

## Alternative Elements

Jessica A. Roth



### ABSTRACT

The U.S. Constitution provides a criminal defendant with a right to trial by jury, and most states and the federal government require criminal juries to agree unanimously before a defendant may be convicted. But what exactly must a jury agree upon unanimously? Well-established doctrine, pursuant to *In re Winship*, provides that the jury must agree that the prosecution has proven every element of the offense beyond a reasonable doubt. Yet what the elements of any given offense are is not as clear as one might expect. Frequently, criminal statutes—especially federal statutes—describe an array of prohibited conduct, leaving ambiguous whether a particular statute sets forth (1) a single offense with alternative means of commission or (2) several different crimes. Under current doctrine, pursuant to *Schad v. Arizona*, this distinction is a significant one. If the statutory alternatives are determined to be alternative means of committing a single offense—or, more precisely, alternative means of establishing a particular element of a single crime—then a jury need not agree on any of the alternatives before it can convict. By contrast, if the alternatives represent discrete elements, signifying discrete offenses, then the jury must agree unanimously on at least one of the alternatives before it can convict. This Article argues that the ambiguity surrounding “alternative elements” has negative consequences throughout the criminal justice system, not the least of which is that it undermines the proof beyond a reasonable doubt standard. Drawing upon some of the insights set forth in *Apprendi v. New Jersey* and its progeny, this Article draws out the tensions between *Apprendi* and *Schad* and suggests a new approach to “alternative elements” that could strengthen the jury’s constitutional role and be a force for greater clarity in our criminal laws.

### AUTHOR

Jessica A. Roth is Assistant Professor of Law at Benjamin N. Cardozo School of Law.

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## INTRODUCTION

The state of substantive criminal law in the United States is widely lamented. Federal criminal law, the subject of particular scorn, has been derided for being disorganized, vague, incomprehensible, and seemingly boundless. While many scholars have discussed these pathologies and the institutional forces that contribute to them, most have diagnosed the likelihood of significant change as remote. While this Article acknowledges that the prospects for wholesale criminal law reform may be slim, it nevertheless suggests that certain well-articulated principles of criminal procedure could be enlisted to do some important, albeit subtle, reform work. This Article specifically focuses on the right to trial by jury—which has received much attention since the U.S. Supreme Court’s seminal decision in *Apprendi v. New Jersey*<sup>1</sup>—and its potential reform utility with respect to “alternative elements” crimes: offenses defined in such a way that at least one of their elements can be established by several alternative means.

Alternative elements are particularly ubiquitous in federal criminal law. To use some of the most commonly charged federal criminal laws as examples, the federal wire fraud provisions make it a crime to use interstate wire communications in furtherance of a scheme to defraud persons of tangible property *or* of the intangible right to honest services.<sup>2</sup> The federal narcotics laws make it unlawful to manufacture, distribute, *or* dispense a controlled substance, *or* possess a controlled substance with the intent to do any of those things.<sup>3</sup> And the federal firearms laws make it a crime to use *or* carry a firearm during and in relation to a crime of violence or drug trafficking crime, *or* to possess a firearm in furtherance of such a crime.<sup>4</sup>

Current doctrine authorizes prosecutors to charge numerous alternatives for each element of an offense in a single count of an indictment—and prosecutors frequently do so for strategic reasons. After all, a prosecutor will not always be able to anticipate at the charging stage which alternative will be supported by the most evidence when the investigation is complete, how the evidence will unfold at trial, and which alternative will ultimately prove the most persuasive to a jury. But when such charges proceed to trial, the question arises

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1. 530 U.S. 466 (2000).

2. *See* 18 U.S.C. §§ 1343, 1346 (2006).

3. *See* 21 U.S.C. § 841(a) (2006).

4. *See* 18 U.S.C. § 924(c).

as to whether the jury must unanimously agree on at least one of the alternative elements as the basis for the defendant's guilt, or whether the jury may instead pool votes for conviction so long as each juror is individually satisfied by the proof of at least one of the alternatives. Supreme Court precedent provides that the U.S. Constitution generally does not require the former, heightened level of unanimity. As a consequence, already-broad criminal laws are effectively broader in their application, since conduct that might not clearly fall within one of the statutory alternatives—at least not to the unanimous satisfaction of twelve jurors—is more likely to result in a conviction. For example, actions by corporate officers that smell bad and result in shareholder losses are more likely to lead to wire fraud convictions, even when it may be unclear exactly what the qualifying “scheme to defraud” entailed. Similarly, defendants found in proximity to guns and drugs are more likely to be convicted under the federal firearms laws, even if it is not entirely clear how the defendant “used,” “carried,” or “possessed” the gun with the requisite nexus to an underlying drug offense. This effect is exacerbated by the ubiquitous—and doctrinally sanctioned—practice of charging defendants as principals and, in the alternative, as accomplices to a crime in a single count of an indictment, without requiring a jury to decide whether the defendant was the principal or the accomplice. When this practice is used in the context of an alternative elements charge, the potential for juror disagreement about the basis for conviction expands exponentially, as does the potential to sweep within a statute's reach those whose connection to a particular crime may be weak.

Alternative elements statutes present an opportunity for courts to erect a barrier against the ever-expanding reach of substantive criminal law and to protect defendants' rights by adopting a clear procedural rule requiring jurors to unanimously agree on at least one of the charged alternatives. But this is an opportunity that has thus far been missed. This is due in large part to the fact that in its only decision squarely on point, *Schad v. Arizona*,<sup>5</sup> the Supreme Court framed the issue presented by alternative elements statutes as an issue falling within the legislature's authority to define the content of the substantive criminal law rather than as an issue falling within the boundaries of constitutional criminal procedure. *Schad* instructed courts to focus on whether a statute sets forth one offense or more than one offense—at the expense of constitutional procedure questions, which would have asked instead which decisional rules would be most consistent with the rights of criminal defendants

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5. 501 U.S. 624 (1991).

protected by specific provisions of the Constitution, such as the right to trial by jury. So framed, the answer in cases presenting alternative elements is almost invariably that the statute creates a single offense, such that a jury need not decide which statutory prong the offense was committed under.

