRODUCTION

Criminal liability depends on facts. To convict a defendant, a federal jury must unanimously find "proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged."[1] Yet this celebrated legal standard does not identify *which* facts are necessary to conviction and must be found unanimously. Murder, for example, is still a crime regardless of when it occurs, who the victim is, or how it is accomplished. But can jurors disagree on crucial facts—whether the defendant murdered *X* on Tuesday or *Y* on Wednesday,[2] whether the victim was strangled or run over by a bulldozer[3]—and still convict the defendant of murder *tout court*? Or must even trivial disputes, such as whether the murderer held the gun in his left or right hand, always invalidate a "patchwork verdict" of guilt?[4]

The problem is far from academic. In the celebrated obstruction-of-justice trial of Arthur Andersen, LLP, the prosecution advanced three

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1. *In re* Winship, 397 U.S. 358, 364 (1970) (emphasis added); *see* Johnson v. Louisiana, 406 U.S. 356, 369-70 (1972) (Powell, J., concurring) (collecting cases concerning the unanimity requirement); *see also* FED. R. CRIM. P. 31(a) (requiring unanimity). The Court has not incorporated the unanimity requirement against the states, *see* Apodaca v. Oregon, 406 U.S. 404 (1972), although many states do provide for unanimous juries. This essay therefore largely focuses its analysis on the federal system, though its reasoning will frequently be applicable to the states as well.

2. *Cf.* Schad v. Arizona, 501 U.S. 624, 651 (1991) (Scalia, J., concurring in the judgment) ("We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts.").

3. *Cf.* Tabish v. State, 72 P.3d 584, 597 (Nev. 2003) ("[W]hen conflicting or alternative theories of criminal agency are offered through the medium of competent evidence, the jury need only achieve unanimity that a criminal agency in evidence was the cause of death; the jury need not achieve unanimity on a single theory of criminal agency.")

4. For the origin of the term, see Comment, *Right to Jury Unanimity on Material Fact Issues:* United States v. Gipson, 91 HARV. L. REV. 499, 503 (1977) [hereinafter *Gipson* Comment].

different theories of the element of "corrupt persuasion," each involving a different Andersen employee undertaking entirely separate acts.[5] In response to a query,[6] the court told the jury it must agree as to whether "at least one Andersen [employee] acted corruptly to persuade others to destroy documents, but you need not agree unanimously [that] it was the *same* agent of Andersen who acted corruptly"[7]—a decision that has been harshly criticized.[8]

Indeed, every trial contains the possibility of "alternative theories of the crime"—of inconsistent factual scenarios taken by different jurors to be the basis of guilt.[9] A shared belief that the defendant has done something-or-other against the law will not suffice; it is "an assumption of our system of criminal justice . . . that no person may be punished criminally save upon proof of some specific illegal conduct."[10] Yet no indictment could possibly specify all the facts relating to a criminal offense, nor could any jury agree on

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5. *See* David N. Cassuto, *Crime, War & Romanticism: Arthur Andersen and the Nature of Entity Guilt*, 13 VA. J. SOC. POL'Y & L. 179, 210 (2006) ("In Andersen, the prosecution . . . . suggested that it could have been [David] Duncan's directing subordinates to shred, [Nancy] Temple's emails regarding the document retention policy . . . , or [Michael] Odum's video presentation encouraging the destruction of audit workpapers . . . .").

6. *See* Stacey Neumann Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 462 (2004) ("If each of us believes that one Andersen agent acted knowingly and with corrupt intent, is it [necessary] for all of us to believe it was the same agent? Can one believe it was Agent A, another believe it was Agent B, and another believe it was Agent C?").

7. Sterling P.A. Darling, Jr., *Mitigating the Impressionability of the Incorporeal Mind: Reassessing Unanimity Following the Obstruction of Justice Case of* United States v. Arthur Andersen, L.L.P., 40 AM. CRIM. L. REV. 1625, 1648 (2003) (quoting Carrie Johnson, *Key Ruling Made on Andersen; Judge Says Jury Need Not Agree on Culprit*, WASH. POST., June 15, 2002, at A1).

8. *See, e.g.*, Cassuto, *supra* note 5; Darling, *supra* note 7.

9. This essay does not address inconsistent scenarios in acquittals, as juries need not agree on the factual basis for an acquittal. A "not guilty" verdict is appropriate even when some jurors believe the defendant is guilty, if the evidence fails to meet the reasonable doubt standard.

10. *Schad*, 501 U.S. at 633 (Souter, J.) (plurality opinion). All subsequent mentions of *Schad* will refer to the plurality opinion unless otherwise indicated.

them. And the courts have recognized no workable measure of the factual agreement required for a unanimous "guilty" verdict.

The Supreme Court has considered the question twice in the last sixteen years[11]—first in *Schad v. Arizona*[12] and later in *United States v. Richardson*[13]—without formulating an effective test. Indeed, the *Schad* plurality was "convinced . . . of the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution."[14] *Schad* instead relied on "a long-established rule of the criminal law"—one found among the Federal Rules of Criminal Procedure—that an indictment need not specify "which overt act, among several named, was the *means* by which a crime was committed."[15] The plurality applied the same logic to the jury, which it required to be unanimous only as to the *elements* of the crime as defined by the legislature.[16]

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11. The question was raised earlier in a concurrence by Justice Blackmun, but he reached no affirmative resolution of the issue. *Compare* McKoy v. North Carolina, 494 U.S. 433, 459 (1990) (Blackmun, J., concurring) (noting that "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line," and that "[p]lainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict"), *with id.* at 459 n.5 ("[T]he Courts of Appeals are in general agreement that '[u]nanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a *requirement of substantial agreement* as to the principal factual elements underlying a specified offense.'" (citations omitted) (emphasis added)).

12. 501 U.S. 624.

13. 526 U.S. 813 (1999).

14. *Schad*, 501 U.S. at 637.

15. *Id.* at 631 (emphasis added); *see* FED. R. CRIM. P. 7(c)(1) ("A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means."); *see also Richardson*, 526 U.S. at 817 ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, [or] which of several possible means the defendant used to commit an element of the crime.").

16. *Schad,* 501 U.S. at 632 ("We see no reason, however, why the rule that the jury need not agree as to mere means of satisfying the actus reus element of an offense should not apply equally to alternative means of satisfying the element of mens rea.").

But *Schad* did not abandon the field to legislative choice. Just as the Court sought in *Mullaney v. Wilbur*[17] and *Patterson v. New York*[18] to distinguish elements from affirmative defenses, or in *Apprendi v. New Jersey*[19] and *Blakely v. Washington*[20] to divide elements from sentencing factors, it struggled in *Schad* and *Richardson* to articulate a constitutional boundary between the elements of an offense and the means used to commit it. Although legislatures may normally define the elements of a crime as they please, *Schad* held that sometimes the "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses."[21]

Unfortunately, *Schad*'s redefinition of the problem did little to resolve it. The plurality was equally convinced of the "impossibility of determining, as an *a priori* matter, whether a given combination of facts is consistent with there being only one offense."[22] As Part I shows, the standards imposed by *Schad* and *Richardson* fail to account for many cases of juror disagreement (raising precisely the same concerns of unfairness) that arise under ordinary and familiar criminal statutes. Worse, as Part II discusses, the *Schad-Richardson* approach rests on ambiguous constitutional foundations, resting in an unclear no-man's-land between substantive and procedural due process. The current doctrine therefore places unclear limitations on the legislature's power to define criminal offenses, limitations that will never be seriously enforced. Indeed, the doctrine seems scarcely better than it was forty years ago, when then-Professor Ruth Bader Ginsburg wrote (in the context of civil verdicts) that the boundaries between "'evidentiary facts' on which jury

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17. 421 U.S. 684 (1975).

18. 432 U.S. 197 (1977).

19. 530 U.S. 466 (2000).

20. 542 U.S. 296 (2004).

21. *Schad*, 501 U.S. at 633.

22. *Id.* at 638.

agreement is not required, [and] so-called 'ultimate facts' on which the jury must reach unanimity . . . are notoriously obscure."[23]

The problem of alternative theories of the crime is a serious one. Yet it is a problem capable of solution, which this essay seeks to provide. The reason why courts and commentators have not yet produced a workable answer is that, with perhaps one exception,[24] they have been asking the wrong question. *Any* definition of a criminal offense will designate some essential elements while leaving other facts unspecified. What matters is not the scope of the criminal offense, as defined by the legislature, but rather the nature of the factual beliefs held by the jurors. The unique danger raised by alternative theories of the crime is that of "factual nonconcurrence"—that a jury may reach a unanimous verdict of "guilty" without any substantive consensus as to a defendant's criminal acts.

To prevent such disagreement, then, the law ought to concern itself with the nature of the jurors' beliefs. When a defendant is accused of employing one of two alternate means of committing a crime, *A* or *B*, the jury should not be able to convict through a patchwork of a few votes for *A* and a few votes for *B*. Part III therefore introduces a distinction, borrowed

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23. Ruth B. Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 COLUM. L. REV. 256, 259 (1965). Justice Ginsburg was not on the Court at the time of *Schad*, but she joined the dissent in *Richardson*.

This essay will focus on the criminal system, in which which the unanimity requirement and the concern for unjust convictions are particularly strong. However, the analogous problem of alternative theories of civil liability has been discussed for almost two centuries. *See* Parrott v. Thacher, 26 Mass. (9 Pick.) 426, 439 (1830) ("If there are three distinct grounds upon which an action can be maintained, all independent of each other, and four only of the jury agree upon each, I do not see how they can amalgamate their opinions and make a legal verdict out of them."); Wheeler v. Schroeder, 4 R.I. 383, 383 (1856) (reporter's headnote) ("Where two or more grounds of action or of defense are taken under the same issue, it is proper for the court, in its discretion, to direct the jury specially to declare upon what ground their verdict is found; in order to ascertain, whether a particular direction of the court, in matter of law, affected or not the verdict.").

24. *See* Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 MO. L. REV. 1 (1993); *see also infra* Part III.

from the field of epistemology, between two types of belief in a set of alternatives.

The first type, which I call a "dependent" belief, is held only in virtue of belief in a particular alternative. For instance, I might hold a dependent belief that "the traffic light is green or red" in virtue of (by inference from, depending on) my belief that "the light is red." The more general belief in the set of alternatives is *dependent* on the identification of a particular color.

The second type, which I call an "independent" belief, concerns the set of alternatives as a whole; it does not depend for its truth on any particular alternative. For instance, a colorblind man might be unable to distinguish green lights from red ones. Yet he might still hold an independent belief that "The traffic light is green or red" in virtue of a belief that "The light is working, and it's not yellow"; this a chain of reasoning that is *independent* of a positive belief in either alternative.

The application to alternative theories of the crime should be clear. A juror might hold a dependent belief that a defendant committed a crime by means *A* or by means *B* based on evidence of *A* or *B* in particular; or she might hold an independent belief based on evidence showing that *one* of *A* or *B* must have been the case, without necessarily indicating which. The concept of an independent belief identifies the conditions under which the jurors' potential disagreement would be irrelevant to the question of guilt or innocence.

Only the evidence in a particular case can determine whether these conditions exist. Jurors might form dependent beliefs on one evidentiary record and independent beliefs on another. This feature explains *Schad*'s difficulty in distinguishing elements from means "as an *a priori* matter" given the nature of the offense.[25] As Part IV discusses, this feature also indicates a practically feasible method of addressing the problem: through a set of jury instructions, the usual way we address fact-specific questions of evidence and belief. Adopting the model of lesser-included-offense instructions, which are only available based on the particular evidence introduced, special unanimity

25. *Schad*, 501 U.S. at 638.

instructions could be given when and only when the evidence merits them. Such a system would not only be theoretically coherent, but it would also be minimally disruptive to existing trial procedure.

Finally, Part V considers various objections to the proposed test, and responds to them by examining the potential values served by a rule against nonconcurrence.

In large part, this essay is an attempt to systematize and explain what I believe to be common intuitions concerning alternative theories of the crime. While my analysis may fail to persuade those who lack such intuitions at the outset, a sufficient number of judges and scholars have been troubled by the issue to suggest that it deserves resolution. Though I argue that my particular proposal advances constitutional principles, I do not claim that it is constitutionally required—only that it is sufficient to exhaust any demands the Constitution might impose on the distinction between elements and means. My proposal would thus alleviate the constitutional concerns expressed in *Schad* and *Richardson* without infringing on the legislature's traditional power to define the elements of a crime.

I. THE PROBLEM, STATED

Every statutory definition of an offense identifies certain facts as elements and leaves others unspecified. For instance, the Model Penal Code defines negligent homicide as "negligently caus[ing] the death of another human being."[26] This plain statement of the elements ignores an infinite number of potential facts concerning the defendant's conduct. The defendant might have been negligent by failing to watch the road or failing to maintain the brakes; the act could have occurred at 7 p.m. or 8 p.m., in Baltimore or Buffalo. While some of these alternative possibilities are critical to the jury's verdict, others may safely be ignored. The task of this essay is to help discern which is which.

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26. MODEL PENAL CODE § 210.1(1); *id.* § 210.4(1).

To explain the problem, this Part proceeds in four Sections. First, it examines the most common requirement found in the case law: that the jury must be unanimous as to the elements of the particular offense charged, as defined by the legislature (the "distinct crimes" or "distinct offenses" test). Second, it analyzes and critiques the ways in which the Supreme Court has restricted legislatures' power to define elements and means. Third, it shows that the various proposed standards of factual specificity fail to reach sensible results in many cases. Fourth and finally, it describes how this theoretical uncertainty has led to the doctrine's underenforcement (if not abandonment) by the lower courts.

A. The Distinct Offenses Test

The most basic constraint of the current doctrine is that alternative theories must concern, in the language of the Double Jeopardy Clause, the "same offense." Consider the following two scenarios, both involving the crime of murder:

> *Example 1—"Tuesday or Wednesday."* *D* is accused of murdering either *X* on Tuesday or *Y* on Wednesday.[27] The prosecution charges *D* with a single count of murder, presents both theories as alternative means, and puts on the stand one eyewitness as to each. Six jurors believe beyond a reasonable doubt that *D* murdered *X*, but they do not find the other witness credible, and thus do not believe that he murdered *Y*. The other six believe the opposite. All vote to convict.
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> *Example 2—"Shooting or Drowning."* *D*, the ship's cook, is accused of shooting the first mate with a pistol and then throwing him into the sea. The prosecutors are uncertain as to whether the mate's death was caused by the gunshot or by drowning, and the indictment charges murder by both means.[28] Six jurors believe each theory of the crime, and all vote to convict.

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27. This scenario was discussed in *Schad*, 501 U.S. at 651 (Scalia, J., concurring in the judgment).

28. This scenario actually took place in *Andersen v. United States*, 170 U.S. 481 (1898).

Neither the day, nor the identity of the victim, nor the precise cause of death is an element of the crime of murder. Yet no sensible court would hold that the jury in Example 1 may convict, or that the jury in Example 2 may not. Why is this so?

One possible difference is that Example 1 involves uncertainty as between two distinct instances of the crime of murder, while Example 2 involves only a single offense. Each legislative definition of a crime incorporates, implicitly or explicitly, principles distinguishing multiple instances of an offense from one another. For example,

> it is up to the legislature to decide whether planting and exploding a bomb should be one crime or two (because the bomb was first planted, then exploded) or fifty (because fifty people died) or 500 (because 450 more were at risk) or 1,000,500 (because the bomb also destroyed one million dollars of property and each dollar of bomb damage is defined as a separate offense).[29]

Under the generally understood interpretation of homicide statutes, had the defendant in Example 1 murdered *both X* on Tuesday *and Y* on Wednesday, he would be guilty of two counts of murder, not one. Thus, if the jury is to hold a unanimous belief "beyond a reasonable doubt of *every* fact necessary to constitute *the crime* with which [a criminal defendant] is charged,"[30] and if the prosecution alleges two distinct offenses, the jury must then be unanimous as to each. On this "distinct offenses test," conviction requires proof beyond a reasonable doubt (and a unanimous jury) with respect to each offense in isolation.

Echoes of this requirement may be found throughout our criminal procedure. Under the Federal Rules, an indictment or other charging document must be "a plain, concise, and definite written statement of the essential facts constituting *the offense* charged,"[31] and Rule 8(a) prohibits as

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29. Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1818 (1997).

30. *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added).

31. FED. R. CRIM. P. 7(c)(1) (emphasis added).

"duplicitous" an accusation charging distinct offenses in a single count.[32] The Constitution could be read to impose similar constraints; the prohibition on double jeopardy for the "same offense" presupposes, if it does not mandate, distinct judgments on distinct offenses, so that a defendant may plead prior conviction or acquittal of those offenses in a subsequent proceeding.[33] The Sixth Amendment similarly demands that a criminal defendant "be informed of *the* nature and cause of *the* accusation," presumably forbidding ambiguity as to the statutory "cause" under which each accusation arises. [34]

At least part of the rule, then, could be put as follows: a jury may not equivocate as to which offense the defendant committed. Consider, then, the second half of *Schad*'s holding: that jurors need not decide "which overt act, among several named, was the means by which a crime was committed."[35] The principle is sensible at first glance; Example 2 charges only a single offense, although it identifies more than one possible means. Regardless of whether the victim died from the gunshot or from drowning, his death represented only a single count of murder,[36] and it would be preposterous to require greater unanimity from the jury.

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32. *Id*. 8(a) (requiring that "2 or more offenses" be charged "in separate counts"). Many of the states have adopted similar rules of procedure. Under California law, for example, "[i]f only one criminal offense could exist as a result of the commission of various acts, the jury need not agree on which particular act (or legal theory) a criminal conviction is based, provided the jurors unanimously agree that all elements of the criminal offense are proved beyond a reasonable doubt." Elizabeth A. Larsen, Comment, *Specificity and Juror Agreement in Civil Cases*, 69 U. CHI. L. REV. 379, 389 (2002) (citing Stoner v. Williams, 54 Cal. Rptr. 2d 243, 249 (App. 4th Dist. 1996)).

33. *Cf.* Amar, *supra* note 29, at 1814-15.