*Schad*'s doctrinal framework is ripe for review, particularly in light of the robust right to trial by jury articulated in *Apprendi* and in its progeny. To be sure, *Apprendi* does not directly call into doubt the holding of *Schad*, because *Schad* does not present questions of increased punishment based on facts found by a judge rather than by a jury. Nevertheless, at the heart of the *Apprendi* line of cases are the insights that the Sixth Amendment (1) requires a jury to consider whether the facts presented by the government establish that the defendant committed a particular crime as defined *ex ante* by the legislature, and (2) requires courts to take an independent view, guided but not bound by legislative labels, of which facts require jury ratification. The focus of *Apprendi* was on the seriousness of a particular crime (for example, whether the crime qualified for an enhanced sentence based on the presence of an aggravating fact), but that was more a function of the particular context in which the case arose than of the Supreme Court's vision of what the jury right is all about. A broader understanding of the jury right as articulated in *Apprendi* is that it ought to require juries to be equally clear on the nature of the crime for which the defendant is being condemned.

This Article makes the case for a fresh look at alternative elements. Part I explores the extent to which alternative elements contribute to the overall breadth and disarray of substantive criminal law. Part II explains how current doctrine, especially the Supreme Court's decision in *Schad*—and a subsequent decision, *Richardson v. United States*<sup>6</sup>—incentivizes legislatures to use alternative elements in the drafting of criminal statutes, motivates prosecutors to charge all possible alternatives, and encourages courts to refrain from instructing jurors on the need to reach agreement on the statutory basis for a conviction, all without sufficient attention to the costs of doing so. Part III shows how the *Schad* regime is ripe for review in light of *Apprendi* and its broader insights. Part IV considers an alternative, *Apprendi*-inspired approach requiring jury unanimity on at least one alternative element. Although imperfect, this approach would strengthen the jury's constitutional role and could be a force for greater clarity and transparency in our criminal laws.

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6. 526 U.S. 813 (1999).

## I. ALTERNATIVE ELEMENTS AND CRIMINAL LAW'S PATHOLOGY

### A. The General Diagnosis

Many scholars have lamented the state of criminal law in the United States. The critiques are well known: We have too many criminal laws, some prohibiting conduct that should not be subject to criminal sanctions; we have redundant and overlapping criminal laws; and our criminal laws are, in many cases, too broad.<sup>7</sup> As William Stuntz wrote, we have no normative theory of criminal law “unless ‘more’ counts as a normative theory.”<sup>8</sup> And these are only the critiques of substantive criminal law. The punishments we impose are also often criticized as being draconian and inconsistent. Nowhere is the critique of criminal law more forceful than with respect to federal criminal law, which suffers from the additional flaw of federalizing what many consider to be local criminal matters.<sup>9</sup> Moreover, many federal criminal laws are poorly drafted (for example, they do not specify the necessary mens rea for a crime);<sup>10</sup> and federal criminal laws as a whole are so disorganized that it is a misnomer to refer to a federal criminal “code.”<sup>11</sup> For these and other reasons, one scholar

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7. In his seminal treatment of the subject, *The Pathological Politics of Criminal Law*, William Stuntz noted that criminal law's breadth is “old news” and has long been the subject of “academic complaint.” William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001). Samuel Buell has written:

The academic consensus is that federal criminal law . . . includes too many offenses, especially too many trivial ones, and covers too many people within the scope of its sanctions. The criminal law of the states has also been charged with being bloated and rapacious, although there the consensus may be weaker.

Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1497–98 (2008) (footnote omitted). Buell stands out as one of the few who have pointed out some of the desirable attributes of this overbreadth—especially in the context of federal criminal law—including the flexibility it gives prosecutors to pursue the worst criminal actors who might otherwise escape sanction by modifying their behavior to stay one step ahead of the law.

8. Stuntz, *supra* note 7, at 508.

9. See generally Symposium, *Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 967 (1995); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

10. See Julie R. O'Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 656 (2006); see also Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 (arguing that federal criminal law is best understood as “a species of federal common law,” consisting of “delegated judicial lawmaking,” notwithstanding the “central principle” of federal criminal jurisprudence that there “can be no ‘federal common law crimes’”).

11. See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 53 (1998) (describing how federal crimes are scattered throughout the fifty titles of the U.S. Code, with a plurality in Title 18, which is “euphemistically referred to as the ‘Federal Criminal Code’”).

has characterized federal criminal law as a “disgrace.”<sup>12</sup> Although most federal crimes are set forth in Title 18 of the U.S. Code, a significant number of federal crimes are also scattered throughout other titles. No one has been able to come up with a reliable count of the number of federal crimes that are on the books, which is a strong indication that something is seriously amiss.<sup>13</sup>

The costs of criminal law’s disarray are many. First, when the criminal law is too big and disorganized for anyone to be able to print it in a single volume, the idea that the average citizen has notice of what the law prohibits becomes an untenable fiction.<sup>14</sup> Yet this precept is critical to our system of criminal justice because ignorance of the law is no excuse; indeed, we assume that people are on notice of the laws that are on the books. This precept is supportable when the laws are relatively few, are clear, and can be readily accessed. The further we get from that ideal, the more problematic the presumption becomes.<sup>15</sup> Second, that courts must frequently fill in large missing pieces of

12. O’Sullivan, *supra* note 10.

13. It is estimated that there are currently approximately 4000 federal crimes, approximately 1200 of them in Title 18 and the remainder scattered in forty-nine other titles of the code. See John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, ENGAGE, Oct. 2004, at 23, 26, 30 n.7. This figure does not include federal regulations that may be criminally enforced. *Id.* at 25. State criminal codes, although imperfect, are somewhat less likely to exhibit federal law’s worst tendencies because the majority of state penal codes are based on the Model Penal Code, which has streamlined the categories of offenses in an effort to create a simpler penal code. Although state legislatures have added onto this basic structure over the years because of a preference for a

somewhat more nuanced treatment of crimes than the Code provided, they have generally respected the goal that penal codes not be loaded down with dozens of overlapping offenses . . . [Thus,] [w]hile the accretion over the years of novel offenses has somewhat cluttered the elegance of the freshly-minted Model Penal Code-influenced penal codes of the 1960s and 1970s, the skeleton of the Code usually remains visible under the accumulated bulk.

Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 313 (1998). The same cannot be said of federal criminal law, which was never revised in light of the Model Penal Code.

14. See O’Sullivan, *supra* note 10, at 665–66 (describing the “fair notice” and “accessibility” problems of the federal criminal law).

15. See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 682 (1983) (“Only a precise, principled code that sufficiently defines forbidden conduct can achieve its goals of condemnation and deterrence. Such a code gives citizens fair warning of what will constitute a crime . . .”); Paul Rosenzweig, *Overcriminalization: An Agenda for Change*, 54 AM. U. L. REV. 809, 819 (2005) (arguing that “perhaps the most insidious effect” of federal criminal law’s expansion is that “we can no longer say with confidence that ignorance of the law is no excuse[, and that t]he maxim was derived at a time and place when the subject matter of criminal law was widely known in the community and we could comfortably assume that any protestation of ignorance was a sham or that one professing not to know of a criminal prohibition had achieved that ignorance through willful blindness”).

the law undermines the notion, central to our democratic system, that the legislature writes the criminal laws.<sup>16</sup> Third, the law's inaccessibility, as well its extension into matters that many might find trivial, tend to decrease the law's legitimacy in the eyes of many.<sup>17</sup> Fourth, the complexity and sprawl of the criminal law exact transaction costs. For example, the players in the system, especially lawyers and judges, waste scarce time figuring out what the law actually says and how to instruct juries.<sup>18</sup> Finally, many commentators have argued that the breadth of the criminal law gives prosecutors not only too much discretion to pick and choose which laws they will enforce but also the virtually unfettered ability to find at least one crime that a defendant who has caught their attention has committed.<sup>19</sup> One important consequence of this breadth is that prosecutors are able to extract guilty pleas in the vast majority of cases, in part because defendants will frequently make a rational calculation to plead guilty to a lesser offense to avoid potential exposure to offenses carrying far greater sanctions.<sup>20</sup>

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16. Most academic scholarship on the pathologies of federal criminal law has focused on the vagueness of many criminal statutes, as well as the fact that the U.S. Congress has in effect delegated lawmaking authority with respect to such statutes to federal prosecutors and to the courts. See, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); Kahan, *supra* note 10; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999). While the vagueness of federal criminal law is undeniably true and problematic, the statutes within which Congress has spoken with greater specificity also raise concerns warranting scholarly attention, for the reasons set forth in this Article.
  17. See Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 265 (1997) ("If criminalization or conviction . . . is to have an effect in the norm-nurturing process, it will be because the criminal law has a reputation for criminalizing and punishing only that which deserves moral condemnation . . .").
  18. Ronald L. Gainer has set forth the many inefficiencies associated with a sprawling and confusing criminal law, including the waste of lawyers' and judges' time as they endeavor to find and understand the law applicable to a particular case, as well as the fact that jurors "regularly are subjected to unusually convoluted instructions in the course of being advised by federal judges of the legal standards they are to apply in assessing the consequences of the facts of a case." Gainer, *supra* note 11, at 75. Moreover, the complexity of our criminal law has in some instances made extraditions difficult, in that foreign officials have frequently expressed confusion about our federal criminal laws. See *id.* at 75-76.
  19. See, e.g., Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 629-30 (2005) ("Federal law enforcers decide whom to send up the river, then select the appropriate items from the menu in order to induce a guilty plea with the desired sentence.").
  20. See *id.*; see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 57-59 (1997) (explaining how the existence of low-level crimes, like sodomy laws and simple drug possession laws, enable state prosecutors to extract guilty pleas when they suspect that a defendant has committed a more serious crime and how

The structural forces that have created criminal law's lamentable condition are also well developed in the literature. The politicians who enact criminal laws frequently do so in the hopes of appearing "tough on crime" and appeasing constituents' fears.<sup>21</sup> Criminal laws responding to the "crime du jour"<sup>22</sup> are enacted, even if they are redundancies of preexisting more general crimes, without politicians giving much (if any) thought to whether the new statutes are really necessary, or to whether the punishments they authorize are consistent with preexisting statutes.<sup>23</sup> There is no political constituency for the repeal of crimes, so the trend is always toward more crimes on the books rather than less.<sup>24</sup> The Supreme Court has interpreted the Constitution as imposing few limits on what can be criminalized and has tended to focus its criminal docket on questions of criminal procedure rather than on substantive criminal law.<sup>25</sup> As

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federal prosecutors are able to do the same thing by virtue of broadly defined crimes, like mail and wire fraud). Of course, there are many other explanations for the high rate of guilty pleas in our system, including inadequate access to counsel for many defendants.

21. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 731 (2005); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 644–45 (2005).
22. Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States From Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 171 (2003).
23. See Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 722–23 (2010).
24. See Susan R. Klein, *Double Jeopardy's Demise*, 88 CALIF. L. REV. 1001, 1049–50 (2000) ("Legislators will continue to enact more and tougher anticrime measures, and those accused of crimes will continue to constitute a politically powerless and disfavored group, so long as the vast majority of Americans correctly conclude that they are highly unlikely to be the target of a police investigation.").
25. Some of the constitutional procedural protections that have received the most attention from the Supreme Court over the years are the Fourth Amendment right to be free from unreasonable searches and seizures, the Fifth Amendment right against compelled self-incrimination, and the Sixth Amendment rights to counsel and to trial by jury. See Stuntz, *supra* note 20, at 17–19. Among these, for example, the law of search and seizure alone spans five volumes in a leading treatise. *Id.* at 17. And of course the Supreme Court's death penalty jurisprudence under the Eighth Amendment has also consumed a great deal of its resources. As a historical matter, however, it was not always clear that the Supreme Court would devote its resources to questions of criminal procedure rather than substance. Indeed, for a brief time in the late 1950s and early 1960s, it appeared that the Supreme Court was going down the road toward the creation of a constitutional jurisprudence of substantive criminal law. For example, in *Lambert v. California*, 355 U.S. 225 (1957), the Supreme Court struck down a state statute making it a crime for felons to fail to register with local authorities on the grounds that the defendant had no notice of the law, suggesting that the Constitution imposed an actual notice requirement. In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court struck down a state statute making it a crime for a defendant to be found in California while being addicted to drugs. For a time, *Robinson* was viewed as articulating a constitutional principle that a defendant could not be penalized for committing an act that was beyond his control because of addiction, which called into doubt the constitutionality of other crimes like