34. U.S. CONST. amend. VI (emphasis added). Under *Russell v. United States*, 369 U.S. 749 (1962), the indictment must "charge[] a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of facts." United States v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992) (citing *Russell*, 369 U.S. at 763-64).

35. *Schad*, 501 U.S. at 631.

36. The alternatives in this hypothetical happen to be mutually exclusive, but that is merely coincidence. Although no one could simultaneously stab *X* in New York and *Y* in Los Angeles, these would still constitute distinct offenses for the purposes of indictment,

The distinct offenses test thus ignores jury disagreement as to means, requiring unanimity only as to the statutory elements of the offense (to which the constitutional requirements of indictment, proof, and double jeopardy already attach). This was largely the approach of the Court in *Schad* and *Richardson*. In *Schad*, the Court considered whether an Arizona jury could convict a defendant of first-degree murder without deciding between theories of premeditation or felony murder. Because, the Court held, the Arizona legislature could legitimately include both theories as alternate means of a single first-degree offense, the jury could reach a guilty verdict without specific agreement on the defendant's mens rea.[37] Likewise, in *Richardson*, the Court held that each act within a "pattern" of drug violations under the continuing criminal enterprise (CCE) statute[38] must be found by a unanimous jury, interpreting the CCE statute to treat individual violations as distinct elements of the offense rather than as mere means.[39] The statutory definition of the offense, rather than *a priori* constitutional reasoning, determined the distinction between elements and means.

B. Judicial Intervention

Yet neither *Schad* nor *Richardson* left the choice entirely up to the legislature. Although the doctrine's precise constraints will be discussed further below,[40] in both cases the Court emphasized that some types of jury disagreement would be unacceptable. "Just as the requisite specificity of the

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unanimity, and double jeopardy. The lines between separate offenses are determined by the relevant statutes, and thus are linguistic and technical rather than conceptual in nature.

37. *Schad*, 501 U.S. at 632.

38. 21 U.S.C. § 848 (2000).

39. *Richardson*, 526 U.S. at 824; *cf. id.* at 817 ("[A] disagreement about means . . . would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element . . . ."). At least one circuit court has taken this principle as a clear inference from *Richardson*. *See* United States v. Powell, 226 F.3d 1181, 1196 (10th Cir. 2000).

40. *See infra* Part II.

charge may not be compromised by the joining of separate offenses," the *Schad* plurality noted, neither would a court be permitted "to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction."[41] Justice Scalia concurred, describing "novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process."[42] Even Justice Kennedy's dissent in *Richardson* assumed *arguendo* that "a habitual-offender statute[,] the sole element of which was the existence of a series of crimes without a requirement of jury unanimity on any underlying offense, . . . would raise serious questions as to fairness and rationality because the jury's discretion would be so unconstrained."[43]

Why did these examples trouble the Court? In *Richardson*, the majority worried that a practice of "treating [certain alternative theories] simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each [theory], will cover up wide disagreement among the jurors about just what the defendant did, or did not, do." This, in turn, "significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire."[44]

Unfortunately, however, the Court's focus on the factual scope of a criminal statute fails to address these concerns. Consider the following example:

> *Example 3—"The Long Declaration." D* submits to the court a 150-page declaration, which he certifies as true under penalty of perjury.[45] In a separate criminal trial, prosecutors allege that six unrelated paragraphs in *D*'s

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41. *Schad*, 501 U.S. at 633.

42. *Id*. at 650 (Scalia, J., concurring).

43. *Richardson*, 526 U.S. at 836 (Kennedy, J., dissenting)

44. *Id.* at 819 (majority opinion).

45. *See* 28 U.S.C. § 1746.

> declaration contain falsehoods, and they charge *D* with a single count of perjury for his concluding statement "under penalty of perjury that the foregoing is true and correct." *D* claims that everything in his declaration was either true or innocently mistaken. For each of the six unrelated paragraphs, two jurors believe beyond a reasonable doubt that it is false and fraudulent, and the other ten jurors do not. However, since each juror believes that the declaration as a whole contained a lie, they all vote to convict.

If we worry that criminal statutes permit juries "to avoid discussion of the specific factual details," or that they "cover up wide disagreement among the jurors about just what the defendant did, or did not, do,"[46] then surely this example should trouble us. The jurors need not discuss the factual details very much; indeed, they can convict in the face of radical disagreement as to which of the statements is false.[47] If the different paragraphs had been charged as separate offenses, rather than as alternative means, the jury would have voted 10-2 to acquit on each count. With regard to each statement, the vast majority of jurors may believe in the defendant's honesty, but that will not save him from conviction.[48]

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46. *Richardson*, 526 U.S. at 819.

47. *See* United States v. Pagán-Santini, 451 F.3d 258, 266 ("[The defendant's] concern is that some jurors might think statement A was perjurious and some might think that of B, but the jurors might not unanimously agree that any single statement was perjurious.").

48. This concern for factual nonconcurrence among the jurors is distinct from the worry that jurors might convict based on a suggested means for which the evidence is legally insufficient. *See* Carol A. Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 WASHBURN L.J. 275, 299 (2005) (describing how Kansas law "insist[s] on assurance that each juror's vote was supported by a means for which there was sufficient evidence," for otherwise there is "no guarantee that the jury was unanimous at the level of factual generality that matters most of all: guilt v. innocence"); Kate H. Nepveu, Note, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 287 (2003) (noting that in a CCE case requiring supervision of five persons, "since the court did not know on which persons the jury relied, if even one of the persons was ineligible . . . the entire verdict would have to be overturned").

Although a greater level of specificity in the form of the verdict (e.g., through a special verdict or special interrogatories) might help avoid this situation, requiring the jury to be

On the *Schad-Richardson* framework, a court may avoid such patchwork verdicts only by interpreting the relevant statute to create distinct offenses rather than a single crime.[49] In many cases, however, a "distinct offenses" interpretation would be inappropriate, and the opposite approach (e.g., treating multiple statements as mere means) might be perfectly reasonable. Consider the following example:

> *Example 4—"*A *and Not*-A.*"* While testifying under oath, *D* recants a statement in an affidavit he made under penalty of perjury, claiming that he was lying to protect a friend. Under continued questioning, however, *D* recants his recantation, which he now says was intended to protect *another* friend. At his subsequent perjury trial, the jurors disagree as to which statement was false. Six jurors believe that *D* was telling the truth in his affidavit, and lied when he "recanted"; the other six believe the first recantation to have been genuine, but the second to have been false. All, however, believe that *D* purposefully lied while on the stand.

Demanding specific unanimity as to which of these contradictory statements is false would be perverse; it would give *D* a get-out-of-jail-free card for his obvious deception on the stand. Treating distinct statements as distinct offenses not only raises conceptual difficulties in distinguishing one "statement" from another, but it also prevents legislatures from addressing situations like Example 4, by making eminently reasonable choices in shaping criminal liability to match the mechanisms of proof.[50] Either legislative option, it seems, will get the answer right in some cases but wrong in others.

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unanimous as to the means will not. All twelve might simply agree on the *wrong* means, for which the evidence is insufficient. Where there is a reasonable likelihood that jurors will produce a conviction that is illegitimate, either unsupported by the facts or prohibited by law, the judge should shape the instructions accordingly. But this does not solve the problem of juror disagreement among various alternative theories, each of which *is* supported by sufficient evidence.

49. This was the approach, by and large, of the Fifth Circuit in *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991), which held that the lack of a specific unanimity instruction after a duplicitous indictment, accusing the defendant of multiple statements that could have given rise to separate perjury charges, was reversible error.

50. *See* MODEL PENAL CODE § 241.1(5) ("Where the defendant made inconsistent statements under oath or equivalent affirmation, . . . the prosecution may proceed by

Whether two alternative theories represent a single offense or distinct offenses thus has little to do with our intuitions regarding jury disagreement. What is more important is the factual circumstances. Consider the following example:

> *Example 5—"Simultaneous Assassins."* Two assassins (*D1* and *D2*), not working in concert (indeed, for rival governments), infiltrate a press conference at the United Nations in New York. As the press conference begins, each fires a single shot into the crowd of foreign diplomats. Two diplomats (*X* and *Y*) fall dead, each with a single bullet in his chest. At *D1*'s subsequent murder trial, the jurors are unable to discern which of the two victims died by his hand, nor can they tell whether he struck his intended victim or an unrelated bystander. All, however, are certain that he murdered one of the diplomats, and so vote to convict.

Surely there are two instances of murder here. The distinct offenses test, taken seriously, would require that the jury agree on which of the two offenses the defendant committed. New York's second-degree murder statute, however, only requires that a defendant, "[w]ith intent to cause the death of another person, . . . cause[] the death of such person *or of a third person*"; the identity of the victim (actual or intended) is not an element of the offense, but only a mere means.[51] This statutory language would seem to allow the jury to convict without deciding which offense *D1* committed. Nor does such a conviction appear unjust: even if the jury might be ignorant of

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setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true."); *see also* N.J. STAT. ANN. § 2C:28-2(c) (West 2005) (same).

51. N.Y. PENAL LAW § 125.25 (McKinney 2006) (emphasis added). The same result could be reached more generally under the doctrine of transferred intent. *See* MODEL PENAL CODE § 2.03(2) ("When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless . . . the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person . . . is injured or affected . . . ." (emphasis added)); *see also* State ex rel. S.B., 755 A.3d 596 (N.J. Super. 2000) (noting that the doctrine "makes an actor criminally responsible for the result of his conduct, even though the person injured is not his intended victim").

which assassin committed which murder, it would know for a fact that each was guilty of one count. That the distinct offenses in Example 5 are simultaneous is merely coincidence; it is easy to create another hypothetical in which the situation of Example 1—convicting a defendant of murdering either *X* on Tuesday or *Y* on Wednesday—seems fully appropriate.[52]

Example 5 fails the distinct offenses test, but it raises no hackles from the perspective of factual nonconcurrence. If the Constitution, then, requires jury unanimity as to each defined offense, our concerns regarding factual nonconcurrence do not track such a requirement.

C. The Specificity Standard

Given the failings of the distinct offenses test, perhaps the courts should require a different level of specificity. None of the proposed standards, however, reliably reaches the correct result when applied to the facts of particular cases. Consider the following example of mail fraud:

> *Example 6—"Six Different Ducats."* *D*, a coin dealer, deposits a letter in the mail offering to sell to *V* a set of six ducats, minted in different years, which *V* had previously viewed in his shop. *D* is charged with mail fraud. At trial, the prosecutors call six expert witnesses, one for each coin: Expert 1 discusses Coin 1, Expert 2 discusses Coin 2, etc. Each expert testifies that her particular coin was counterfeit, and that anyone with *D*'s experience in coin dealing would surely have known this. On cross-examination, however, each

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52. Suppose that *H*, a successful hitman, carries out a murder or two each day. *D*, a New York mobster, hires *H* to carry out a hit. At *D*'s subsequent trial, the prosecution introduces evidence of the initial agreement, as well as of subsequent payment and of a letter from *D* to *H* congratulating him on a job well done. *H*, now a state's witness, freely admits that he was hired by *D* and that he carried out both of his assigned hits that week, murdering *X* on Tuesday and *Y* on Wednesday. Due to his busy schedule, however, he simply cannot remember which person was *D*'s intended victim. In such a case, the jury might well be certain that *D* ordered a murder (and is therefore guilty as a principal), even if they do not know which murder he ordered. *See* Howe, *supra* note 24, at 28 n.109 ("It is not apparent why due process requires concurrence if the 'separate' crimes carry the same penalty and if the inability to resolve which one occurred does not raise a doubt that one or the other occurred.").

> expert admits that she has equal expertise as to the other five coins, and that all of *them* seem perfectly genuine. Thus, for each coin, one prosecution expert testifies that it is counterfeit, and the other five testify that it is genuine. Each expert is found credible by two jurors and disbelieved by the other ten. Thus, all twelve jurors believe that the offer was fraudulent with respect to at least one coin, and they convict on that basis.

Strange as it may seem, such a conviction is perfectly acceptable under the *Schad-Richardson* distinct offenses test. The federal mail fraud statute makes it unlawful, "having devised . . . any scheme or artifice to defraud, . . . or to sell . . . any counterfeit or spurious coin, . . . [to] place[] in any post office . . . any matter or thing whatever to be sent or delivered by the Postal Service."[53] The actus reus of this crime is placing matter in a post office; the mens rea is an intent to defraud or to sell any counterfeit or spurious coin. As at least two circuits have held, *D* can be accused of only a single offense, for only one letter is mailed. The identity of the counterfeit coin represents a mere means of satisfying the mens rea requirement, and not a distinct element of the crime.[54] Thus, the accusation satisfies the distinct offenses test, for only a single offense has been charged.

Yet a conviction in this case seems unjust. For each coin, five out of six prosecution experts believe the coin to be genuine—which should make any rational, Bayesian, probability-weighing jury *less* confident of the defendant's guilt than before the trial began.[55] But once the case is submitted, the distinct offenses test would approve of the outcome, even if the jury splits 10-2 as to each coin. If we take seriously the concern expressed in *Richardson* that

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53. 18 U.S.C. § 1341 (2000).

54. *See* United States v. Freshour, Medicare & Medicaid Guide (CCH) ¶ 43,587, 1995 WL 496662, at *7-8 (6th Cir. 1995) (holding that the jury in a mail fraud case need not agree which item in a single mailing was fraudulent); United States v. Pazos, 24 F.3d 660 (5th Cir. 1994) ("Each separate use of the mails to further a scheme to defraud is a separate offense."); *see also* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL 974 (United States Attorneys' Manual tit. 9, 1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/ crm00974.htm.

55. Indeed, perhaps the court should direct an acquittal instead.

jurors might "avoid discussion of the specific factual details"[56]—or the requirement of *In re Winship* that the fact-finder reach a "subjective state of certitude of the facts in issue"[57]—then surely a verdict like this cannot stand.

A test more exacting than *Schad*'s, however, may not solve the problem. For example, some jurisdictions require what could be called a "distinct act" test. In Kansas, "the jury must be unanimous as to which act or incident constitutes the crime."[58] Such a test requires courts to distinguish different "acts," whose boundaries may be hard to discern. Thus, under Montana law, "in order to warrant a specific unanimity instruction," the alleged acts "must have taken place over an extended period of time, in different locations, and involve different types of conduct."[59] Other jurisdictions have refined the distinct act test through the notion of a "short continuous incident" that may be treated as a single act.[60] Commentators have tied ever more complex metaphysical knots to identify such incidents, with one justice of the Kansas Supreme Court laboring to distinguish among a "short series of behaviors," "simultaneous possession of the same type," and other related actions.[61]

Yet even if courts could effectively police such categories (which seems unlikely), the focus on the act itself ignores cases such as Example 6 ("Six Different Ducats"), in which the alternative theories differ in the mens rea rather than the actus reus. Example 6 involves only a *single* act of mailing a letter; the same might be said of Example 3 ("The Long Declaration"),

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56. *Richardson*, 526 U.S. at 819.

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

58. State v. Timley, 875 P.2d 242, 246 (Kan. 1994); *see* Beier, *supra* note 48, at 282.

59. Brian M. Morris, *Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases*, 62 MONT. L. REV. 1, 55 (2001); *see also* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 97 (2005) (noting, in the context of accomplice liability, that a jury can convict "even if the acts of aiding and abetting are far removed in space and time from the actual commission of the offense").

60. *See, e.g.*, State v. Giwosky, 326 N.W.2d 232, 238 (Wis. 1982); Beier, *supra* note 48, at 301.

61. Beier, *supra* note 48, at 300-02.

which alleges the filing of a single statement. Meanwhile, Example 4 ("A and Not-A") involves two separate statements that might be described as two separate "acts"; yet clearly no heightened unanimity requirement would be needed. The number of alternative "acts" does not seem to correspond to the danger of factual nonconcurrence, and the distinct act test, even when refined, cannot distinguish between the cases that matter.

To avoid these problems, other commentators have suggested tests analogous to that of the Fifth Circuit in *United States v. Gipson*, which divided the available statutory means into "distinct conceptual groupings."[62] The court separated the six means listed in the relevant statute—"receiving, concealing, storing, bartering, selling, or disposing" a stolen vehicle—into two general categories, namely "housing" and "marketing," and it required unanimity among jurors as to the category (though not within categories).[63] One scholar, following this approach, argued that "[c]onceptual similarity, in terms of logical, historical, and/or linguistic interrelatedness," in fact sets "the constitutional limits of the single offense": acts "that can be gathered under a generic 'label'" may constitute alternative means within a single offense, but because there is "no generic abbreviation for the crime of murdering-or-littering," a legislature "cannot constitutionally create a single offense of murdering-or-littering that could be established by a patchwork verdict."[64]

Though inventive, the conceptual approach was criticized by the *Schad* plurality as "too indeterminate to provide concrete guidance to courts."[65] Moreover, the conceptual approach cannot be applied easily to the examples above. *Gipson* did not make conceptual groupings among all the means that could possibly be imagined—an impossible task—but rather among the means explicitly listed in the statute: "receiving," "concealing," etc. (A more

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62. 553 F.2d 453, 458 (5th Cir. 1977); *see also Gipson* Comment, *supra* note 4.

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

64. 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, 557 (1983).

65. *Schad*, 501 U.S. at 635.

exacting version of this test was arguably proposed by the dissenters in *Schad*.[66]) Such a test would not impose a heightened unanimity requirement in Example 6, for example, because the mail fraud statute is no more specific than to prohibit schemes "to sell . . . any counterfeit or spurious coin," and there is no disagreement among the jurors as to whether the coins are "counterfeit" as opposed to "spurious."

Is the answer, then, to require unanimity as to means as well as elements—that is, whenever the jurors might differ on the factual basis for conviction? Some commentators have suggested precisely this.[67] Others have suggested various procedural means of achieving unanimity, such as through special interrogatories[68] or special verdicts.[69] Such procedures, however, are only helpful if we know when they ought to be used. Resorting to special interrogatories or special verdicts in every case of possible nonconcurrence is equivalent in practice to requiring complete and specific unanimity. But not every case involving alternative theories is one in which the jurors should be required to agree; Example 2 ("Shooting or Drowning") establishes that much. Nor even is every case of mail fraud amenable to such a requirement, as the following example shows:

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66. *See id.* at 656 (White, J., dissenting) ("[T]he Arizona statute, under a single heading, criminalizes several alternative patterns of conduct. While a State is free to construct a statute in this way, it violates due process for a State to invoke more than one statutory alternative, each with different specified elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt.")

67. *See* Elizabeth R. Carty, Note, Schad v. Arizona*: Jury Unanimity on Trial*, 42 CATH. U. L. REV. 355, 387-88 (1993) ("[D]ue process should require the jury to agree unanimously upon the specific offense. When two theories are used as interchangeable alternatives, the resultant jury unanimity lacks significance as the jury may have agreed only that a [crime] took place."); *see also id*. at 380 (describing the absence of specific unanimity as "fundamentally unfair").

68. Eric S. Miller, Note, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 YALE L.J. 2277, 2305-06 (1995).

69. Nepveu, *supra* note 48, at 283 (noting that "[s]pecial verdicts are useful in ensuring that juries are unanimous on relevant components of the verdict," but not identifying which components of the verdict might be relevant).

> *Example 7—"Six Similar Florins."* *D*, a coin dealer, offers in a letter to sell to *V* a set of six gold florins that *V* had previously viewed at his shop. *D* is subsequently charged with mail fraud. In a warranted search of *D*'s premises, the police discover raw metal, a recently used coin mold in the shape of an antique florin, tools and equipment for counterfeiting coins, various letters from *D* to partners-in-crime describing his counterfeiting scheme, and inventory records showing that *D* legitimately owned only five florins on the day of *V*'s visit. However, *D* is known as a master goldsmith, and although the coins are themselves distinguishable from one another, not even the best expert witnesses can identify which among the six might be counterfeit—though they each have different guesses, as do many of the jurors. All twelve jurors, however, believe that there is a false coin in the group and so vote to convict.

In both cases of mail fraud I have presented, the prosecution alleges that there is one false coin in a group of six; in both cases, the jurors believe different coins to be false; and in both cases, the expert testimony is inconclusive. The difference between the two is not merely a trick of language or an error in the scope of quantification[70]: the jurors in Example 7 enjoy no more substantive agreement on the identity of the counterfeit coin than do those in Example 6. Yet it should be obvious that the *way* in which they agree is quite different; that Example 7's conviction is legitimate in a way that Example 6's conviction is not; and that both extremes—ignoring all discrepancies as to means, or always requiring specific agreement—would routinely produce unjust results.

D. Responses to Uncertainty

Scholars discussing this topic have been uniformly pessimistic about theoretical solutions. One early commentator considered it "difficult to imagine a theoretical framework that will infallibly determine which fact issues are material," adding that "only common sense and intuition can

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70. In Example 6, every juror believes that there exists some coin that is false, while no coin exists such that every juror believes it to be false. But neither is there any one coin on which the jurors of Example 7 are all agreed.

define the specificity with which the jury must describe the defendant's conduct."[71] Others have complained of courts' "fall[ing] into error because they substitute their own vague platonic sense of what constitutes an 'act' for a determination of legislative intent,"[72] or have concluded that "no clear line has emerged," leading courts to "struggle as they engage in ad hoc balancing tests . . . as the cases can set forth only general principles."[73]

Without clear theoretical guidance, the courts have resorted to the distinct offenses test. The instruction in the Arthur Andersen trial, as discussed above, relieved the jury of any need to agree on which employee acted as the corrupt persuader.[74] Other courts in recent years have found that the jury need not agree on the intent of the defendant's financial transaction in a money laundering case;[75] on which statement in a passport application was false;[76] on which five identification documents were false or were possessed with unlawful intent;[77] on which overt act the defendant committed in furtherance of a conspiracy;[78] on which unlawful activities, as

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71. *Gipson* Comment, *supra* note 4, at 502.

72. Trubitt, *supra* note 64, at 548.

73. Morris, *supra* note 59, at 55; *see also* Larsen, *supra* note 32, at 400 (stating that in the civil context, "[f]ew courts have considered the appropriate level of specificity, though surely it is an issue that often arises in jury trials").

74. *See supra* notes 5-8 and accompanying text.

75. *See* United States v. Navarro, 145 F.3d 580 (3d Cir. 1998).

76. *See* United States v. McCormick, 72 F.3d 1404 (9th Cir. 1995).

77. *See* United States v. Kayode, 254 F.3d 204, 213-14 (D.C. Cir. 2001) (concerning a prosecution under 18 U.S.C. § 1028(a)(3)).

78. *See* United States v. Dickerson, 27 F. App'x 236 (4th Cir. 2001); Hoover v. Johnson, 193 F.3d 366, 369-70 (5th Cir. 1999) ("Further consideration of *Richardson* reveals, however, that the Court did not therein, and has not elsewhere, explicated a constitutional requirement that state-court juries must agree to a single act that satisfies the overt act element of the relevant crime, and then identify that act in a special ballot. In fact, the Court has not even firmly established such a requirement for federal juries."); People v. Russo, 25 P.3d 641 (Cal. 2001) (finding that under California law "the jury need not agree on a specific overt act as long as it unanimously finds beyond a reasonable doubt that some conspirator committed an overt act in furtherance of the conspiracy").

defined by the Travel Act,[79] a defendant crossed state lines to perform;[80] on which defendant was the principal and which the aider and abbetor;[81] on which portion of a letter sent through the mail is threatening;[82] or on whether an unusual death was caused by poison or by suffocation, when the defendant claimed that it was by natural causes.[83] This lax review is understandable given the procedural posture of these cases, which usually arise as challenges to the trial court's jury instructions, often when the defendant's guilt is barely in question. For instance, in *United States v. McCormick*, the defendant asked for a unanimity instruction as to which statement in his passport application was false, when *every* statement in the application (submitted under an entirely different identity) appeared to be false.[84] Lacking an appropriate rule to apply, and facing the enormous difficulty and expense

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I am not aware of any court's having applied this doctrine to the Treason Clause, which requires either a confession or "the Testimony of two Witnesses to the same overt Act." U.S. CONST. art. III, § 3, cl. 1.

79. 18 U.S.C. § 1952(a).

80. *See* United States v. Owens, 159 F.3d 221, 228 (6th Cir. 1998) (affirming a conviction on an indictment that "charged only one offense, albeit with four possible predicate state crimes"); United States v. Gatto, 995 F.2d 449, 450 n.1 (3d Cir. 1993) (finding no error in the trial court's "failing to specifically instruct the jury that it had to agree unanimously as to which unlawful debt [the defendant] collected").

81. *See generally* Kurland, *supra* note 59.

82. United States v. Bellrichard, 62 F.3d 1046, 1049 (8th Cir. 1995) (upholding the trial court's instruction that jurors need not reach specific agreement when"one juror believes that one part of a letter is threatening, and the other jurors believe a different part is threatening, and the rest of the jurors believe yet a different part of a letter is threatening"). *But see id*. at 1052-53 (Morris, J., dissenting) (distinguishing cases in which statements could not be judged in isolation, because "context supplies meaning," from the case at bar, in which jurors disagreed as to "whether certain language (presumably in context) was threatening").

83. *See* Tabish v. State, 72 P.3d 584 (Nev. 2003).

84. 72 F.3d 1404 (9th Cir. 1995).

of a second trial, an appellate court will naturally ignore the subtle doctrines of factual nonconcurrence in order to affirm a conviction.[85]

Yet no one who would object to patchwork convictions for the "freakish" crimes imagined in *Schad*[86] can accept this lax enforcement with equanimity. The dangers posed by factual nonconcurrence may be as great, or even greater, in cases brought under the most traditional of criminal statutes. Consider the following example:

> *Example 8—"Multiple Schemes."* In filing his tax return, *D* reports his full-time wages as his only income. He is later charged with tax evasion. The prosecution alleges that over the previous fiscal year, *D* engaged in six moneymaking criminal schemes—wire fraud, espionage, extortion, bank robbery, arms trafficking, and importation of zebra mussels and a mongoose contrary to 18 U.S.C. § 42(a)(1)—without reporting his illegal income. Each criminal transaction is testified to by a single eyewitness. Each pair of jurors (as the reader may have guessed) believes that a different criminal scheme occurred, and disbelieves the others. Since all twelve, however, believe that the defendant knowingly failed to report his true income, they unanimously vote to convict.

Few would describe tax evasion as a "freakish" crime. Both the statute and the case law make clear, however, that the various ways in which a particular return might be fraudulent are merely alternative means of committing the single offense of tax evasion.[87] The range of alternatives over

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85. *See generally* WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 24.10(a) (2d ed. 1999) ("Even though trial courts have the discretion to grant these requests in many jurisdictions, appellate courts have rather consistently denied claims by defendants that a judge's refusal to honor a request for special findings was error requiring a new trial.").

86. 501 U.S. 624, 640 (1991).

87. *See* 26 U.S.C. § 7201 ("Any person who willfully attempts *in any manner* to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony . . . ." (emphasis added)); United States v. Lennon, 246 F.2d 24, 27 (2d Cir. 1957) ("The felonious act in issue for each year named in the indictment was the willful filing of a false and fraudulent income tax return. A single return, of course, could be falsified in an unlimited number of particulars. The filing of such a return, however, constitutes but a single act within the meaning of [the statute]. Hence the indictment was not 'duplicitous,' because each count charged only

which jurors could reach a guilty verdict are scarcely better than the *Schad* plurality's parade of horribles—"a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction."[88] Indeed, the example is less powerful than it could be, for I have restricted the alleged moneymaking activities to those prohibited by law. In practice, a juror could vote to convict based on a finding that the defendant had concealed income from *any* substantially remunerative activity, whether unlawful or not. Thus, the universe of alternative means is almost limitless, and there are almost as many ways to violate the statute as there are human pursuits.[89] Yet a requirement of specific agreement would produce equally unjust results, as the following example shows:

> *Example 9—"Al Capone."* *D*, a notorious mobster, is on trial for tax evasion. The prosecution introduces evidence of a wide variety of *D*'s criminal

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one criminal violation."); *see also* United States v. Newman, 74 A.F.T.R.2d (RIA) 94-5438, 1993 WL 503078, at *10-11 (6th Cir. 1993) (reaching the same result after *Schad*).

88. *Schad*, 501 U.S. at 633. In fact, it is not difficult to construct a case in which this very parade of horribles might be presented. Suppose that *D*, contrary to the mail fraud statute, deposits in the mail a letter to *V* proposing a business deal and fraudulently stating: "I recognize that you might be hesitant to do business with me, given the many criminal charges pending against me, to wit, ... However, I want to assure you that I am a law-abiding citizen, and that all of those crimes were committed by another man of the same name."

89. Nor would such injustice require fantastic variety in the indictment. Suppose that *D* is charged with tax evasion, under two theories. First, the prosecution alleges that *D* understated the gains he made when he sold a certain asset, so as to reduce his tax liability for the previous tax year. Second, however, it alleges that *D did not sell the asset at all*, but only claimed that he did, the better to conceal its sale in a future year after a rate increase would take effect. *D* pleads not guilty, and testifies that he sold the asset and reported its true value. As it turns out, six jurors believe the first theory, the other six believe the second, and all vote to convict.

It is hard to describe this scenario as anything other than a miscarriage of justice. The asset might have been sold and undervalued, or it might not have been sold, but not both. Any evidence elicited to support the first theory necessarily undermines the second, and vice versa; perhaps no other scenario could do more to "permit[] a jury to avoid discussion of the specific factual details of each [theory]," or to "cover up wide disagreement among the jurors about just what the defendant did, or did not, do." *Richardson*, 526 U.S. at 819.

> enterprises. It also shows that *D* maintains a fleet of expensive cars, resides in a five-star hotel, and keeps an exorbitant staff of butlers and servants. Although the jurors do not agree on the particular criminal activities generating *D*'s income, they are all certain that he is earning more than his reported lumberjack's wages of $20,000, and all vote to convict.

The problem of alternative theories cannot be restricted—at least, not in a principled way—to the freakish inventions of future legislatures. Doing so might have the comforting effect of preserving existing statutes, and avoiding the upset of contemporary apple-carts, but it ignores the plight of modern defendants in complicated fraud or tax evasion cases, for whom the relative specificity of a "murder-or-littering" statute would be a welcome relief.[90]

I hope these examples will convince the reader that our intuitions concerning alternative theories of the crime do not raise warning flags only under freakish criminal statutes. Particular statutory language may be worrisome in one context and entirely unobjectionable in another. It would be strange, therefore, if the Constitution placed limits only on the scope of the statute, and not on the divergent theories themselves. It is to this question that we now turn.

II. CONSTITUTIONAL FOUNDATIONS

Schad's analysis began with the Due Process Clause, rather than with the jury-related right to unanimity that the petitioner sought. To the plurality, phrasing the issue as a right to a unanimous jury "would beg the

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90. *Cf.* Albert W. Alschuler, *The Mail Fraud & RICO Racket: Thoughts on the Trial of George Ryan*, 9 GREEN BAG 2D 113, 113 (2006) ("At the conclusion of this trial, the jury will not announce which of the allegations of improper conduct have been proven and which have not. It will announce only whether the defendants engaged in some scheme or artifice to defraud and some conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity. If the jury decides that the prosecutors' charges weren't entirely a lie and that some of the dirt they have thrown at the wall has stuck, it is likely to find the defendants guilty of the principal charges against them. It may seem to the jurors, after months of exposure to the smoke in the courtroom, that there must have been a fire somewhere.").

question raised," for it "would fail to address the issue of what the jury must be unanimous *about*."[91] The plurality therefore examined the legitimacy of the *statute* rather than of the *verdict*: "[P]etitioner's real challenge is to Arizona's characterization of first-degree murder as a single crime as to which a verdict need not be limited to any one statutory alternative."[92] Thus, the issue was framed as one "of describing the point at which differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses."[93]

This Part examines the current doctrine in three respects. First, it describes and critique the particular test enunciated by the Court in *Schad* and *Richardson*.[94] Second, it argues that the Due Process Clause is an unlikely source for principles governing the scope of a criminal statute as a whole. Third and finally, it considers suggestions that other provisions of the Constitution might provide a stronger foundation for a specificity requirement than did *Schad*.

A. Schad*'s Specificity Requirement*

Schad's specificity requirement can be frustratingly vague. The plurality described its sense of "appropriate specificity" as "a distillate of the concept of due process with its demands for fundamental fairness . . . and for the rationality that is an essential component of that fairness."[95] In implementing such demands of fairness and rationality, courts should look to "history and wide practice as guides to fundamental values," as well as to "the

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91. *Schad*, 501 U.S. at 630 (emphasis added); *see also id.* (adding that the question would "still remain[] whether it was constitutionally acceptable to permit the jurors to reach one verdict based on any combination of the alternative findings").

92. *Id.* at 630-31.

93. *Id.* at 633.

94. The discussion will center on the language and reasoning of *Schad*, since *Richardson* primarily applied *Schad*'s standards rather than altered them.

95. *Schad*, 501 U.S. at 637.

moral and practical equivalence of the different mental states that may satisfy the *mens rea* element of a single offense."[96] Thus, the plurality enunciated three criteria for the legislature's choice of elements: fundamental fairness, equal blameworthiness, and the guide of history.

The fundamental fairness test was not very useful to the *Schad* Court, however. The plurality noted that it was "impossible to lay down any single analytical model for determining when two means are so disparate as to exemplify two inherently separate offenses," as such an approach would seem to require.[97] The alternative theories problem also differed from previous issues resolved with reference to fundamental fairness; for instance, the question was distinct from that of statutory vagueness, although the plurality sometimes spoke in those terms.[98]

Blameworthiness seemed to offer a more substantial test. The plurality stated that alternative means with regard to mens rea "must reasonably reflect notions of equivalent blameworthiness or culpability."[99] But as Justice Scalia indicated, equal blameworthiness was at most necessary rather than sufficient: "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the

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96. *Id.*

97. *Id.* at 643; *cf.* James J. McGuire, Note, Schad v. Arizona*: Diminishing the Need for Verdict Specificity*, 70 N.C. L. REV. 936, 966-67 (1992) ("The plurality's fundamental fairness test might occasionally invalidate a new state criminal procedure, but it is hard to imagine how the plurality could ever really test the intrinsic fairness of a well-entrenched historical practice.").

98. The plurality noted "[t]he axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning," and added that this requirement "carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him." *Id.* at 632-33; *cf.* Kolender v. Lawson, 461 U.S. 352, 357 (1983). However, it added that its test was "not dependent upon . . . vagueness," since "combin[ing] findings of embezzlement and murder would raise identical problems regardless of how specifically embezzlement and murder were defined." *Schad*, 501 U.S. at 633 n.4.

99. *Schad*, 501 U.S. at 643.

'moral equivalence' of those two acts."[100] Similarly, the various separate drug transactions alleged in *Richardson* may have been equally blameworthy, but the Court did not allow them to be charged as alternatives.[101]

History, then, seemed to be the defining feature of a legitimate statutory definition. "Where a State's particular way of defining a crime has a long history," the plurality wrote, "it is unlikely that a defendant will be able to demonstrate that the State . . . has defined as a single crime multiple offenses that are inherently separate." On the other hand, "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."[102]

This historical approach was echoed by Justice Scalia, who concurred in the judgment (and provided the fifth vote) on this basis. He noted that the crime of which Edward Schad was convicted "has existed . . . since at least the early 16th century,"[103] and although a "6-to-6 verdict" in "novel 'umbrella' crimes" might "seem contrary to due process,"[104] it is "precisely the historical practices that define what is 'due.'"[105] Fundamental fairness

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100. *Id*. at 651 (Scalia, J., concurring in the judgment).