a result, almost all conduct is fair game as a subject of criminal sanction.<sup>26</sup> The only caveat is in the area of federal criminal law in which the Supreme Court has required a showing of a basis for federal jurisdiction—which for most federal crimes is an effect on interstate commerce—in order to impose federal criminal sanctions on conduct.<sup>27</sup>

The same forces that contribute to criminal law's problems also prevent their improvement. Although many states pursued criminal law reform in the 1960s and 1970s, following the promulgation of the Model Penal Code by the American Law Institute,<sup>28</sup> there has not been a similar code revision effort at the state level since then. Nevertheless, state codes have begun to expand once again, exhibiting the same tendencies toward redundancy and inconsistency that inspired the original reforms.<sup>29</sup> At the federal level, an effort to codify

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simple drug possession. However, the Supreme Court quickly moved in another direction. *Lambert* has yielded no progeny and is now widely recognized as an outlier in the Supreme Court's criminal jurisprudence—which generally is now understood not to require actual notice of the law's requirements. *Robinson* was promptly limited by the Supreme Court in a subsequent case, *Powell v. Texas*, 392 U.S. 514 (1968), upholding a Texas law prohibiting public drunkenness and making it clear that *Robinson* stands solely for the proposition that due process requires the commission of a voluntary act and precludes criminalization of mere status. Thus, although for a time “the chance that constitutional regulation of criminal justice would be primarily substantive rather than procedural” seemed a real possibility, in subsequent decades the Supreme Court has clearly chosen to regulate through procedure rather than through substance. Stuntz, *supra* note 20, at 68; see also Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1533 (2001) (“The few attempts by the Court to develop a grand theory of substantive criminal law have fallen flat and have been quickly abandoned.”).

26. As Darryl Brown has written, the fact that “criminal law has no coherent description or explanation” or “conceptual boundaries” means that we have reached the point where “a crime is whatever a legislature says is a crime.” Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 971–72 (2010). The concept of “crime” must now be defined “self-referentially as acts ‘capable of being followed by criminal proceedings.’” *Id.* at 972 (quoting Glanville Williams, *The Definition of Crime*, 8 CURRENT LEGAL PROBS. 107, 123 (1955)).
27. See generally John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545 (2005) (reviewing the Supreme Court's cases limiting the federal government's authority to criminalize conduct under the Commerce Clause, including *Lopez v. United States*, 514 U.S. 549 (1995), and *Morrison v. United States*, 529 U.S. 598 (2000)). The other primary basis for federal jurisdiction is the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18.
28. See Lynch, *supra* note 13, at 297 (“In the first two decades after its completion in 1962, more than two-thirds of the states undertook to enact new codifications of their criminal law, and virtually all of those used the Model Penal Code as a starting point.”).
29. See Robinson & Cahill, *supra* note 21 (describing how most American criminal codes have begun to “degrade” in the last few decades, undermining the useful reforms implemented by the adoption of comprehensive codes in the 1960s and early 1970s modeled on the Model Penal Code). A few states have made efforts to counter these trends, appointing commissions

and streamline federal criminal law (also inspired by the Model Penal Code movement) was pursued in the 1970s and 1980s, but this effort came to an end when it failed in the Senate.<sup>30</sup> What survived of that federal effort was the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission and authorized it to promulgate the U.S. Sentencing Guidelines in an effort to standardize federal criminal sentencing.<sup>31</sup> In the last few decades, there has been no renewed effort to streamline substantive criminal law, and the criminal laws have generally continued their ad hoc expansion.

## B. Alternative Elements' Role in the Pathology

In all of the literature about criminal law's breadth and disarray, the role of alternative elements in these pathologies has for the most part not been remarked upon. Although many have lamented how broadly state and federal criminal laws sweep as a whole, and how broadly some specific provisions—like federal mail and wire fraud statutes—sweep in particular,<sup>32</sup> the extent to which this breadth is achieved by legislatures' setting forth alternative elements has attracted little attention. Similarly, although many have assailed legislatures, especially Congress, for sloppy draftsmanship and for the various problems that ensue from it—including making criminal codes unreadable and too long and leaving ambiguous whether particular provisions are intended to set forth independent offenses or not—the extent to which alternative elements contribute to these problems has received little notice.

Yet there are good reasons to focus on the role that alternative elements play. To begin, alternative elements contribute significantly to the sheer length and impenetrability of criminal statutes. For example, the federal kidnapping statute provides, in pertinent part, that it is a crime when anyone “unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts or carries away and holds for ransom or reward or otherwise any person” who has been transported in interstate commerce.<sup>33</sup> The federal statute prohibiting transactions in stolen

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to look into the possibility of simplifying and consolidating their codes. See Robinson et al., *supra* note 23, at 26 n.135.

30. See generally Gainer, *supra* note 11 (providing a detailed history of the federal criminal law reform movement in the 1960s through the 1980s).

31. See David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 884–85 (1996); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 257 (1993).

32. See, e.g., O'Sullivan, *supra* note 10, at 660–65.

33. 18 U.S.C. § 1201(a) (2006).

vehicles provides that it is a crime whenever anyone “receives, possesses, conceals, stores, barter[s], sells, or disposes of any motor vehicle, vessel, or aircraft, which has crossed a State or United States boundary after being stolen.”<sup>34</sup> And these are some of the simplest federal criminal statutes.<sup>35</sup> If legislatures used fewer words to describe the same offenses, the criminal laws might be more accessible.

Alternative elements also frequently leave ambiguous where one offense ends and another begins. Indeed, this tendency accounts for some of the difficulty in determining how many federal criminal offenses there are—and hence the “disgraceful” state of federal criminal law as a whole.<sup>36</sup> In the context of

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34. *Id.* § 2313(a).

35. In addition to the examples of the most commonly prosecuted federal offenses discussed *supra* notes 2–4, other such examples include the federal false statements statute (which makes it a crime when any person “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,” 18 U.S.C. § 1001(a)); the child pornography laws (which make it a crime when anyone knowingly “advertises, promotes, presents, distributes, or solicits” obscene depictions of children, *id.* § 2252A(a)(3)(B)); the Hobbs Act (which makes it a crime whenever anyone “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section,” *id.* § 1951(a)); the money laundering provisions (which make it a crime to engage in monetary transactions for the purpose of “promot[ing] the carrying on of specified unlawful activity,” “to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity,” or to “avoid a transaction reporting requirement under State or Federal law,” *id.* § 1956(a)(1)); and the Violent Crimes in Aid of Racketeering Activity statute (which makes it a crime whenever anyone “as consideration for the receipt of, or as consideration for a promise or agreement to pay anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do,” *id.* § 1959(a)). To summarize in broad strokes, some of these statutes list the conduct they prohibit in a series of verbs, expressed in the disjunctive, separated by commas; others use the same structure to describe the various motives or resulting consequences that will bring conduct within the coverage of the statute; and some do a little of each. Analysis of the frequency with which particular criminal statutes are charged in the federal courts, based on data provided by the Justice Department, can be found through TRAC Reports at <http://trac.syr.edu>. A breakdown of the types of criminal cases litigated in the federal courts can be found in the 2010 Annual Report on the Judicial Business of the United States Court, published by the Administrative Office of the United States Courts, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>.

36. *See, e.g.*, O’Sullivan, *supra* note 10, at 648 n.21 (noting that one of the factors that makes it difficult to count the number of federal crimes is the difficulty of determining what counts as a separate crime

a particular criminal case, this ambiguity requires courts to engage in detailed statutory analysis to discern whether a particular provision sets forth a single offense or different offenses.<sup>37</sup> This is for a number of reasons: The rules regarding “duplicity” prohibit prosecutors from charging two offenses in a

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when “different acts are criminalized within a single statutory section”). In the federal criminal system, whether particular statutory provisions are included in the same statutory section is not dispositive of whether they will be considered independent offenses. For example, the honest services provision of mail and wire fraud, which is set forth in a different statutory section than the tangible rights provision, is widely considered to set forth an alternative means of committing these crimes rather than an independent offense. Similarly, whether particular provisions are codified in separate paragraphs or subparagraphs of a particular statutory section is not considered dispositive. Whereas some state criminal codes include default rules of construction, which provide that every subparagraph of a criminal statute shall be deemed to create a separate offense (which must be charged in a separate count of an indictment), *see, e.g.*, N.Y. CRIM. PROC. LAW § 200.30 (McKinney 2011) (providing that each subparagraph of a penal statute shall be deemed a separate offense, and that each count of an indictment may allege only one offense), the federal criminal law has no such default rule of construction.

37. The prevailing doctrine directs courts to consider statutory cues like whether alternatives are contained in the same statutory section, but only to the extent that they are indicative of legislative intent—which is the controlling question regarding whether a provision sets forth one or more offenses. *See* *United States v. UCO Oil Co.*, 546 F.2d 833 (9th Cir. 1976) (directing courts, in discerning legislative intent to create one or more offenses, to consider the statutory language, the legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishments). Yet the proposition that legislatures consider whether they are creating one or more than one offense when they enact a statute with alternative elements (or when they add an alternative element to an existing statute, like the honest services provision of wire and mail fraud) seems implausible. Instead, the evidence suggests that most legislators aim to make sure that the particular conduct covered by each alternative is subject to criminal sanction, without regard to whether each alternative creates an independent offense. For example, the honest services provision, 18 U.S.C. § 1346, was enacted in 2000 in response to the Supreme Court’s decision in *McNally v. United States*, 483 U.S. 350 (1987), in which the Supreme Court ruled that the existing wire fraud statute, 18 U.S.C. § 1343, could not fairly be read as applying to schemes to deprive persons of the intangible right to honest services. The legislative history of the honest services provision is devoid of any mention of whether Congress considered whether the new provision would be considered a separate offense. The driving concern of that debate, rather, was simply to ensure that intangible rights schemes would be subject to criminal sanction, as they had been understood to be prior to *McNally*. Similarly, Congress’s 1998 addition to the firearms statute, *id.* § 924(c)—in which Congress added to the statute’s prohibition the “possession” of a firearm “in furtherance of” a drug trafficking crime or a crime of violence—shows that the addition was a direct response to the Supreme Court’s decision in *Bailey v. United States*, 516 U.S. 137 (1995), in which the Supreme Court held that the terms “use” or “carry” did not encompass mere possession. The legislative history evidences Congress’s intent to expand the reach of the statute to conduct to which the statute had been understood to apply prior to *Bailey*, but it does not touch on the question of whether the addition was seen as having created a new offense. *See* H.R. REP. NO. 105-344 (1997); 144 CONG. REC. S12,671 (daily ed. Oct. 16, 1998).

single count in an indictment;<sup>38</sup> the rules regarding “multiplicity”<sup>39</sup> prohibit prosecutors from charging the same offense in several counts in a single indictment; in cases going to trial, juries must decide whether the government has met its burden of proof as to every element of each offense charged;<sup>40</sup> accordingly, judges must instruct juries about what those elements and offenses are;<sup>41</sup> and the Double Jeopardy Clause<sup>42</sup> prohibits prosecutors from charging the same offense in a subsequent prosecution. Thus, the use of alternative elements imposes transaction costs on lawyers and judges charged with construing the statutes at issue in a particular case.