101. *Richardson*, 526 U.S. 813. The emphasis on blameworthiness may in part be an artifact of the particular circumstances of *Schad*, which involved alternative theories only with regard to mens rea. Once we encounter alternative possibilities for the actus reus, however, blameworthiness becomes less certain a guide. Is a negligent homicide more blameworthy than an intentional maiming? Is theft more blameworthy than fraud? And—to return to the facts of *Schad*—is felony murder, which may be committed accidentally, despite substantial precautions to avoid it, really no less blameworthy than premeditated murder in cold blood? Additionally, *Schad* does not explain why the blameworthiness test should be applied facially to the statute as a whole, rather than 'as applied' to the facts of each particular case. Some robberies, assaults, or perjuries are vastly more blameworthy than others, but all are punished under the same statute, with no distinctions among alternative means. Since the blameworthiness test is not historical in its approach, and does not "grandfather in" existing crimes, it seems that were the test taken seriously few offenses would be left on the books.

102. *Schad*, 501 U.S. at 640.

103. *Id.* at 648 (Scalia, J., concurring in the judgment).

104. *Id*. at 650.

105. *Id*. at 650-51.

analysis, he wrote, should only "be applied to *departures* from traditional American conceptions of due process," and he argued that it was "impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.'"[106]

Regardless of its relation to Due Process Clause, however, a purely historical approach cannot play the role that both the plurality and the concurrence in *Schad* hoped it would. History, in this context, has an essentially *negative* function: the traditions of our legal system may immunize particular long-established practices against what Justice Scalia termed "the indignity of 'fundamental fairness' review,"[107] but there are fewer criteria for determining what the tradition *disallows*, criteria that must be more general than the individual traditions on which they are based. How untraditional must a statute be before the tradition itself can produce an *affirmative* argument for its invalidity? Given that radical disagreements can be tolerated by as familiar a crime as tax evasion, would only a novel "umbrella" crime violate due process? Or would every offense sufficiently novel in its subject matter—cyberstalking, unauthorized moon mining, etc.—be invalidated as soon as the inevitable patchwork possibilities (which will arise under *any* statute) come to light? As the *Schad* plurality noted, "[H]istory will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots."[108]

Perhaps history can serve in a different way. Nancy King and Susan Klein have proposed an "anti-combination" rule against offenses that "could be satisfied by alternative means that had been treated historically as separate elements."[109] The rule seems to track the various categories of improper offenses mentioned in dicta in *Schad* and *Richardson*: a "simple recidivism

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106. *Id.*

107. *Id.*. at 651.

108. *Id.* at 640 n.7 (plurality opinion).

109. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1513 (2001).

statute" consisting of mere combinations of existing offenses;[110] various combinations of "embezzlement, reckless driving, murder, burglary, tax evasion, or littering";[111] or an "umbrella" crime "consisting of either robbery or failure to file a tax return"[112]—all of which would also "allow jurors to mix and match criminal acts that carry grossly disparate levels of moral blameworthiness."[113]

Such an anti-combination rule would at least be coherent. It would not, however, be an accurate description of how courts actually treat new criminal statutes, which frequently pour old offenses into new bottles. Consider section 211.1 of the Model Penal Code, which defines "simple assault" and "aggravated assault." According to the accompanying explanatory note, "[s]ection 211.1 effects a *consolidation* of the common law crimes of mayhem, battery, and assault."[114] A jurisdiction that preserved the common law crimes would be required to charge them separately to a jury. Under the Code, however, the prosecution could bring all three factual scenarios before the jury as a single offense. More seriously, the explanatory note goes on to add that section 211.1 "also consolidates into a single offense what the antecedent statutes in this country normally treated as a *series* of aggravated assaults or batteries."[115] This seems to be a paradigm case of illicit combination, yet no court seems eager to invalidate it on this basis.[116]

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110. *Richardson*, 526 U.S. at 835 (Kennedy, J., dissenting).

111. *Schad*, 501 U.S. at 633.

112. *Id*. at 650 (Scalia, J., concurring in the judgment).

113. King & Klein, *supra* note 109, at 1515-16. *Richardson* also emphasized that the pattern of "violations" in the CCE statute was a set of distinct crimes, each of which would previously have been found by a unanimous jury. *See Richardson*, 526 U.S. at 819 ("To hold that each 'violation' here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not.")

114. MODEL PENAL CODE art. 211 note (emphasis added).

115. *Id*. (emphasis added). Under the old statutes, if *D* were accused of punching *V* and then subsequently kicking him, he might be charged with a series of batteries (each of which must be found by a unanimous jury). Under the Code, he may be charged with a single

Alternatively, consider the recent spate of state statutes criminalizing a "pattern" of sexual assaults of a minor. According to the *Corpus Juris Secundum*, such statutes have been enacted because "many young victims, who have been subject to repeated numerous incidents of sexual assault over a period of time by the same assailant, are unable to identify discrete acts of molestation."[117] The statutes therefore "criminalize a continuing course of sexual assaults, not isolated instances"; the "essential culpable act" under them is "the pattern itself, that is, the occurrence of more than one sexual assault over a period of time, and not the specific assaults comprising the pattern."[118] As a result, the jury in such cases "must unanimously agree that a defendant engaged in more than one act of sexual assault as described in [the relevant statute], but need not agree on the particular acts, provided that they find the requisite number of acts occurred during the statutory time period"[119]—a time period that may be as long as several years.[120]

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count of aggravated assault, and his various physical acts treated as mere means (as to which the jury need not be unanimous).

116. *See generally* LAFAVE, *supra* note 85, § 24.10(c) ("Where modern statutes lump together in a single offense what was recognized at common law as separate offenses (e.g., including in a single theft statute the obtaining of property by such diverse methods as larceny and false pretences), most courts have not required unanimity as to the underlying theory."). Nor have courts questioned the inconsistent-statement perjury offenses described *supra* note 50.

117. 6A C.J.S. *Assault* § 75 (2005) (footnotes omitted).

118. *Id.*

119. State v. Fortier, 780 A.2d 1243, 1250-51 (N.H. 2001); *cf.* N.H. REV. STAT. § 632-A:2, para. III (2003) ("A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault against another person . . . who is less than 16 years of age.").

120. *See* Hunter v. New Mexico, 916 F.2d 595, 596, 600 (10th Cir. 1990) (accepting as sufficiently precise, without extended discussion, a conviction based on conduct "occurring from [the victim's] thirteenth birthday until she was sixteen"), *cert. denied. sub. nom.* Hunter v. Tansey, 500 U.S. 909 (1991); *see also* Valentine v. Konteh, 395 F.3d 626, 632 (6th Cir. 2005) (considering a thirteen-month time window unproblematic, but invalidating the conviction on other grounds).

One might think that such pattern statutes have escaped scrutiny simply because courts are less energetic in protecting accused pedophiles. Yet *Richardson* explicitly noted that the states "have sometimes permitted jury disagreement about a 'specific' underlying criminal 'incident,'" instead "insisting only on proof of a 'continuous course of conduct' in violation of the law."[121] The Court noted that this practice that "may well respond to special difficulties of proving individual underlying acts,"[122] and it distinguished these laws from the CCE statute by noting that convictions under the pattern statutes "are not federal but state, where this Court has not held that the Constitution imposes a jury-unanimity requirement."[123] Moreover, the "special subject matter" of the sex-abuse cases "indicates that they represent an exception; they do not represent a general tradition or a rule."[124]

What is revealing about this defense is how little it has to do with *Schad*'s criteria. *Schad* emphasized that the right at issue sounded in *due process*, not jury unanimity, and the states are most certainly bound by due process.[125] Moreover, the description of the pattern statutes as an "*exception*" from the "general tradition or rule" would make them perfect targets for

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121. *Richardson*, 526 U.S. at 822. The pattern crimes were also noted by the dissent in *Richardson*, which took them to be analogous to the CCE statute. *See id.* at 832 (Kennedy, J., dissenting) ("A crime may be said to involve a continuing course of conduct because it is committed over a period of time, like kidnapping, harboring a fugitive, or failing to provide support for a minor. In such cases, the jury need not agree unanimously on individual acts that occur during the ongoing crime."); *id*. at 833 ("States have also chosen to define as continuous some crimes that involve repeated conduct where the details of specific instances may be difficult to prove, as in cases of child molestation or promoting prostitution.").

122. *Id.* at 822 (majority opinion).

123. *Id*.

124. *Id.* at 822-23.

125. Moreover, the states *are* bound to convict defendants by a "substantial majority" of the jury. *See* Apodaca v. Oregon, 406 U.S. 404 (1972). Suppose that the required majority were 9-3, and three jurors vote for outright acquittal. If the other nine jurors split six different ways on alternative means, could so fractured a "substantial majority" still convict?

invalidation under *Schad*'s historical approach. *Richardson* even criticized the CCE statute for departing from a historical "tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law."[126]

The inconsistent application of the anti-combination rule also demonstrates how difficult the rule is to apply to real cases. A consistently enforced anti-combination rule will either be overly lax, permitting convictions on a CCE statute in the face of radical disagreement within the jury, or it will be overly strict, invalidating otherwise legitimate definitions of crimes such as aggravated assault. The traditions enforced by the Due Process Clause cannot be so exacting as to preserve common law crimes in perpetuity.

B. Due Process and Statutory Validity

The previous Section questioned whether *Schad*'s particular standard for statutory validity was the right one. This Section returns to the question of *Schad*'s central analytic move, namely interpreting the defendant's claim as "challeng[ing] . . . Arizona's *characterization* of first-degree murder as a single crime."[127] Later commentators have approved of *Schad*'s attention to the criminal statute as a whole; as one wrote, if a court "does not interpret the predicate acts to be principal factual elements of the crime, it must determine whether [the legislature] has overstepped the limits imposed by the Due Process Clause on its power to define criminal conduct."[128]

This is a strange application of the Due Process Clause, for two reasons. First, the alleged violation of the Due Process Clause appears to be substantive, rather than procedural. Under a garden-variety murder statute, prosecutors can advance alternative theories (and judges can deny special unanimity instructions) without violating due process. There is no reason to expect these identical trial procedures to be constitutional in one context but

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126. *Richardson*, 526 U.S. at 819.

127. *Id*. at 630-31.

128. Miller, *supra* note 68, at 2292.

unconstitutional in another, unless the violation is caused by the substantive content of the criminal statute.[129] Indeed, literature and case law speak as if the constitution is violated by the substantive range of the statute itself: "The more ways to violate a statute, the more likely the statute violates due process."[130]

Yet the requirements *Schad* imposed on statutory crimes are unlike any other substantive requirements imposed by due process. If an indictment were specific enough as to allege a particular means, or if a defendant requested and received a specific instruction requiring unanimity, any constitutional defect due to alternative theories would be cured. Yet if the constitutional violation springs from the *substantive* definition of the crime,[131] and not merely the *procedural* aspects of how the crime is proved, how could this constitutional defect be avoided by a procedural jury instruction in a single case, without substantive revision to the statute? In other words, why wouldn't the

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129. The due process question is therefore different from that faced by the Court in *Mullaney v.* Wilber, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977). In *Patterson*, the Court repeated *Mullaney*'s prior holding that courts could not presume the existence of any statutory element of a criminal offense; the defendant could not be considered guilty of a particular element until he was proven innocent. *See Patterson*, 432 U.S. at 215-16 ("Premeditation was not within the definition of murder [in the Maine statute]; but malice, in the sense of the absence of provocation, was part of the definition of that crime. Yet malice, i.e., lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation."). However, *Patterson* went on to hold that a state was free to eliminate a particular element from the statutory definition of the crime, while making its absence a mere alternative defense. Thus, the due process requirement remained procedural ("no presumptions in favor of elements") and concerned the rules of evidence rather than the substantive definition of the crime. (In *Montana v. Egelhoff*, even this formal requirement was relaxed, and the Court accepted an evidentiary rule as equivalent to a substantive redefinition of the crime. 518 U.S. 37, 50 n.4 (1996) (Scalia, J.) (holding that legislative definitions of a crime "may be implemented . . . with equal legitimacy by amending the substantive requirements for each crime, or by simply excluding [particular] evidence from the trial"); *see also* Clark v. Arizona, 126 S. Ct. 2709 (2006)).

130. Miller, *supra* note 68, at 2296.

131. *See id*. at 2291-92.

constitutional violation always be facial, rather than as applied? For other criminal statutes thought to violate substantive due process guarantees—laws violative of fundamental freedoms, say, or those held void for vagueness—no procedural jury instruction in a single case could cure them, as the substantive criminal prohibitions *themselves* are invalid under the Due Process Clause.[132]

Second, the focus on the content of the statute cannot explain why alternative theories are problematic only when presented to multiple fact-finders. If alternative theories *A* and *B* are offered in a bench trial before a single judge, there are three ways to convict the defendant: the court could believe *A* beyond a reasonable doubt; it could believe *B* beyond a reasonable doubt; or it could believe beyond a reasonable doubt that either *A* or *B* occurred, while experiencing reasonable doubt as to which. The first two options are unproblematic. The third raises only the issue of *uncertainty between alternatives*—which may also be unproblematic, given that the court holds a belief beyond a reasonable doubt that at least one of the alternatives is true. (Consider Example 7, where the court might not know which coin was counterfeit, but would know that one of them was false; or Example 2, in which the court might not be convinced as between shooting and drowning, but would know that the victim was murdered.) In contrast, the problem posed by alternative theories is that of *nonconcurrence*—in which at least one fact-finder believes only *A*, and others believe only *B*.

This difficulty cannot possibly arise within the mind of a single fact-finder. Yet if the due process violation concerns only the substantive criminal statute itself, what does it matter how many fact-finders there are? If the legislature, by choosing a particular definition of the crime, exceeded its authority and "overstepped the limits imposed by the Due Process Clause on

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132. Purely procedural concerns might inspire certain limits on the substantive elements of crimes; for example, if due process would not allow the President to dole out criminal penalties on mere whim, this rule may itself imply a limit on the legislature's substantive ability to criminalize "the state of having been pointed at by the President." (I am indebted for this example to Will Baude.) But there is no reason to think that this is such a case.

its power to define criminal conduct,"[133] then the statute is no more legitimate in a bench trial. The statutory focus of *Schad*'s due process test seems incompatible with our actual intuitions concerning alternative theories.

C. Alternative Constitutional Foundations

Although *Schad* relied on the Due Process Clause as a limit on statutory breadth, three other provisions appear as possible candidates to ground a rule regulating alternative theories of the crime: the jury trial right, both of Article III and of the Sixth Amendment; the Double Jeopardy Clause; and the Sixth Amendment right to be informed "of the nature and cause of the accusation." None of them, however, seem capable either of generating effective statutory standards or of properly regulating the specificity of verdicts.

1. Jury Trial

In his dissent in *United States v. Edmonds*,[134] three years before *Richardson* was decided, then-Judge Alito suggested a rational-basis test founded in the jury trial right of the Sixth Amendment. If the jury must be unanimous as to elements, but not as to means, Congress might "circumvent" the Amendment "by lumping together incongruous elements under the rubric of a single offense." However, he wrote, "I do not think that the Sixth Amendment would tolerate such a stratagem. If a new offense contained a combination of elements having no rational basis other than the evasion of the Sixth Amendment's jury unanimity requirement, that combination would be unconstitutional."[135]

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133. Miller, *supra* note 68, at 2292.

134. 80 F.3d 810 (3d Cir. 1996).

135. *Id.* at 834 (3d Cir. 1996) (Alito, J., concurring in part and dissenting in part). A similar approach was taken by Justice Kennedy in his *Richardson* dissent. In considering Justice Scalia's example of "an irrational single crime consisting of, for instance, either robbery or

The suggestion of a jury unanimity right, however, raises three questions. First, the problem of alternative theories emerges less from a lack of *jury unanimity* than from a lack of *factual concurrence*. Suppose a bench trial were held before a three-judge panel. Whatever the voting rule for conviction (whether 2-1 or 3-0), the same concerns for nonconcurrence might emerge—one judge might find murder, while another finds littering. Since the problem is just as great even when juries are absent, the jury trial right is an unlikely source for whatever rule is imposed.

Second, a rational basis test would have little bite in practice. As Justice Kennedy noted in his *Richardson* dissent, states have chosen to redefine as continuous-course-of-conduct crimes "some crimes that involve repeated conduct where the details of specific instances may be difficult to prove, as in cases of child molestation or promoting prostitution."[136] If the difficulty of proving separate offenses may itself be a legitimate rational basis, hardly any statute could fail the rational basis test: it will *always* ease the prosecution's burden if new factual scenarios may be offered as alternative means.[137] Additionally, as the *Richardson* majority noted, sometimes the very "difficulty in proving individual specific transactions" tends to "cast doubt upon the existence of the requisite 'series.'"[138] The ease of conviction, then, cannot be

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failure to file a tax return," he noted that the CCE statute "does not represent an end run around the Constitution's jury unanimity requirement, for the Congress had a sound basis for defining the elements as it did." *Richardson*, 526 U.S. at 835-36 (Kennedy, J., dissenting).

136. 526 U.S. at 833 (Kennedy, J., dissenting). Kennedy also found the anti-recidivism element of the statute to satisfy the rational basis test, since it targeted "drug lords whose very persistence and success makes them a particular evil." *Id.* at 835.

137. One commentator even notes this fact in *support* of patchwork verdicts in corporate cases, as a means of making convictions more likely in the face of pervasive doubt as to which corporate officers committed which—or, indeed, any—unlawful acts. *See* Vu, *supra* note 6, at 459 ("Where evidence of multiple guilty agents exists, the defense can exploit this ambiguity to create reasonable doubt as to each agent. Such an outcome seems wrong—criminal conviction should be more, not less, likely where evidence of multiple guilty agents exists. . . . [C]ourts should inform the jury that they can reach a guilty verdict without agreement upon which agent engaged in the criminal offense.").

138. 526 U.S. at 823.

a legitimate legislative goal unless the obstacles facing the prosecution are somehow irrational or unnecessary. But if we were fortunate enough to possess criteria identifying which obstacles were unnecessary and which were fundamental, we could presumably use those same criteria directly in judging the legitimacy of each statute—and no rational-basis test would be needed in the first place.[139]

Third, the rational basis test may suffer the same dependence on our current nomenclature as the rejected "conceptual grouping" test of *Gipson*. The irrationality of the robbery-or-tax-evasion statute in part emerges from the fact that the two crimes, like "murdering-or-littering," cannot "be gathered under a generic 'label'";[140] if they could, their combination might appear less strange. Yet the criminal law is full of generic labels; we prohibit the use of minors to commit a "crime of violence,"[141] the crossing of state lines to conduct an "unlawful activity";[142] and a remarkable variety of human activities under the rubric of "tax evasion."[143] If the rational-basis test is to perform the work we expect of it, some stronger foundation may be necessary.

2. Double Jeopardy

The Double Jeopardy Clause offers a second potential source for constitutional limits on alternative theories. As discussed above,[144] the Clause presupposes certain specificity requirements on criminal convictions beyond the simple wording of a statute. In order for the defendant to plead prior

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139. As Judge James Hill of the Eleventh Circuit once told an attorney in the course of oral argument, "A 'technicality' is a rule of law under which you lose. A rule of law under which you win is a 'cornerstone of justice.'"

140. Trubitt, *supra* note 64, at 557.

141. 18 U.S.C. § 25 (2000); *see also* 18 U.S.C. § 16 (defining "crime of violence").

142. Travel Act, 18 U.S.C. § 1952(a) (2000).

143. *See supra* text accompanying notes 86-90.

144. *See supra* text accompanying note 33.

conviction or acquittal in a future proceeding, a present court cannot merely try him for "murder," but for a *particular* murder, and that particularity requirement necessitates greater specificity in both the pleading and the jury instructions.

Double jeopardy does not, however, necessarily impose any requirements more exacting than the individuation of offenses themselves, as described in Part I. So long as a future court could know enough about the initial proceeding to rule on a plea of prior conviction or acquittal, the double jeopardy requirement would be satisfied. A court could do so even if the original conviction had failed the distinct offenses test: a conviction in Example 5 ("Simultaneous Assassins")—even though it does not identify whether the defendant murdered diplomat *X* or diplomat *Y*—would still allow a subsequent court to throw out an indictment for murdering "the other guy."

If one wished to generate an alternative-theories rule from the Double Jeopardy Clause, one could perhaps adopt the principle that all alternative theories of a crime that *can* be charged in separate counts *must* be charged separately, and that only the theories that cannot be charged in separate counts, given the statutory definition of the crime, may be offered as alternative means. Yet such a rule would, if anything, likely be more lenient than the distinct offenses test. Consider the defendant in Example 6 ("Six Different Ducats"). The various alternative theories of that crime would still only constitute a single offense under the statutory language, and neither the Double Jeopardy Clause nor associated due-process principles[145] would interfere with that fact. Such principles exist to limit the number of different convictions that could arise out of the same set of facts, not to limit the number of different facts that could result in the same conviction.[146] If double-jeopardy-related principles have any bite in Example 6, it would be to identify *additional* offenses—state-law fraud, for example—that could

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145. *See generally* Amar, *supra* note 29, at 1819-20.

146. *See* Otto Kirchheimer, *The Act, the Offense, and Double Jeopardy*, 58 YALE L.J. 513 (1949).

neither be separately or subsequently charged; which, on the charge-'em-if-you-got-'em rule suggested above, could only *add* to the number of possible theories considered as alternative means. Since, as we have seen, the distinct offenses test is insufficiently precise to exclude cases like Example 6, there is no reason to think that a test inspired by the Double Jeopardy Clause would fare any better.

3. The Nature and Cause of the Accusation

A more promising source for specificity requirements might be the Sixth Amendment right to be "informed of the nature and cause of the accusation."[147] In serious cases, the Fifth Amendment requires indictment by a grand jury; but even in lesser cases, the defendant is entitled to certain information concerning the charges. The case law emphasizes the need for clarity; the offense "must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged,"[148] and it may not employ "the same generic terms as in the definition," but must "state the species" and "descend to particulars," including "reasonable particularity of time, place, and circumstances."[149]

This information right contains greater requirements of specificity than did the Double Jeopardy Clause. An information or indictment must not

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147. U.S. CONST. amend. VI. I am indebted for this suggestion to Will Baude.

148. United States v. Mills, 32 U.S. 138, 142 (1833).

149. United States v. Cruikshank, 92 U.S. 542, 558 (1875). This requirement is partly a consequence of the rule that the indictment must allege facts sufficient for conviction and "inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction." *Id.*; *see also id.* at 558-59 ("So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal.")

only "contain[] the elements of the offense charged" and "enable [the defendant] to plead an acquittal or conviction in bar of future prosecutions," but it also must "fairly inform[] a defendant of the charge against which he must defend."[150] More importantly, under due process principles, the prosecution will (at least in part) be bound to its presentation for the remainder of the case.[151] If the defendant is preparing an alibi to the charge of stealing a car on May 7, the prosecution cannot then seek a conviction based on evidence that he stole the same car on August 12, even though the precise date may be a mere means of committing the offense.[152]

Yet there are two reasons why the information right would be unable to regulate alternative theories of the crime. The first and most fundamental is that a right to be informed of the nature and cause at the *beginning* of the trial doesn't mandate any particular level of precision in the verdict at the *end* of the trial. Nothing in the information right prevents an indictment from listing seventeen means of committing the single offense and then allowing jurors to pick and choose among them. It may be difficult to defend against such a charge, but that is due to the substantive breadth of the criminal

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150. Hamling v. United States, 418 U.S. 87, 117 (1974); *see also* Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992) (Easterbrook, J.) ("[A] charge is sufficiently specific when it contains the elements of the crime, permits the accused to plead and prepare a defense, and allows the disposition to be used as a bar in a subsequent prosecution."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779 (1833) ("[T]he indictment must charge the time, and place, and nature, and circumstances, of the offence, with clearness and certainty; so that the party may have full notice of the charge, and be able to make his defence with all reasonable knowledge and ability.")

151. Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("[A] conviction upon a charge not made . . . constitutes a denial of due process." (citing Cole v. Arkansas, 333 U.S. 196, 201 (1948))).

152. A "constructive amendment" of the indictment, which raises the risk of conviction for a different offense than the one charged—distinguishing among factual scenarios by something like the distinct offenses test—is always prejudicial. However, a mere "variance" between the evidence at trial and the charging document is normally considered harmless error, unless it "misleads the accused in making her defense or exposes her to the danger of double jeopardy." Martin v. Kassulke, 970 F.2d 1539, 1543 (6th Cir. 1992).

statute, not any lack of *information* with which to prepare a defense. A defendant would be equally well informed by an indictment charging particular acts of murder and littering under a single "murder-or-littering" statute as under two separate counts of murder and littering.

Second, at least under current law, the actual requirements of the information right are relatively weak. For instance, the Seventh Circuit has upheld charges involving two counts of unlawful sexual conduct during a six-month period, reasoning that "it is hard to provide an alibi for a six-month period," but that "six weeks would be little better than six months for this purpose."[153] It added in dicta that a "five-year" span would be unacceptable, and that the Constitution "would bar such a vague charge";[154] but periods of up to three years have been upheld by federal courts (and certiorari denied).[155] The absence of a clear standard has encouraged laxity by the courts, especially given that such cases frequently concern the sexual assault of a minor. Without a clear standard for the specificity required for making a defense, the "nature and cause" rule cannot provide any more clarity with respect to alternative theories.

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153. *Fawcett*, 962 F.2d at 619.

154. *Id*.

155. Hunter v. New Mexico, 916 F.2d 596, 600 (10th Cir. 1990) (accepting a three-year period as sufficiently precise), *cert. denied. sub. nom.* Hunter v. Tansey, 500 U.S. 909 (1991); *see also Valentine*, 395 F.3d at 632 (6th Cir. 2005) (concerning a thirteen-month time window). Indeed, a firmer standard might produce unreasonable results. Suppose that the police discover, in a walled-up section of Montreysor's wine cellar, the remains of an unknown victim, chained there some forty or fifty years ago—along with Montreysor's fingerprints on the chains, drops of Montreysor's blood on the floor, and an inscription scrawled by the victim, "For the love of God, Montreysor!" Would an indictment alleging that Montreysor imprisoned the victim in the above manner "some forty or fifty years ago" necessarily be invalid, because it would deprive him of the chance to present a particularized alibi?

D. Conclusion

The standards of statutory specificity enunciated in *Schad* and *Richardson* appear both unsound in theory and unworkable in practice. Moreover, the Due Process Clause may be incapable of imposing meaningful limits on the substantive breadth of statutes, as are other related provisions of the Constitution. The next three Parts will seek to present an alternative vision of alternative theories of the crime—a theory solidly rooted in common intuitions, a method for turning that theory into practice, and a new way of viewing the constitutional principles that this vision promotes.

III. THE SOLUTION, REVEALED

A. The Independence Test

As the examples in Part I demonstrate, the notion that a guilty verdict resting on inconsistent theories of the crime can in certain circumstances be deeply troubling. In other circumstances, however, the possibility of disagreement seems irrelevant, trivial, or immaterial. None of the tests proposed by courts or commentators, whether statute-based or more specific, seem capable of accurately differentiating the two. Yet any solution of the problem must be able to identify the conditions under which alternative theories of the crime really matter.

With this principle as a starting point, it may be worthwhile examining how the Supreme Court attempted to explain the difference more than a hundred years ago, when it encountered the "Shooting or Drowning" case of Example 2 in *Andersen v. United States*. The Court wrote:

> Granting that death could not occur from shooting and drowning at the same identical instant, yet the charge that it ensued from both involved no repugnancy in the pleading. For the indictment charged the transaction as continuous, and that two lethal means were employed co-operatively by the accused to accomplish his murderous intent; and whether the vital spark had fled before the riddled body struck the water, or lingered until extinguished by the waves, was immaterial. . . . The government was not required to make

> the charge in the alternative in separate counts. The mate was shot, and his body immediately thrown overboard; and there was no doubt that, if not then dead, the sea completed what the pistol had begun.[156]

Those familiar with the *Schad* framework will immediately notice that neither the legislative definition of murder, nor its long history, nor its compatibility with fundamental fairness, nor the equal blameworthiness of the means, is once mentioned in the above paragraph. The Court was not concerned with the nature of the statute but with the nature of the evidence presented in the case. On this *evidence*, the possibility of either death-by-gunshot or death-by-drowning was "immaterial"; on these *facts*, there "was no doubt."

Perhaps because of the strong statutory focus of *Schad* and *Richardson*—or, perhaps, the desire to formulate a solution at the highest level of generality—few courts and commentators have considered whether the response to alternative theories of the crime should take account of the particular circumstances of each case. One notable exception is Scott Howe, who argued not long after *Schad* that the courts "typically have obscured the underlying interests implicated by factual nonconcurrence claims."[157] The possibility of juror disagreement is worrisome, not because the criminal statute might have been overly broad, but because of "the *doubt* that a divergence may reflect about whether the defendant committed any prohibited act."[158] The fact that the jurors are clinging to factually inconsistent theories—indeed, asserting them to be true beyond a reasonable doubt—makes us wonder whether *any* of them are getting it right. Regardless of whether alternative factual theories "are deemed to be distinct crimes or merely alternative means of committing a single crime," Howe argues, "if an adequate number of jurors cannot agree on one or more of the theories, grave doubt exists that any such theory is true."[159]

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156. 170 U.S. 481, 500-01 (1898).

157. Howe, *supra* note 24, at 6.

158. *Id.* (emphasis added).

159. *Id.* at 31.

Unfortunately, Howe does not specify a precise test by which courts could identify the presence of such doubt in a particular case. He acknowledges that "[d]istinguishing between material and trivial factual differences requires a multi-faceted and complex inquiry," one involving "a careful analysis of the evidentiary context in each case," such that "[t]he trial court's determination warrants some deference."[160] Yet before we start deferring to trial courts, we should provide them with criteria on which to rule in the first instance. Howe writes that the "ultimate question in each instance is whether the inability to resolve the dispute raises doubt that the defendant committed an act under conditions or causing a result that the criminal statute prohibits"; but this is just to restate the issue, not to resolve it.[161] The fact that any solution must be *applied* on a case-by-case basis, however, does not mean that our *theory* must be equally context-bound and indeterminate.

We can begin to develop such a theory, I contend, by distinguishing the cases in which alternative theories are troubling from those in which they are not. In some of the latter cases (such as *Andersen*), one might be tempted to say that there is no actual absence of unanimity; all the jurors agree that the defendant murdered either by shooting or by drowning. Yet this description is clearly too broad: in Example 3 ("The Long Declaration"), all twelve jurors believe that the defendant committed perjury *somewhere*; and in Example 6 ("Six Different Ducats"), they all believe that *some* coin is counterfeit. Indeed, any case of conviction on alternative theories could be so rephrased. Suppose that six jurors believe beyond a reasonable doubt that p, and six believe similarly that q. Using the rules of logical inference, the first group infers from p the further proposition, which they also believe beyond a reasonable doubt, that either p or q (or, to use the logical symbolism, $p \vee q$). The other six jurors do likewise. Thus, the jury of twelve now unanimously

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160. *Id*. at 46.

161. *Id*.; *see also id*. at 74 ("The general inquiry is whether a failure to agree on one or both bases of liability would raise doubt that the offender engaged in any conduct that amounted to [the crime].")

believes beyond a reasonable doubt that $p \vee q$. So how could the defendant complain of a lack of unanimity?

To separate these two cases, we can introduce a distinction, proposed in another context by Brian Skyrms, between what I will call "dependent" and "independent" beliefs in a disjunction.[162] Some of our beliefs in everyday facts are equivalent to beliefs in disjunctions, or in sets of alternatives. Occasionally we believe such sets of alternatives in virtue of a belief in a *particular* alternative: I might believe "The traffic light is green or red" in virtue of my belief that it is red. In other cases, however, we might hold a belief in a set of alternatives without respect to a belief in any particular alternative: someone with green-red colorblindness might believe that the traffic light is green or red, not because he knows the particular color, but because he can tell that it is working and that it is not yellow. As Skyrms writes, "[I]t is possible to have good evidence for '$p \vee q$' and to believe '$p \vee q$' on this basis, without having evidentially warranted belief in either 'p' or 'q.'"[163]

What would it mean for a juror, then, to find a defendant guilty on the basis of an independent belief? Stated formally, we might say that X has an independent belief beyond a reasonable doubt that $p \vee q$ when:

(i) there exists a body of evidence 'e';

(ii) X believes that e, and believes 'e' is good evidence for '$p \vee q$';

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162. See Brian Skyrms, *The Explication of "*X *knows that* p*,"* 64 J. PHIL. 373, 379-80 (1967). For clarity, I have replaced Skyrms' terminology of "derivative" and "non-derivative" with "dependent" and "independent," respectively. In addition to this distinction concerning disjunctive propositions, Skyrms also proposed a generalized theory regarding knowledge of nondisjunctive propositions, which has been heavily criticized. Fortunately for our purposes, however, the criticisms in the philosophical literature either apply only to the generalized version, *see* Marshall Swain, *Skyrms on Nonderivative Knowledge*, 3 NOÛS 227 (1969), or are ill-founded, *see* Keith Lehrer & Thomas Paxson, Jr., *Knowledge: Undefeated Justified True Belief*, 66 J. PHIL. 225, 232-34 (1969) (misinterpreting Skyrms' requirement that *some* body of evidence meet a given condition as applying to *all* bodies of evidence).

163. Skyrms, *supra* note 162, at 380.

(iii) *X* believes beyond a reasonable doubt that $p \vee q$ on the basis of the beliefs referred to in (ii); and

(iv) it is not the case that (ii) and (iii) both hold good with either '*p*' or '*q*' uniformly substituted for '$p \vee q$'.[164]

Though forbidding at first glance, the formal definition simply tracks the intuitive description above. To hold an independent belief that today is a weekday, I might reason from beliefs that I had classes this morning, and that I have classes only on weekdays. Other beliefs (that my friend told me it is Tuesday, and she is trustworthy) would also support the proposition that today is a weekday, but only in virtue of supporting a *particular* alternative (Tuesday). In this context, we might call the latter body of evidence "dependent evidence," and the former body "independent evidence"—evidence tending to support an independent belief.

One clarification should be made before proceeding further. The categories of "independent" and "dependent" are not mutually exclusive,[165] in that one can have both a dependent *and* an independent belief that $p \vee q$. I might believe that today is either-Tuesday-or-not-Tuesday both because a trusted friend tells me it *is* Tuesday (a dependent basis) and because of the law of the excluded middle (a clearly independent basis). Paraphrasing Skyrms, to believe that *x* on the basis of '*e*' doesn't mean that '*e*' is one's *sole* ground for believing that *x*; it merely requires that '*e*' alone would be *sufficient* for a belief that *x*.[166]

At this point, the application of this theory to alternative theories of the crime should be clear. The reason we are untroubled by juror disagreement in the "Shooting or Drowning" case of Example 2 is that the jurors possess an *independent* belief that one or the other alternative occurred. They consider the defendant guilty based on a belief that he shot the first mate and threw him into the sea, and *not* based on any belief in a particular scenario of death-by-shooting or death-by-drowning. The same could be said for the "*A* or not-

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164. This definition parallels that of Skyrms. *See id*.

165. Nor are the categories of dependent and independent evidence. *See infra* note 174.

166. Skyrms, *supra* note 162, at 379 n.13.

A" perjury case of Example 4, in which the jurors need not know which statements was true to know that the defendant perjured himself; the "Simultaneous Assassins" case of Example 5, in which both assassins fired and two victims fell; the "Similar Florins" case of Example 7, in which the coin mold, the business records, etc., demonstrate that *some* coin is counterfeit without explaining which; or the "Al Capone" case of Example 9, in which the evidence strongly indicates tax evasion without indicating any particular source for the unreported income. In all of these scenarios, we intuitively accept the possibility of uncertainty or disagreement as to the alternatives, as the facts on which the jurors might disagree play no role in the validity of their ultimate conclusions. Even if the jurors might prefer one alternative to another—e.g., whether Coin 1 or Coin 2 is false—those conflicting preferences do not undermine the foundations of their shared *independent* belief as to the set of alternatives as a whole.