Alternative elements also lead to inconsistencies. Not surprisingly, courts charged with deciding whether a particular statute or series of statutes create one or more than one offense will frequently reach different conclusions. For example, several of the U.S. Courts of Appeals have recently split on the question of whether the federal conspiracy statute, which makes it a crime to conspire to commit an offense against the United States *or* to defraud the United States<sup>43</sup> (a statute used with great frequency in federal court because it can be used in connection with nearly every other federal criminal statute), sets forth one offense capable of being committed through two different means—or, alternatively, two different offenses.<sup>44</sup> Similarly, several federal courts have

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38. “Duplicity is the joining in a single count of two or more distinct and separate offenses.” *UCO Oil Co.*, 546 F.2d at 835; *see also* 1A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE § 142 (4th ed. 2008). The concerns raised by duplicity and unanimity are related. One concern is that a defendant will be convicted without the jury agreeing on which offense he or she committed; other concerns are that the defendant will be prejudiced in the proceeding by the introduction of evidence that is related to only one of the offenses and that the defendant will be prejudiced in a subsequent proceeding, in terms of his or her ability to raise a double jeopardy claim, by not being able to clearly identify the basis for the first jury’s verdict.

39. The danger of multiplicity is that “the punishment provided for a single offense may be pyramided by a multi-count indictment.” *UCO Oil Co.*, 546 F.2d at 835. Multiplicitous indictments are also considered unfair to the extent that they may improperly coerce defendants into pleading guilty, as well as because the appearance of numerous charges might influence a jury to believe that the defendant must be guilty of at least one of them.

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

41. *See, e.g.*, FED. R. CRIM. P. 30.

42. U.S. CONST. amend. V.

43. 18 U.S.C. § 371 (2006) (emphasis added).

44. *See United States v. Rigas*, 605 F.3d 194, 203–12 (3d Cir. 2010) (en banc) (describing a 4–3 circuit split). At stake in the most recent opinion on the subject, from the Third Circuit, was whether members of the Rigas family, who had previously been prosecuted in New York for conspiring to commit offenses against the United States in connection with the collapse of the Adelphia Communications Company, could subsequently be prosecuted in Pennsylvania for

recently split on the question of whether a section of the federal firearms statutes sets forth a single offense or multiple offenses (depending on whether the defendant “used or carried” the firearm during a drug trafficking crime or a crime of violence, or whether the defendant “possessed” the firearm “in furtherance of” such a crime).<sup>45</sup> Although inconsistencies are to a certain extent unavoidable in a decentralized criminal justice system, they ought to be avoided to the extent possible.

And, of course, alternative elements contribute significantly to criminal laws’ breadth. To a certain extent, this may be so obvious as to be unremarkable—the more ways there are to commit a crime, the more conduct that is criminal. If Congress adds an “honest services” prong to the mail and wire fraud provisions, then schemes that were once not criminal because the Supreme Court had ruled that they did not fall within the existing fraud provisions now become criminal.<sup>46</sup> Similarly, if Congress enacts a provision to make it clear that possession of a firearm in furtherance of a drug trafficking crime or a crime of violence is a federal crime, then the reach of the firearms laws that did not previously include possession is expanded.<sup>47</sup> The greater the number of motives that turn a financial transaction into money laundering or an assault into a violent crime in aid of racketeering, the broader the scope of those laws.<sup>48</sup> The addition of an attempt or conspiracy provision to a particular statutory section, like the Hobbs Act (which prohibits robberies, extortion, and other acts which interfere with interstate commerce<sup>49</sup>) extends the reach of that law to conduct that might not result in the actual commission of a robbery or act of extortion. The inclusion of a general accessory statute in the criminal law, making it a crime to aid or abet another person in the commission of a crime and providing that the accessory shall be liable to the same extent as is the principal,<sup>50</sup> expands the reach of every criminal law.

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conspiring to defraud the United States in connection with essentially the same course of events without violating the Double Jeopardy Clause.

45. Compare *United States v. Arreola*, 467 F.3d 1153, 1155 (9th Cir. 2006) (holding that 18 U.S.C. § 924(c) creates one offense with two means of commission), *with* *United States v. Combs*, 369 F.3d 925 (6th Cir. 2004) (reaching the opposite conclusion), *and* *United States v. Pleasant*, 125 F. Supp. 2d 173 (E.D. Va. 2000) (same).

46. See *supra* note 37 (explaining the history of the honest services provision).

47. See *supra* note 37 (explaining the history of the amendment to 18 U.S.C. § 924(c)).

48. See *supra* note 35.

49. See *supra* note 35.

50. The federal aiding and abetting statute provides that

(a) [w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a

In the context of any particular criminal case, the inclusion of several alternative elements in the charging language of a single indictment count tends to increase the odds of conviction. At the charging stage, there may be evidence of several possible motives for the defendant's actions, several different ways to view what he or she did, and uncertainties about a great number of other factual matters. Accordingly, the government will want to preserve its options to see how the evidence unfolds during further investigation and, ultimately, at trial.<sup>51</sup> If the evidence does not develop in support of a particular theory, the government need not pursue it at trial. But if the alternative was not included in the indictment, the prosecutor may be precluded from introducing evidence of it and a jury generally will not be permitted to consider that theory, on the grounds that doing so would effect a constructive amendment of the indictment. Thus, including as many alternative bases for guilt in the charging instrument as can possibly be supported by the evidence is the course the prudent prosecutor will follow in most cases.

When such a case does go to the jury, the question then arises as to whether the jury must unanimously agree on at least one of the alternatives, or whether it may instead convict so long as each juror is satisfied that at least one of the alternatives has been established. If the answer is that the jury must unanimously agree, the defendant would only be convicted if all twelve jurors could agree on at least one alternative as to each component of the offense—regardless of how many alternatives were included in the charging instrument. This rule, if adopted, would provide a narrower basis for liability. Some defendants who

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principal[; and] (b) [w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, in punishable as a principal.

18 U.S.C. § 2 (2006).

51. The Federal Rules of Criminal Procedure authorize prosecutors to charge the various statutory alternative elements in the conjunctive without committing to a particular theory of the case. *See* FED. R. CRIM. P. 7(c) (providing that a single count of an indictment 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”); *Griffin v. United States*, 502 U.S. 46, 51 (1991) (“A statute often makes punishable the doing of one thing *or* another . . . sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has ‘or,’ and it will not be double, and it will be established at the trial by proof of any one of them.” (quoting 1 JOEL PRENTISS BISHOP, *NEW CRIMINAL PROCEDURE* § 436, at 355–56 (2d ed. 1913) (footnotes omitted)) (internal quotation marks omitted)).

might otherwise have been convicted would not be. If the answer is that the jurors need not agree, then the basis for liability would be broader. Each juror could hold a different view of the evidence and what it establishes, yet the defendant could still be adjudged guilty of the charged offense.

Thus, the effective reach of criminal laws is the broadest when (1) a defendant can be charged with having committed a crime in several ways in the alternative, and (2) a jury is not required to agree on an alternative to convict. This is the set of rules currently in place. The following section explores how we got here.

## II. THE SORRY STATE OF THE ALTERNATIVE ELEMENTS DOCTRINE

### A. *Schad v. Arizona*

The current rules—that alternative elements may be charged in a single count, and that all alternatives are submitted to the jury without a requirement that the jury must agree on one of them—are due in no small measure to a single Supreme Court opinion, *Schad v. Arizona*,<sup>52</sup> in which the Court affirmed the conviction of a defendant for first-degree murder by a jury that was not required to agree on at least one of the state's two theories of why the killing fell within the first-degree murder statute:<sup>53</sup> (1) that it was a premeditated killing, *or* (2) that the killing was committed during the perpetration of another felony. In *Schad*, a plurality of the Supreme Court reduced the questions presented by alternative elements to a single inquiry: whether the alternatives stated a single offense or multiple offenses.<sup>54</sup> The plurality did not use the

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52. 501 U.S. 624 (1991).

53. The statute provided, in pertinent part, that “murder which is . . . willful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery” constitutes first-degree murder. *Id.* at 628 (quoting ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1973)). *Schad* was convicted of the murder of an elderly man named Lorimer Grove whose body had been discovered by the side of a highway with a rope around his neck. The state's case consisted entirely of circumstantial evidence, including *Schad*'s possession of Grove's personal property and the car Grove was last seen driving, and his use of Grove's credit cards shortly after Grove was killed. *Schad* had also told the state trooper who first stopped him as he was driving Grove's car that the car belonged to an elderly friend named Larry Grove. The state's theory of the case was that *Schad* had killed Grove *either* with premeditation (as evidenced by the rope found around Grove's neck) *or* that he had killed him in the course of a robbery.

54. There were three opinions in *Schad*. Justice Souter wrote for the plurality, joined by Justices Rehnquist, O'Connor, and Kennedy. Justice Scalia wrote a concurring opinion, and Justice White wrote a dissenting opinion, joined by Justices Marshall, Blackmun, and Stevens.

term “alternative elements.” Rather, the Court divided what this Article has called alternative elements into two categories: (1) true elements, which are indicative of a distinct crime, and (2) mere means of committing a single element of a crime. Under the framework created by the Supreme Court, if several statutory alternatives are mere means of establishing a single element, then they can be combined in a single charge, and a jury need not choose among them because they all represent different ways of committing the same crime. If statutory alternatives are in fact true elements, then they cannot be combined—at the charging stage or at the jury deliberations stage—because they represent separate crimes.<sup>55</sup> Separate crimes must be charged in distinct counts of the indictment, and the jury must deliberate on each of them individually. Thus, under *Schad*, the two questions—what may be charged in one count and what may be combined in a jury verdict—rise and fall together.

The *Schad* plurality stated that the key determinant of whether several statutory provisions are elements or are mere means is legislative intent. Citing the burden-shifting cases of *Mullaney v. Wilbur*<sup>56</sup> and *Patterson v. New York*,<sup>57</sup> the Supreme Court noted the difficulty it had encountered in the past deciding “as an abstract matter, what elements an offense must comprise.”<sup>58</sup> Accordingly,

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55. In adopting this framework, the Supreme Court reasoned “by analogy” from prior cases holding that an indictment need not specify precisely how an offense was committed and could even state that the means of commission was unknown. See *Schad*, 501 U.S. at 631. Among these cases were *Andersen v. United States*, 170 U.S. 481 (1898), in which the Supreme Court sustained a murder conviction over the objection that the indictment was duplicitous in charging that the victim (who had been shot and thrown overboard) was killed through both shooting and drowning. The Supreme Court explained that there was no error in that charge because it was immaterial “whether the death was caused by one means or the other.” *Schad*, 501 U.S. at 631. The Supreme Court also cited *Borum v. United States*, 284 U.S. 596 (1932), a famous case in which the murder convictions of three codefendants were upheld under a count stating that all three men were responsible as principals or accessories, but that which of the three it was who fired the fatal shot was unknown. *Schad*, 501 U.S. at 631. These cases were quite different from *Schad*, however, and borrowing from their reasoning clearly contributed to the Supreme Court’s error. In *Andersen*, it truly was immaterial to the murder charge whether the killing was the result of shooting or of drowning because these means were not part of the definition of the criminal offense. In *Borum*, the defendants were charged as principals and, in the alternative, as accessories, and it was essentially unknowable which of them had fired the fatal shot. Neither case was directly on point in *Schad*, in which a single individual was charged pursuant to two of the enumerated statutory alternatives sufficient to elevate a second-degree murder to a first-degree murder.

56. 421 U.S. 684 (1975).

57. 432 U.S. 197 (1977).

58. *Schad*, 501 U.S. at 639.

the Court stressed that the “state legislature’s definition of the elements of the offense is usually dispositive.”<sup>59</sup>

Given this approach, the outcome of the *Schad* case was somewhat foreordained: It was an appeal in a state capital murder case in which the state’s highest court had authoritatively construed the state’s first-degree murder statute, which encompassed both premeditated murder and felony murder, as having created a single offense. Mindful of the “legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime,”<sup>60</sup> particularly in the case of state law crimes,<sup>61</sup> the Supreme Court accepted the construction of the statute given by the Arizona court and upheld the conviction.