This distinction also helps explain why we are troubled by juror disagreement when independent beliefs are absent. In the perjury case of Example 3, nothing links the six allegedly false statements other than the fact that they are contained in the same declaration. A juror's belief that *D* committed perjury through one of the various means could *only* be a dependent belief, for there is no independent evidence that *D* is lying. The same applies to the "Different Ducats" case of Example 6, in which the falsity of each coin is independent of the falsity of any other, or the "Illegal Income" case of Example 8, in which the jurors must pick and choose among various unrelated transactions. In these examples, there is no evidence that could lead a juror to believe in guilt, except insofar as she believes in a particular *theory* of guilt. We therefore intuitively refuse to accept the jurors' patchwork agreement on the guilty verdict when they still disagree as to the theory.

These considerations suggest a rough-draft "independence test" (to be refined in Part IV) for determining when convictions may be based on alternative theories of the crime. When faced with a set of alternatives left open by the prosecution, jurors might be required either (1) to agree

unanimously[167] on a particular theory of guilt, and to hold that belief beyond a reasonable doubt, or (2) to share unanimously an independent belief, beyond a reasonable doubt, that one of the alternative theories of guilt is true.[168]

B. Its Advantages

Thus framed, the independence test possesses five advantages over the present system. First, it renders *irrelevant* the question of whether there is one fact-finder or many. As discussed above,[169] alternative theories cannot pose a nonconcurrence problem for a single fact-finder, who can find guilt only through one of three ways: believing *A* beyond a reasonable doubt; believing *B* beyond a reasonable doubt; or believing (independently) that either *A* or *B* occurred, without knowing which. Were independence made the touchstone of agreement, the same result would hold for juries (or, indeed, for any group of fact-finders required to concur): either all would find *A*, all would find *B*, or all would hold an independent belief in the disjunction '*A* ∨ *B*.' As noted above, the worst that can occur in this scenario is *uncertainty between alternatives*, limited by the requirement of independent belief. What cannot occur under the independence test, however, is the problem unique to cases involving multiple fact-finders, that of *nonconcurrence*—whereby a conviction is obtained merely by combining one fact-finder's belief that only *A*, with another's contradictory belief that only *B*.

Second, the independence test is uniquely compatible with the expressed reasoning of the courts, if not with their ultimate conclusions. For instance, the Supreme Court has frequently allowed indictments in the alternative for cases of clear independent belief. The "Shooting or Drowning" example of *Andersen* has already been presented; but in the similar case of *St. Clair v.*

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167. Or, in states with non-unanimous juries, to achieve the requisite level of agreement.

168. *But see infra* note 186.

169. *See supra* text accompanying note 133.

United States, the Court tolerated ambiguity as to whether the victim died by beating or drowning, as well as on which part of the high seas the crime occurred, when it was clear that he died on *some* part of the high seas.[170] *Borum v. United States* upheld the murder convictions of three accomplices, each of whom were acquitted of having been the gunman, when there was sufficient reason to believe that *one* of them had held the gun, and this fact properly established all three as principals.[171] Indeed, the independence test seems to track precisely the question posed in *Richardson* (and in different form by Howe)—whether the "difficulty in proving individual specific transactions" would, in point of fact, "tend to cast doubt upon the existence of the requisite 'series.'"[172]

Third, such a test avoids the need for courts to sit in judgment of the legislature's substantive choices in constructing a criminal law. Consider the dilemma that Justice Scalia recognized in *Schad*, but failed to resolve:

> When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her. While that seems perfectly obvious, it is also true . . . that one can conceive of novel "umbrella" crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-6 verdict would seem contrary to due process.[173]

The line between these cases will now be familiar. The distinction is not merely that the "umbrella" statute is "novel," for as we have seen, similar cases can be generated for the most familiar crimes. The distinction is that in

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170. 154 U.S. 134 (1894).

171. 284 U.S. 596 (1932). Indeed, one of the purposes of conspiracy or accomplice liability may be to avoid any need for prosecutors to distinguish among the various roles of those joining in a crime spree; like the Model Penal Code's treatment of inconsistent-statement perjury, *see supra* note 50, or (more generally) like a ban on possession of burglar's tools, such a substantive rule reduces the evidentiary burden of identifying a particular criminal theory when it is highly likely that *one* of the criminal theories will be correct.

172. *Richardson*, 526 U.S. at 823.

173. Schad v. Arizona, 501 U.S. 624, 650 (Scalia, J., concurring in the judgment).

the burned-house case, the evidence would clearly produce an independent belief in guilt: if new evidence came forward that tended to disprove one theory, it would simply make the other theory *more* likely.[174] This would almost never be the case under the robbery-or-tax-evasion statute. Were the independence test applied in practice, a mischievous legislature would gain nothing by creating the "umbrella" crime of robbery or failure to file a tax return, for it is virtually impossible to convince jurors beyond a reasonable doubt, in an *independent* fashion, that either robbery *or* tax evasion must have occurred. (One identical twin commits a robbery in New York, while

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174. Note, however, that this "disproving evidence" test is not precisely identical to the independent/dependent distinction. In some situations, a belief beyond a reasonable doubt in a disjunction might be entirely the consequence of certain subsidiary beliefs in each of the disjuncts, none of which quite rise to the beyond-reasonable-doubt standard. Consider a case in which *D* holds a dinner party with twelve unrelated guests, all of whom promptly die. He and his cook are charged with conspiracy to commit murder, and they defend on the grounds that the guests may have suffered from a rare food allergy afflicting 11% of Americans. It is conceivable that the jurors might possess reasonable doubt as to whether any *individual* guest had this food allergy, and thus could not convict *D* of any one of the 12 individual counts of murder, yet might believe *beyond* a reasonable doubt that the defendants conspired to poison at least one of the guests, since the probability that *all* of the guests had the allergy (≈1 in 318 billion) is extremely low. In this case, new evidence that a particular guest *did* in fact possess such an allergy would actually *undermine* rather than confirm the other theories of guilt.

Such arguments, often described under the label of the "doctrine of chances," have produced vigorous debates in the law of evidence. *See, e.g.*, Edward J. Imwinkelreid, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419 (2006). My theory, however, is agnostic as to whether such arguments ought to be admitted. All the formal definition requires for independent belief *beyond a reasonable doubt* is a body of supporting evidence that does not necessarily create belief *beyond a reasonable doubt* in any of the individual disjuncts. The theory does not rely on any particular explanation of *how* one piece of evidence creates belief in another proposition, and it accepts the possibility that a single piece of evidence might help support both a dependent and an independent belief at the same time. Thus, whether a jurisdiction chooses to admit "doctrine-of-chances" evidence is a separate question from whether such evidence would support a dependent or an independent belief in guilt, and the categories of dependent and independent *evidence* (as opposed to beliefs) are therefore not mutually exclusive.

the other is busy not-filing his tax return in California . . . .) Such cases are not logically impossible, just silly.

But suppose an unruly legislature *did* put an umbrella statute on the books. Under the independence test, the jury would be required—given any halfway-reasonable set of facts—to achieve unanimity on whether the defendant had committed robbery or tax evasion. Would any harm have been done to the defendant? Probably not; even today, a defendant might face charges of both tax evasion and robbery in *separate counts*, on each of which the jury must be unanimous. If anything, highway robbers and tax evaders would be *better* off if the indictment listed only a single umbrella offense rather than two specific offenses; for then double jeopardy, or related principles of due process, might block an additional prosecution or punishment (however unlikely) on an alternative theory arising out of the same events.[175] A defendant convicted of robbery-or-tax-evasion for doing act *X*, once a jury has determined that *X* was "umbrella-robbery," could not be subsequently prosecuted on the grounds that *X* was also "umbrella-tax-evasion."

Fourth, the independence test helps explain why courts can legitimately ignore the infinite number of possible facts that the prosecution does not even seek to prove, and about which the jurors may have formed no beliefs whatsoever. Consider the hypothetical presented by then-Judge Alito in his dissent to *United States v. Edmonds*:

> [S]uppose that a motorist is seen picking up a hitchhiker at one end of a state and that the hitchhiker is stopped many days later at the other end of the state driving the motorist's car. Suppose also that blood stains are found in the trunk, that the motorist's bullet-ridden body is discovered in a wooded area in another part of the state and that other evidence tying the hitchhiker to the crime is gathered. Would anybody suggest that the hitchhiker cannot

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175. *See* Amar, *supra* note 29, at 1819-20. Thus, even if a legislature *could* enact a general "crime" statute, it would have strong incentives not to, for reasons of double jeopardy and collateral estoppel.

> be convicted unless the prosecution can prove specifically where and when the killing occurred?[176]

The answer is no, for precisely the reasons discussed above. No reasonable juror could vote to convict, on this evidence, in virtue of a dependent belief *as to the particular time or place of death*, as opposed to an independent belief (for example) that the defendant carried the body in his trunk. Similarly, in the hitchhiker, the prosecution also did not establish whether or not the Yankees won the previous night, whether the war in Iraq was wise, or whether the moon is made of green cheese. However these factual disputes might divide the jurors, they are almost certainly not part of the body of evidence necessary to forming a shared independent belief in guilt (e.g., the defendant did *X*, and either the Yankees won or they didn't).

Fifth, the independence test manages to subsume many of the previous proposals by commentators on the issue, in a way that shows both the proposals' contributions and their errors. For instance, under Montana law, Brian Morris states that "alleged bad acts" will not merit a specific unanimity instruction unless they "have taken place over an extended period of time, in different locations, and involve different types of conduct."[177] Attempting to apply this standard conceptually would be a metaphysical nightmare—how far apart must two points be to constitute "different locations"?—but it makes perfect sense as a heuristic for judging the evidence. Acts taking place in different locations and over an extended period of time are unlikely to share sufficient evidentiary connections to produce an independent belief in guilt; they are much more likely to produce only dependent beliefs. Similarly, Howe offers four nonexclusive factors to help guide trial courts in the exercise of their discretion: whether the alternatives exist "at a level so specific that the dispute . . . does not undermine the conclusion"; whether "other evidence convincingly establishes [the] fact"; whether "doubt as to one basis for guilt appears only to suggest that an alternative basis for guilt is true"; and

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176. United States v. Edmonds, 80 F.3d 810, 832 (3d Cir. 1996) (Alito, J., concurring in part and dissenting in part). The facts of this hypothetical are similar to those of *Schad*.

177. Morris, *supra* note 59, at 55.

whether "the language in a statute covers a range of events or conditions and leaves few gaps."[178] All of these questions are subsumed in the more general question of whether the fact-finder's belief is independent or dependent in nature; the four individual criteria are merely special cases for the application of the independence test.

This proposed test is suggested as a theoretically coherent approach to governing alternative theories of the crime. The test is tied through its design to the specific feature that makes alternative theories worrisome—the potential for nonconcurrence among fact-finders. Compared to the alternatives, the independence test gets the results right, rather than wrong, in a far greater variety of hypothetical cases. The next Part, therefore, examines how this theoretical framework might be implemented in practice.

IV. FROM THEORY TO PRACTICE

One reason why the previous proposals have all encountered difficulties is that their analysis is uniquely centered on *judges*. Perhaps this should be unsurprising, since trial courts' efforts to correct the problem are rarely remembered; both the doctrine and the scholarly literature are typically addressed to appellate courts. If the true solution to alternative theories depends on questions of fact and evidence, however, its practical implementation must instead be centered on those who normally resolve such questions: the *jurors*. This Part describes a method analogous to that of lesser-included-offense instructions, whereby courts can bring their fact-finding procedure in line with the theoretical framework described in Part III.

A. The Lesser-Included-Offense Model

To develop a satisfactory courtroom procedure, we might first examine a competing proposal. For example, Howe writes that when alternative

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178. Howe, *supra* note 24, at 43.

theories are suggested at trial, "relief is easily provided"; the court "need only direct jurors' attention to the evidentiary inconsistency and instruct them that the requisite number of jurors must agree on a theory before finding the defendant guilty." Such an instruction should be given "with the accused's consent whenever the evidence reveals any potential for disagreement among convicting jurors on a material fact issue."[179]

This procedure allows too much judicial involvement in criminal fact-finding. In some cases, of course (e.g., a prosecution for murder-or-littering), the materiality of the disputed factual issue will be obvious. But other cases will not be so simple; whether the inconsistency is material might depend on *other* evidence, as to which a rational jury could go either way. Consider the "Different Ducats" case of Example 6, with a few pieces of independent evidence, such as a co-conspirator's testimony to the nefarious plot, thrown in: whether the uncertainty as to the coin is material depends on whether the jury credits the co-conspirator's testimony. To treat materiality as an on-or-off, binary question assumes away the many cases in which both dependent and independent evidence will be available to the jury. Moreover, it forces the judge to adopt one of two options: either she can always resolve such cases against the prosecution, requiring unanimity whenever *any* dependent evidence has been presented—thus discouraging the prosecution from introducing such evidence, even when it is reliable and highly probative of guilt—or, on her own authority, she can occasionally resolve such cases against the defendant, officially declaring the co-conspirator's testimony to be credible and thereby displacing the essential role of the jury as the ultimate fact-finder. Neither option seems compatible with our traditional vision of the jury trial.[180]

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179. *Id*. at 49.

180. This dilemma is quickly encountered by other suggested approaches to alternative theories, including that adopted by the state of Kansas. Under Kansas law, "[w]hen the state has evidence of more than one specific criminal act and the acts can be differentiated from one another factually, then the State must be required to charge and prosecute each act on its own count." Beier, *supra* note 48, at 322. When, however, the state offers only "generic evidence . . . of multiple criminal acts that cannot be factually

To avoid such judicial predetermination of the facts, we might instead adopt the model that has been established for another fact-dependent question of criminal procedure, namely lesser-included-offense instructions. In theory, there is always a logical possibility of conviction on a lesser included offense; the elements of attempted murder are a strict subset of those of murder, and only the dead body is missing. But a jury in a criminal case will not be given an instruction for *every* offense logically included within the indictment; if the defendant is accused of publicly decapitating his victim, he is not constitutionally entitled to an instruction for misdemeanor battery.

The Supreme Court's test for lesser-included-offense instructions therefore asks what, on this evidence, a rational jury could find. Under *Keeble v. United States*, the defendant may receive an instruction "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater."[181] There are three relevant possibilities. First, if no rational jury could find the defendant guilty of the greater offense (e.g.,

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differentiated by its witnesses," such as evidence of child abuse "when the victims are too young and/or too inarticulate to describe repeated, long term abuse in specific terms," a different procedure is adopted. *Id*. at 323. In these cases, the prosecution may charge the various acts under a single count, but the "jurors would have to be instructed that, to convict on that count, they must unanimously agree that the defendant committed all of the alleged acts or any [particular] one of them." *Id*. at 323-24.

Assuming that the various alleged acts have been made mere means under a pattern statute, this elect-or-instruct standard fails to recognize that the jury often need not agree as to the particular act. If there is evidence that a child was abused by the defendant (say, DNA samples), and there is evidence that the defendant had access to the child on three distinct occasions, the jury need not agree that the defendant abused the child on all three occasions, or on any particular one of them; the evidence is sufficient to produce an independent belief that abuse occurred. Similarly, the Kansas rule implies that as soon as *any* evidence is introduced of acts that can be factually differentiated, the prosecution *must* charge them in the alternative. Thus, if one passing witness saw *D* punching *V*, and another passing witness saw *D* kicking *V*, the prosecution would be forced to charge two separate counts of assault—which cannot be the correct rule.

181. 412 U.S. 205, 208 (1973); *see also* Schmuck v. United States, 489 U.S. 705, 716 n.8 (1989) ("[T]he independent prerequisite for a lesser included offense instruction [is] that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater.").

murder), then the charge must be dismissed. Second, if a rational jury *could* convict on the greater offense, but could not convict the defendant *only* of the lesser offense (e.g., misdemeanor battery) *without* the greater offense, the greater charge may be given alone. The defendant is entitled to an instruction only if a rational jury could convict on either offense in isolation (e.g., either murder or manslaughter, when the mens rea is in doubt).

This framework does involves some judicial interpretation of the evidence against the defendant's interest. It is the *judge*, not the jury, who examines the strength of the evidence and decides that no lesser charge will be available. When a judge denies a lesser-included-offense instruction, however, she is not convicting the defendant of the crime; she is only holding that on the evidence presented, no rational jury could find the lesser offense without *also* finding the greater offense. Returning to the grisly case mentioned above, if the defendant is accused of decapitating his victim, no rational jury could believe these facts to support a verdict of battery without also, at the very least, finding manslaughter.

B. The 'Alternative Theories' Instruction

A system of special unanimity instructions could follow a similar pattern. After closing arguments, and before the jury instructions are given, the defense could request a unanimity instruction, identifying what it claims to be a factual disjunction in the indictment.[182] (Since the sufficiency of the indictment is not at issue, just as in the case of lesser included offenses, a failure to request the unanimity instruction could be considered as waiving

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182. As some courts have worried that greater specificity in verdicts may work to the defendant's disadvantage, *see* State v. Simon, 398 A.2d 861 (N.J. 1979) (stating that special interrogatories can "constitute a form of mental conditioning which is antithetical to the untrammeled functioning of the jury"); *see also* United States v. Spock, 416 F.2d 165, 180-81 (1st Cir. 1969), the proposal here would only offer such instructions at the defendant's request. *See generally* Nepveu, *supra* note 48 (discussing verdict specificity). As mentioned above, the precise question of *which* disjunctions are to be handled in this way is addressed *infra* Part V.

the objection, subject to plain error review.[183]) The judge would then consider what, on this evidence, a rational jury could find.

There are three possibilities, analogous to those described for lesser included offenses. The first possibility is that no rational jury could reach an independent belief in guilt; i.e., the independent evidence is legally insufficient for conviction. Under the robbery-or-tax-evasion statute, for example, almost no rational jury could find (in an independent fashion) that *either* robbery *or* tax evasion had occurred. In this case, the court must give an instruction requiring unanimity among the jurors.[184] The jury should not be

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183. *See* FED. R. CRIM. P. 51(d); Lampkins v. Thompson, 337 F.3d 1009 (8th Cir. 2003) ("[A]bsent plain error, appellants must raise specific objections to the form or content of jury instructions, including special interrogatories, before the district court in order to preserve such matters for appeal." (quoting Horstmyer v. Black & Decker, Inc., 151 F.3d 765, 770 (8th Cir.1998))); *see also* Howe, *supra* note 24, at 46 n.171 ("As with other claims of constitutional error, factual nonconcurrence claims are typically waived unless raised by the defendant.").

184. The Seventh Circuit provides an example of such an instruction:

> The indictment alleges that the defendant[s] committed certain specific acts. . . . The government need not prove that each and every specific alleged act was committed by the [a] defendant. However, the government must prove that [a] defendant committed at least one of the specific acts which are alleged [in that count]. In order to find that the government has proved the [a] defendant committed a specific act, the jury must unanimously agree on which specific act that defendant committed.
>
> For example, if some of you find defendant [insert example from indictment] and the rest of you find defendant [insert different example], then there is no unanimous agreement on which act has been proved. On the other hand, if all jurors find defendant [insert example from indictment], then there is unanimous agreement.

COMM. ON FED. CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 4.03, at 49 (1998), *available at* http://www.ca7.uscourts.gov/Rules/ pjury.pdf (alterations in original); *see also* FIFTH CIRCUIT DIST. JUDGES ASS'N, 2001 FIFTH CIRCUIT CRIMINAL JURY INSTRUCTIONS § 1.25, at 32 (2001), *available at* http://www.lb5.uscourts.gov/juryinstructions/ ("The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one is enough. But in order to return a guilty verdict, all twelve of you must

permitted to reach a patchwork verdict, and the appropriate instruction would require agreement on a particular theory.

The majority of cases, however, represent a second possibility—that a rational jury could convict the defendant *only* through an independent belief in guilt. The prosecution may not have established whether the death in Example 2 was caused by shooting or drowning, but a rational juror who would find the defendant guilty of murder must hold an *independent* belief in guilt, one that does not depend on a particular choice of alternatives. Just as the court would not give a lesser-included-offense instruction to allow for possibilities any rational jury would ignore, no additional unanimity instruction should be required in these cases.

The final possibility is that a rational jury could convict *either* on the basis of independent beliefs alone, *or* on the basis of dependent beliefs. Many cases involving alternative theories will be of this form, with evidence not only of the disjunction $p \vee q$, but also of the individual disjuncts p and q. For instance, in a tax evasion case, there might be evidence of unreported income generally—the defendant is living well beyond his means—and of specific unreported transactions. Whether the defendant is properly convicted of the crime depends on whether the jury *actually* credits the independent evidence, or whether the jurors reach their decision through an illegitimate patchwork of dependent beliefs. Because these outcomes will be obscured under a general verdict of "guilty," this possibility—following the example of lesser included

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agree that the same one has been proved. All of you must agree that the government proved beyond a reasonable doubt that the defendant _____; or, all of you must agree that the government proved beyond a reasonable doubt that the defendant _____; or all of you must agree that the government proved beyond a reasonable doubt that the defendant _____."). The Ninth Circuit's special unanimity instruction is quite cursory in nature, *see* NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 7.9, at 131 (2003), http://www.ce9.uscourts.gov/web/sdocuments.nsf/crim, while the Eleventh Circuit provides no general model unanimity instruction, instead incorporating unanimity into the instructions for particular criminal offenses, *see* JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT, ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 2003 *passim* (2003), *available at* http://www.ca11.uscourts.gov/documents/jury/crimjury.pdf.

offenses—calls for a special jury instruction. A rough cut of such an instruction, in a case involving two alternative and exclusive means, *A* and *B*, might look something like the following:

> You have been instructed that your verdict, whether it is guilty or not guilty, must be unanimous. The following instruction applies to the unanimity requirement as to Count *n*.
>
> Count *n* of the indictment accuses the defendant of committing the crime of *X* in two different ways. The first is that the defendant did *A*. The second is that the defendant did *B*.
>
> The government does not have to prove both of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one is enough. But in order to return a guilty verdict, one of two possibilities must be met.
>
> The first possibility is that all twelve of you agree that the same alternative has been proved; that is, all of you must agree that the government proved beyond a reasonable doubt that the defendant did *A*; or, all of you must believe that the government proved beyond a reasonable doubt that the defendant did *B*.
>
> If you do not all agree that the same alternative has been proved, you must consider a second possibility—in which all twelve of you agree that the government has proved beyond a reasonable doubt that the defendant did one of either *A* or *B*, and your agreement is based on some *other* reason beyond individual and particular beliefs that the defendant did *A* or that the defendant did *B*.
>
> I will illustrate this second possibility with an example. Imagine a man who sees a traffic light from a long way off. If you ask him, "Is the light either green or red?," he may answer "yes," because he can see that it is red. But if the man is colorblind, and cannot tell the difference between green and red, he may still be able to answer "yes," because he can see the light and knows that it is not yellow. Even if he cannot tell the true color of the light, he can know that it is one of either green or red. And even if he suspects, guesses, believes, or knows by other means that the light happens to be red, he still has an *independent* reason for believing that it is one of either green or red.
>
> Thus, the first possibility is met if all twelve of you agree that the government proved beyond a reasonable doubt that the defendant did *A*, or that the defendant did *B*. The second possibility is met if all twelve of you

> agree that the government's proof has given independent reasons that establish beyond a reasonable doubt that the defendant did one of either *A* or *B*, and these reasons do not rely on any individual beliefs beyond a reasonable doubt that the defendant did *A* in particular or *B* in particular.
>
> Again, in order to return a guilty verdict, one of these two possibilities must be met. [185]

This model instruction is preliminary in form, and could require adaptation to the facts of particular cases, the understanding of jurors, etc.[186] But its basic features should be clear. If the jurors agree unanimously (and beyond a reasonable doubt) on one of the two theories of the crime—e.g., that the defendant failed to report income from a particular transaction—this eliminates any problem of factual nonconcurrence. Alternatively, if the jurors are uncertain or disagree as to which theory of the crime is correct, they could still agree unanimously on an *independent* belief in guilt beyond a reasonable doubt. A juror who would vote for guilt only because of a dependent belief in a particular theory—one who believes "$p \vee q$" only in virtue of her belief that p—could not vote for guilt if her favorite theory were ruled out. But a juror who would convict based on an independent belief in guilt could still convict on such an instruction. Therefore, so long as a proper instruction were given, a special verdict would be unnecessary. Jurors abiding by the instruction could

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185. This instruction is modeled on the Fifth Circuit's unanimity instruction. *See* FIFTH CIRCUIT DIST. JUDGES ASS'N, *supra* note 184, § 1.25, at 32.

186. For example, the extension to cases involving three or more alternative means is left as an exercise for the reader. It should be noted, however, that special concerns arise in cases in which alternative means *A* and *B* are not mutually exclusive, and thus the three alternative means are (1) *A*-and-not-*B*, (2) *B*-and-not-*A*, and (3) both-*A*-and-*B*. In this case, if some jurors believe both *A* and *B*, while others believe only *A*, there is no need for a unanimity instruction, since all twelve share a belief in facts that are sufficient to establish guilt. Thus, it may also be the case that in cases of uncertainty or disagreement, not all twelve jurors need share an independent belief as to the alternatives; if some jurors believe both *A* and *B*, while others believe that (independently) either *A* or *B*, a conviction would also be warranted—as an independent belief that either *A* or *B* should be at least as sufficient for conviction as a belief in one of the particular options. In such a case, there is disagreement among the jurors, but not factual nonconcurrence.

only convict if they either (1) agree on the particular theory, or (2) agree that the independent evidence is sufficient for guilt.[187]

C. Summary

The system of jury instructions proposed above manages to implement the theoretical framework of Part III in a manner compatible with our traditional vision of the jury trial. The proposed jury instructions might be complicated at times, but not substantially more so than many existing jury instructions, which are designed more for their acceptability to appellate courts than for their success in communicating the relevant legal standards to the jury. Moreover, the procedure is certainly no more complicated for the judges than the current doctrine on lesser included offenses. Any error in a trial court's instructions could be corrected on appeal, in the same manner as for lesser-included-offense instructions and with the same provisions for harmless error.

The procedure suggested above has the particular advantage of automatically denying most frivolous requests for unanimity instructions. Suppose that independent evidence shows conclusively that the crime occurred between 7 and 8 p.m., and the defense requests a unanimity instruction as to whether it occurred before or after 7:23 p.m. In such cases, even if evidence concerning the specific time had been introduced, no reasonable juror would have relied on such evidence in reaching a decision of guilt; if new evidence appeared that the crime could not have occurred before 7:23 p.m., any reasonable juror who might have voted to convict would

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187. Howe notes that even if a rational jury could go either way on certain evidence, "a court can sometimes conclude that a reasonable juror *probably* would not find the defendant guilty without resolving the disputed or uncertain evidentiary point," and should give a specific unanimity instruction in such cases. Howe, *supra* note 24, at 43 n.159 (emphasis added). Rather than have courts engage in such probabilistic reasoning (with the dangers of either denying a legitimate unanimity instruction, or requiring unanimity when the jurors' weighing of the evidence would render it counterproductive), it seems better to leave the question to the jurors.

simply conclude that the same crime took place later. Thus, even though every criminal accusation leaves some facts unspecified, *not* every criminal accusation will require a special instruction for unanimity. On this approach, a jury instruction will only be necessary in the cases where there actually is some doubt about the process by which a rational jury might convict.[188]

Most importantly, the proposed instructions seem to get the answers right in each of the various hypothetical scenarios. Rather than grant a unanimity instruction in every case where it might be requested, the proposal identifies the limited cases where such an instruction might be necessary. Rather than give judges full discretion in weighing the evidence, the proposal preserves the traditional role of the jury in resolving questions of fact. And rather than rely on unsound and unenforceable tests on the legislature's choice of statutory definition, the proposal returns the problem of alternative theories to where it belongs—to the fact-finder at trial.

V. OBJECTIONS AND RESPONSES

The previous four Parts have presented a theoretical understanding of the problem of alternative theories of the crime, as well as a practical means for addressing that problem through trial procedure. This Part considers two

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188. Note that this process again involves the judge making a finding of fact against the defendant's interest. What if the court is *wrong* to assume that the jury will be reasonable, and the jury *in fact* convicts *irrationally* on a patchwork of dependent evidence? The same objection, however, could be made in the context of lesser included offenses. An irrational jury could, perhaps, find only misdemeanor battery in a case of public decapitation—or, for that matter, find only some unrelated and unindicted crime such as jaywalking. Before an irrational jury, the judge's refusal to give the lesser instruction might indeed prejudice the defendant's interests. This has not, however, been taken as a reason to grant every request for a lesser-included-offense instruction that might emerge from the feverish mind of defense counsel. Similarly, not every set of facts left unspecified by the indictment—of which there will be, in every case, an *infinite* number—must give rise to a separate jury instruction. *But see* Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 ST. LOUIS U. PUB. L. REV. 25, 31 (2002) (noting that since juries rarely receive instructions on the subject, they may well in practice impose a higher standard of unanimity than the law actually requires).

potential objections to the proposals of this paper, and in so doing, it illuminates constitutional values that may be served by addressing alternative theories of the crime.

A. Two Objections

1. Does the Independence Test Go Too Far?

A basic feature of the proposed independence test is that it looks beyond the simple agreement of the jurors as to guilt or innocence, instead examining the reasoning that lies behind each of their decisions. Some commentators, however, have argued that such an investigation is inappropriate and inconsistent with our theory of the jury. On Hayden Trubitt's account, the jury system is governed by what he terms the "rule of individualism"—i.e., "that each juror should give his verdict as if he were the sole judge of the case."[189] The unanimity requirement acts as an institutional voting rule to guarantee consensus, but it might not impose any requirement of substantive agreement.[190] On this view, jury unanimity is more akin to the Senate's supermajority voting requirement for approving treaties,[191] which requires a two-thirds vote but does not require that all sixty-seven Senators share the same reasons.

Indeed, the individualist picture of jury unanimity seems unavoidable in any system with nonunanimous verdicts, in which notions of general agreement are specifically replaced with supermajoritarian voting rules. As the Supreme Court noted in *Johnson v. Louisiana*, the fact "[t]hat rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard"; juries may convict even

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189. Trubitt, *supra* note 64, at 559.

190. *Cf.* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007) (proposing a similar supermajoritarian framework for overturning agency interpretations of statutes).

191. *See* U.S. CONST. art. II, § 2, cl. 2.

though "the evidence was such that the jury would have been justified in having a reasonable doubt," even though "the trial judge might not have reached the same conclusion as the jury," and even though "appellate judges are closely divided on the issue [of] whether there was sufficient evidence to support a conviction."[192] Moreover, perhaps individualism is a necessary response to the extreme complexity of certain trials. Justice Ginsburg has presented a hypothetical example of a "personal injury case in which the plaintiff contends that the defendant was negligent in seven separate particulars, while the defendant claims that the plaintiff was contributorily negligent in five particulars, and the claims of both have sufficient evidentiary support to warrant submission to the jury."[193] Trying to determine which facts were believed by which jurors "would necessitate the submission of at least twelve separate fact questions," and a process that would be "cumbersome and confusing" (to say the least).[194]

If this individualist picture of the jury is accepted, no more agreement would be required beyond a unanimous verdict of guilty or not guilty. The purpose of the jury would be to make it more likely, by a unanimous or supermajoritarian voting rule, that the defendant is indeed guilty of the charged offense; beyond that ultimate conclusion, no sharing of reasons or common beliefs would be necessary. Any stronger notion of agreement may fall prey to a mysticism of the jury, or what Justice Ginsburg described as "a theoretical image of the jury as a singular body—twelve men who, through the alchemy of the deliberative process, become as one," when "[i]n reality, . .

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192. 406 U.S. 356, 362-63 (1972).

193. Ginsburg, *supra* note 23, at 267 (citing Samuel M. Driver, *The Special Verdict—Theory and Practice*, 26 WASH. L. REV. 21, 25 (1951)).

194. *Id*. Moreover, the more complex the jury instruction, the less likely it will be followed accurately, *see* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677 (2000), and the more likely that it will privilege wealthy, sophisticated, and well-counseled defendants over others, *see* Note, *Simplicity as Equality in Criminal Procedure*, 120 HARV. L. REV. 1585 (2007).

. [such] perfect harmony, even if it were desirable, is not to be anticipated."[195] Such a rule, we might say, "does not take seriously the distinction between persons."[196] The rule of individualism, by contrast, accepts the inevitably individual nature of jury decision-making, and "does not purport to carry the image of a composite individual beyond practical limits."[197]

2. Does the Independence Test Go Far Enough?

A second possible criticism of the proposal could be made from the opposite direction. Given that the independence test requires something more than a unanimous vote, why shouldn't the test take the matter to its logical conclusion by requiring complete agreement among the jurors on all potentially relevant beliefs? Alternative theories were defined above as "inconsistent factual scenarios taken by different jurors to be the basis of guilt."[198] But why must such scenarios necessarily be the *basis* of guilt, rather than merely part of the jurors' reasoning in voting for guilt? While many possible disagreements could be addressed by the "rational jury" standard described in Part IV,[199] others might not. For example, suppose that witnesses *A* and *B* testify to similar facts, but the credibility of each has been

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195. *Id*. at 268.

196. JOHN RAWLS, A THEORY OF JUSTICE 27 (1971).

197. Ginsburg, *supra* note 23, at 268.

198. *See supra* text accompanying note 9.

199. For example, one might imagine a jury that is divided as to basic principles of how the world works. Suppose six jurors are Leibnizians, who believe that witnesses can testify truthfully only because they have mediated access to the noumenal realm, while the other six are Kantians, who believe that witnesses can testify truthfully only because they can perceive phenomena, despite having no knowledge of things as they are in themselves. *See generally* RAE LANGTON, KANTIAN HUMILITY (1998). Although these jurors might well share only a dependent belief in the proposition that "the witnesses are truthful, one way or another," it is safe to say that no rational jury in *our* world could be expected to divide on this question. If society were different, such that these questions were hugely divisive, arising immediately whenever jurors assembled to ask whether *A* shoplifted from *B*'s store, a unanimity instruction might well be appropriate.

impeached. Six jurors decide to credit the testimony of witness *A*, while the other six credit the (identical) testimony of witness *B*. The jurors' shared beliefs that "either *A* or *B* is telling the truth" are dependent, not independent, in nature. And since a rational juror might find each witness credible or not, why shouldn't the defendant be entitled to a unanimity instruction? (Or, what if all twelve jurors believe witness *A*, but have reached that conclusion through "different indicia of reliability"?[200])

One tempting answer might be that the jurors' disagreement in this example concerns events in the courtroom (i.e., who is telling the truth and who isn't), rather than matters of historical fact. But that answer is too quick; as Trubitt has noted, "if three witnesses tell the same story but there is evidence that each was at another place and, thus, one or more may be lying, no court has suggested that it would be improper for different groups of jury members to believe different witnesses," even though there is a disputed question of historical fact as to where each witness was at the time.[201] And the examples in Part I show the difficulty of separating out which historical facts are necessary for the jury to resolve.[202]

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200. Trubitt, *supra* note 64, at 539.

201. *Id.*

202. Trubitt's example cannot be excluded on the grounds that the historical fact "doesn't involve any element of the crime," for neither do the other examples presented in Part I, and there are surely cases where disputes over merely circumstantial facts would trigger our concern. For example, in most cases, it would be entirely immaterial what color bandana the gunman was wearing in a murder case. But suppose that the only two witnesses to a murder saw two accomplices, one wearing a red bandana and the other wearing blue, and they disagree as to which bandana the gunman wore. Suppose also that another two witnesses, who saw the accomplices after they fled, disagree as to which color bandana (red or blue) the defendant removed from his face. Assuming that holding the gun is an element of the offense, all twelve jurors might believe that the defendant held the gun, but they might differ radically in their specific factual beliefs: six might believe that the gunman wore a red bandana, and that the red-bandana-wearer was the defendant, while six might believe that the gunman wore a blue bandana, and that the blue-bandana-wearer was the defendant. Since the *only* grounds for holding that the defendant held the gun is this patchwork of dependent beliefs, the jury's agreement would in theory fail the independence test described in Parts III and IV.

These examples might appear trite or silly, but they are quite serious given the usual explanation why courts should care about alternative theories of the crime. In Howe's words, "[w]hen a substantial majority of jurors cannot agree on all of the material facts necessary to prove a crime, there is reasonable doubt that the defendant is guilty";[203] the inability of a substantial number of jurors "to embrace either version casts doubt on whether the defendant engaged in *any* prohibited conduct."[204] Yet if the presence of patchwork beliefs as to material facts would create reasonable doubt, so should the presence of patchwork beliefs further up in the inferential chain. No rational juror can hold a beyond-reasonable-doubt belief in guilt on the basis of evidence '*e*,' unless the juror *also* holds an equally strong belief that '*e*' is true. (If I thought the odds were only 50-50 that witness *A* was actually present at the scene, I couldn't conclude—without other information—that *A*'s story is true beyond a reasonable doubt.) So, if the jurors cannot agree on whether witness *A* or witness *B* were present at the scene, then on Howe's account, this produces reasonable doubt that either of them were present. But then, as a matter of logical inference, there *must* be reasonable doubt that the defendant is guilty, if the only evidence for his guilt is the eyewitness testimony of *A* and *B*.

Making rational doubt the touchstone would seem to place no limit on the scope of concurrence requirements—which could travel all the way up the inferential chain to philosophical disagreements about the nature of knowledge.[205] Forcing the jury to agree about more and more facts would, it is true, continually decrease the rate of false convictions; but so would randomly forcing two out of every three juries to acquit. Any workable system must have a stopping point somewhere, and the theory presented thus far does not provide one.

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203. Howe, *supra* note 24, at 42.

204. *Id*. at 46 (emphasis added).

205. *See supra* note 199.

B. Determining "What Happened"

The two objections presented above are forceful. Indeed, in light of them, one might doubt that any approach to alternative theories is capable of producing an acceptable rule for improving a rational, Bayesian fact-finder's confidence in the accuracy of a criminal verdict.

But perhaps maximizing the Bayesian probability of guilt is not the purpose of an alternative-theories rule. Perhaps the goal is rather to maximize the confidence of the *community* in the *system* of verdicts as a whole. Building on the work of Charles Nesson and James Whitman, this Section suggests that the intuitions underlying the independence test also underlie much of our criminal procedure, and thus may make better sense of our constitutional commitments than simple probability-based rules.

1. Scholarly Approaches

In a 1985 article, Nesson famously discussed the case of the Blue Bus, in which the plaintiff is hit by a bus on a road where 80% of the buses are operated by the defendant, the Blue Bus Company.[206] If these are the only available facts, it seems that the probability that he was hit by one of the Company's buses is 80%, and that the preponderance of the evidence therefore favors liability. Yet regardless of the probabilities, Nesson argues that a verdict against the Company would violate common intuitions:

> [R]eaching a verdict is not simply a matter of establishing a high probability that the event occurred. A verdict based on a high probability may be unacceptable if it fails to make a statement about what happened; conversely, a verdict based on a low probability may be acceptable if it makes such a statement. The aim of the factfinding process is not to generate mathematically 'probable' verdicts, but rather to generate acceptable ones;

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206. *See* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1378-79 (1985).

> only an acceptable verdict will project the underlying legal rule to society and affirm the rule's behavioral norm.[207]

One may doubt Nesson as to whether, in fact, a sufficiently high probability may be popularly understood as a "statement about what happened." (For example, DNA evidence provides only probabilities, yet many Americans speak of it as the highest form of proof in both murder cases and paternity suits.) What is important about Nesson's account, however, is his identification of the object of the criminal trial as obtaining "a statement about what happened." Although the fact-finder sees "only evidence of the act, not the act itself,"[208] the verdicts must not be understood *merely* as assessments of probability, but also as "statements about what actually happened, which the legal system can then use as predicates for imposing sanctions without further considering the evidence on which the verdicts were based."[209] The verdict, in other words, is designed to be a "set[] of factual conclusions that the public can accept as the predicate for the application of legal sanctions."[210]

Whitman identifies a related distinction in his forthcoming work *The Origins of Reasonable Doubt*.[211] In examining the history of the legal standard, he identifies two types of procedures in criminal justice: "proof procedures," designed primarily to elicit the truth, and "moral comfort" procedures, designed to reassure the participants in the system of their personal blamelessness.[212] Whitman's principal argument is that the reasonable doubt standard itself originated as a moral comfort procedure, "concerned with protecting the souls of *the jurors* against damnation"—

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207. Nesson, *supra* note 206, at 1358-59.

208. *Id.* at 1358.

209. *Id.*

210. *Id.* at 1391.

211. JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: RELIGIOUS ROOTS OF THE CRIMINAL TRIAL (Yale Univ. Press, forthcoming 2007); *see also* James Q. Whitman, *The Origins of "Reasonable Doubt"* (Yale Law School Faculty Scholarship Series, Paper 1, March 1, 2006), http://lsr.nellco.org/yale/fss/papers/1/ [hereinafter Whitman, *Origins*].

212. Whitman, *Origins*, *supra* note 211, at 8-9.

assuring them that they could sinlessly condemn a man to death "as long as their 'doubts' were not 'reasonable.'"[213] Indeed, Whitman claims, "'reasonable doubt' was never designed to be a proof rule, and it cannot possibly work as one," for there is "no possible formula, in any jury instruction, that will meaningfully guarantee that the ends of proof have been reliably attained."[214] Rather, the rule was "addressed to the subjective state of mind" of the worried juror.[215]

2. Constitutional Values

a. What the Constitution Says

Regardless of whether Nesson's analysis of evidence law and Whitman's historical argument are correct, it should be clear that the concern for "moral comfort" and for determining "what happened" has not entirely left us. These models help explain some curious features of contemporary constitutional discussions of alternative theories of the crime—including the fact that so many discussions are phrased in terms of the *community's* doubt and the quest for a particular kind of *moral* certainty.[216] In *Winship*, for

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213. *Id.* at 3.

214. *Id.* at 162-63.

215. *Id.* at 164.

216. Even Trubitt, the strongest supporter of the "rule of individualism," expressed concern for the impact of patchwork verdicts on communal certainty. In the context of a vehicular homicide case, he wrote that

> the *community's* doubts of guilt, and each citizen's fear that he may someday face unjust conviction, may not be assuaged. The fact that was found . . . is so general that one might doubt whether, *as a matter of historical fact*, the defendant did any culpable thing. After all, six jurors found the accusation of speeding unproved; six found the accusation of intoxication unproved.

Trubitt, *supra* note 64, at 532 (emphasis added). Trubitt added that "[i]t is not the average citizen's doubts that set the benchmark, but the judgments of legislators"; yet no matter what substantive statutes a legislature might enact, it might always encounter similarly troubling patchwork verdicts.

example, the Court described the reasonable-doubt standard as "indispensable to command the *respect and confidence of the community* in applications of the criminal law. It is critical that the *moral force* of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[217] In *Schad*, the plurality twice repeated the notion that "it is an assumption of *our system* of criminal justice . . . that no person may be punished criminally save upon proof of *some specific* illegal conduct"[218]—a maxim resting not only on the principle of legality (which might be satisfied by a finding of criminal conduct, whether specific or not), but also on Whitman's discussion of criminal justice as a "rule-bound system" that alleviates the personal guilt of the participants, in which "it was *the law* that made the decision, and not *the judge*."[219]

Though the Constitution does not speak expressly to the question of alternative theories, it has been read to impose a number of requirements on criminal procedure—in addition to the reasonable-doubt rule mentioned above—in order to make criminal justice acceptable to the public as a whole. First, the Sixth Amendment requires that criminal trials be *public* trials, both in the sense that the public is allowed into the gallery, and in the sense that the trials are held before an impartial jury of the people: "[t]he people sitting in both boxes," the gallery box and the jury box, are "educated in their rights and duties and in the workings of the criminal justice system that operate[s] in their name."[220] The public trial "was designed to infuse public knowledge into the trial itself, and, in turn, to satisfy the public that truth had prevailed

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217. 397 U.S. at 364 (emphasis added).

218. *Schad*, 501 U.S. at 633 (emphasis added); *see also id.* at 633 n.4 ("[A] requirement of proof of specific illegal conduct is fundamental to our system of criminal justice . . . ."); Trubitt, *supra* note 64, at 531 ("The jury is valued not only as a community buffer between the accused citizen and oppressive, overzealous law enforcers, but also as a guarantor that the stigma of conviction will not be attached except on clear proof of specific conduct.").

219. Whitman, *Origins*, *supra* note 211, at 20.

220. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 114 (1998).

at trial."[221] Such concerns raise a strong presumption that constitutional criminal procedure was designed to assuage not only the jury's conscience, but also that of the community.

Second, the Sixth Amendment may address this question in an oblique way through the provision of an information right. The Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." It is crucial to note that in describing this right, the Constitution speaks in the *singular*; the accused is informed of "*the* nature and cause of *the* accusation," not merely some nature and cause of some accusation. What this clause presupposes is that each criminal accusation shall possess a single nature and cause—that there will be *a* particular story about what the defendant has done, under what circumstances, with what intent, and with what result, that could justify the imposition of criminal punishment. Such a regime can tolerate some degree of *uncertainty* and *ambiguity* in a criminal accusation; it can tolerate a multiplicity of actions constituting a single criminal offense; but it cannot tolerate *disagreement* as to the nature of the crime, or a verdict that consists of the mere aggregation of discordant beliefs. The latter denies the possibility of a single particular story, of the conviction following from *the* unique nature and cause of *the* accusation, or of there being "proof of *some specific* illegal conduct."[222]

Finally, the Due Process Clause may act in a general way to require that a finding of guilt be intelligible to a single fact-finder. Due process ensures, to use Whitman's language, that the legal system will function as a "rule-bound system" that alleviates the personal guilt of the participants—a system in which "it was *the law* that made the decision, and not *the judge*."[223] Such a spare description does not place many boundaries on the content of such rules, for virtually any set of outcomes can be reconciled with a sufficiently complicated rule. But if the application of such rules is intended to shield the

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221. *Id.*

222. *Schad*, 501 U.S. at 633 (emphasis added).

223. Whitman, *Origins*, *supra* note 211, at 20.

participants in the system from moral blame, by requiring that the defendant *do something* to deserve his punishment, they cannot function simply by aggregating disagreements as to what, precisely, the defendant *did*.[224] The individual participant in the system must be able to understand and take comfort from the *grounds* on which the punishment is imposed, and this may not be possible when the discordant judgments of fact-finders are combined in a patchwork fashion. As stated above, the key feature of the independence test is that it renders irrelevant the plurality of individual fact-finders; it restricts the factual possibilities—p, q, or (independently) $p \vee q$—to those a single mind can entertain. Such a due process right would not be *created*, but rather *instantiated*, by the presence of multiple fact-finders; it is automatically fulfilled when a single fact-finder judges alone.

b. What the Independence Test Protects

These are all tentative and speculative considerations, to be sure; I am not arguing that the Constitution prohibit patchwork criminal convictions, only that constitutional values are served by such a prohibition. But this fact alone helps clarify the appropriate responses to the two objections raised above.

First, the distinctions between statements about the criminal act and statements about the fact-finder's knowledge—between facts about the crime and facts about how *we* know the crime occurred—help to explain why an alternative-theories instruction need not be available at every level of the inferential chain. Our intuition that something is wrong with a patchwork

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224. This may explain in part the discomfort many have felt regarding prosecutions brought against multiple defendants on mutually incompatible theories. *Compare* Jacobs v. Scott, 513 U.S. 1067, 1069 (Stevens, J., dissenting) ("[F]or a sovereign State represented by the same lawyer to take flatly inconsistent positions in two different cases . . . surely raises a serious question of prosecutorial misconduct. In my opinion, it would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed."), *with* Bradshaw v. Stumpf, 545 U.S. 175, 190 (2005) (Thomas, J., concurring) ("This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories.").

conviction for murder-or-littering does not extend to a conviction for a single act of murder, in which some jurors believe the identical testimony of different eyewitnesses. Jurors are allowed to reach their verdicts based on any sufficient set of proofs presented; we both allow and expect such disagreements in the jury room. The concern is that there will be no good answer to the question of "what happened," not that the question "why should we believe that *X* is what happened" has will have many possible answers. This is why the alternative theories must concern factual scenarios that are the basis of *guilt*, not the basis of a juror's *belief* in guilt.

Alternative theories must relate, in the words of the Sixth Amendment, to the nature and cause of the accusation—to the particular acts, omissions, mental states, or related circumstances to which criminal liability may be attached. Thus a jury might need to agree, depending on the procedure discussed in Part IV, on the time or place of the alleged criminal act, even though the time or place are not named elements of the offense. But it would not need to agree on which witnesses are to be believed, or why they should be thought credible. No indictment—no matter how excessively detailed—would in the process of describing the nature and cause of the accusation list the various witnesses who are to testify or the content of their expected testimony—much less the reasons for believing them to be truthful. If there is essentialism here, it is an essentialism explicitly contemplated by the Constitution, in describing an "accusation" as the sort of thing that possesses a particular "nature."

Second, an approach centered on the *community's* sense of doubt, rather than that of a Bayesian probability theorist, will be less vulnerable to a criticism on the grounds of a "rule of individualism." Viewing the unanimity requirement solely as a voting rule is sensible from the perspective of proof procedures, but not from the perspective of establishing an official account of "what happened." The reliance of twelve individual jurors on discordant factual scenarios as the very *basis* of their verdict is troubling in part because such a patchwork fails to announce "what happened" with a single voice.

Moreover, the Constitution frequently speaks of rights as held by "the people" in their collective capacity.[225] And if juries are to be seen, not merely as fact-finders, but also as opportunities for "the people" to participate in their own governance, then the notion that they must speak with a collective voice does not seem so strange. The virtue of the procedures proposed in this essay is that they do not require agreement on *everything*; they do not seek to collapse the twelve jurors, "through the alchemy of the deliberative process,"[226] into a single composite being. Rather, they merely eliminate the potential dangers of factual nonconcurrence among multiple fact-finders.

Finally, the constitutional values served by this proposed approach may help to assuage potential concerns about its workability. I personally doubt that the procedures would be significantly unworkable; no instruction would be necessary unless requested by the defense, and frivolous requests could be rejected on the grounds that no rational jury would reach that particular patchwork. But in the cases where the requirements would have some bite—where, for instance, there are seventeen different means alleged, of uncertain relation to one another—complexity alone may not be a sufficient objection. After all, two can play at the complexity game. Consider what Albert Alschuler wrote of the trial of former Illinois Governor George Ryan:

> When judges allow lengthy 'one scheme' trials, they often voice confidence that the jury will be able to sort everything out in the end. It would, however, take a special verdict form stretching from the courthouse in Chicago to the Governor's Mansion in Springfield to sort the issues in the Ryan trial. . . . [N]o jury would be likely to go through such a picky analysis of every factual allegation. At the end of a long trial, however, the jury may have heard enough bad things about George Ryan and Larry Warner to want to convict them of devising a scheme or artifice to defraud, whatever that

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225. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1175 (1991) (noting that "the First and Second Amendments' references to 'the people' implied a core collective right").

226. Ginsburg, *supra* note 23, at 268.

> language might mean. The rule of law won't have much to do with the trial's outcome.[227]

Why blame the complexity of a count with seventeen alternative means on the independence test, rather than on the prosecution that brings the indictment? There is no *a priori* reason for the defendant to bear all the risk of complexity, especially when doing so creates a real danger of wrongful conviction. The independence test may burden the prosecution and introduce procedural complications in an already complex trial; but it is not clear whether it does so any more than the prosecution—and the accused—might deserve.

CONCLUSION

This essay has sought to advance a new solution of the problem of alternative theories of the crime. The existing doctrine, under *Schad* and *Richardson*, has imposed legislative restrictions that are unsound in theory, ungrounded in constitutional law, and unworkable (and, therefore, frequently unapplied) in practice. These restrictions, along with those suggested by many commentators, fail to appreciate the fundamentally contextual and fact-based nature of patchwork verdicts, and therefore cannot effectively distinguish those verdicts that ought to be preserved from those that ought to be rejected. By focusing attention on the nature of the jurors' shared beliefs, and in particular by introducing the distinction between dependent and independent beliefs, this essay has proposed an alternative theoretical framework more consistent with common intuitions. It has also presented a potential means of implementing this theoretical method in our everyday criminal procedure, through the use of a system of jury instructions akin to those employed for lesser included offenses. Finally, it has sought to answer objections and to identify potential constitutional guidance on patchwork verdicts, reconceptualizing the issue as one concerned with the

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227. *Cf.* Alschuler, *supra* note 90, at 117.

community's confidence in the legitimacy of punishment rather than only with the likelihood of guilt in a particular trial.

At the same time, one should recognize what this paper has *not* accomplished. I argue that the procedures described above would be sufficient to alleviate any legitimate concerns arising from the possibility of juror nonconcurrence and patchwork verdicts. Were we to amend the Federal Rules of Criminal Procedure and the various state procedural codes to incorporate these proposals, the courts would no longer have to review criminal statutes for compliance with an illusory constitutional distinction between elements and means. I have not, however, sought to establish the foregoing system as *necessary* to a fair system of justice—much less to demonstrate that the proposals made above are constitutionally required, or that convictions obtained without them are constitutionally invalid. The meaning of the constitutional right of a criminal defendant to a public trial by jury, the constitutional right to be informed of the nature and cause of the accusation, or the constitutional command that no person be deprived of life, liberty, or property without due process of law, might or might not address the issue of alternative theories of the crime. My discussion of these issues is purely speculative. Perhaps the values underlying these provisions would be best served by the system of jury instructions described above; I happen to think so. But one must avoid conflating Fifth and Sixth Amendment values with the actual requirements of the Fifth and Sixth Amendments, and this paper has not attempted to discern the proper interpretation of the latter.