In so doing, the Supreme Court refused to decouple the issues of whether the two types of first-degree murder could be included in the same count and whether the jury had to unanimously agree on one of them—despite the fact that the defendant had urged the Court to do so. The defendant did not care much about how the charge had been phrased in the indictment. Rather, he was concerned about the jury’s instructions, arguing that the lack of an instruction requiring the jury to agree on the basis for his conviction had violated his Sixth Amendment right to a unanimous jury—a right that he acknowledged the Supreme Court had never recognized in the context of state criminal cases, but one he argued the Court *ought* to recognize at a minimum in capital cases.<sup>62</sup>

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59. *Id.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986)).

60. *Id.* at 637–38.

61. *See id.* (citing the need for courts to be particularly deferential to state legislatures’ crime definitions, in light of the oft-cited fact that “preventing and dealing with crime is much more the business of the States than it is of the Federal Government”).

62. The Supreme Court had previously incorporated the right to trial by jury to the states through the Fourteenth Amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968). However, in subsequent cases, the Supreme Court suggested that the jury right guaranteed by the Fourteenth Amendment was not coextensive with the jury right guaranteed by the Sixth Amendment for federal cases, which is viewed as being necessarily a unanimous jury of twelve (these features are also guaranteed in federal criminal cases by FED. R. CRIM. P. 23(b), 31(a)). Accordingly, the Supreme Court has upheld the use of nonunanimous juries in state criminal cases and state juries of fewer than twelve. *See Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). The current status of the law is that the Supreme Court has upheld state laws authorizing juries of as few as six, provided that the six must be unanimous, as well as laws providing for juries of twelve, provided that at least nine votes be necessary to convict. In a recent decision on the incorporation of the Second Amendment right to bear arms, the Supreme Court noted the incongruity of the two-track approach to the right to trial by jury developed in the Supreme Court’s Sixth Amendment jurisprudence. The Supreme Court observed that this area of jurisprudence was the “one exception” to the general rule stating that Bill of Rights protections “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that

But the plurality declined to analyze the case in terms of the Sixth Amendment right to trial by jury. Rather, the Supreme Court viewed the case through the prism of the Due Process Clause, which it viewed as the only limitation on a state's authority to define a crime through the use of various statutory means. Writing for the plurality, Justice Souter ventured that "nothing in our history suggests that the Due Process Clause would permit a State 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"<sup>63</sup> would suffice to convict. But Justice Souter also wrote that to acknowledge that principle begged the question of where to draw the line between means too distinct to be included in a single offense (like embezzlement and reckless driving) and means similar enough to coexist in a single statute (like felony murder and premeditated murder). Finding that task too difficult, the Supreme Court declined to provide a single test "for the level of definitional and verdict specificity permitted by the Constitution."<sup>64</sup> Instead, the Court advised that the test of "appropriate specificity" would be "a distillate of the concept of due process with its demands for fundamental fairness."<sup>65</sup> Among the factors to be considered were (1) the moral equivalency of the conduct or states of mind combined in a single statute, (2) whether the alternatives had historically been considered distinct offenses, and (3) whether other states treated the alternatives as distinct offenses.<sup>66</sup> Finding those factors satisfied by the Arizona statute,

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protect those personal rights against federal encroachment." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 & n.14 (2010). The Supreme Court explained that this anomaly was the "result of an unusual division" of the Justices in *Apodaca*, rather than an endorsement of the two-track approach to incorporation. *Id.* at 3035 n.14. Although these comments were dicta, they suggest that the two-track approach to the jury right might not survive if the issue were to be squarely presented to the Supreme Court again. Criminal defendants and other concerned parties—including the American Bar Association—have made repeated attempts to persuade the Supreme Court to revisit *Johnson* and *Apodaca* in recent years, thus far to no avail. *See, e.g.,* *Barbour v. Louisiana*, 131 S. Ct. 1477 (2011) (denying certiorari in a challenge to Louisiana's continued use of nonunanimous juries in criminal cases notwithstanding the support of the American Bar Association as amicus curiae in support of the petition); *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (same). One of the most recent such petitions for certiorari explicitly drew upon the above-cited language in *McDonald*. *See* Petition for a Writ of Certiorari, *Herrera v. Oregon*, No. 10-344 (Or. Ct. App. Sept. 9, 2010), 2010 WL 3555966. This petition, too, was denied. *See Herrera*, 131 S. Ct. 904 (2011).

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

64. *Id.* at 637.

65. *Id.*

66. *Id.* at 640 ("Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has . . . defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the

the Supreme Court found no due process flaw in the statute as written or in *Schad*'s conviction.

*Schad* has been criticized by commentators<sup>67</sup> and by courts for, among other things, failing to provide clear guidance for future cases.<sup>68</sup> But perhaps the most scathing criticism of the plurality opinion to date can be found in Justice Scalia's concurring opinion in *Schad*. Justice Scalia agreed that due process permitted a jury to convict a defendant of first-degree murder without agreeing on whether the murder was premeditated or was committed in the course of a felony, but only because that "was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today."<sup>69</sup> Justice Scalia wrote that but for the unique historical status of felony murder as a species of first-degree murder, he might have sided with the dissenters.<sup>70</sup> In particular, Justice Scalia chided the plurality for providing an unsatisfactory explanation of why "but for

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criminal law of other jurisdictions will lighten the defendant's burden." (footnote omitted)). Justice Souter noted the "perhaps obvious proposition that history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots than it is in cases, like this one, that deal with crimes that existed at common law." *Id.* at 640 n.7.

67. See, e.g., Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 MO. L. REV. 1, 6 (1993) (noting that in *Schad*, "although all of the Justices admitted that factual nonconcurrence among criminal jurors could sometimes violate the Constitution, none of the opinions offered a clear vision of when and why trial courts should demand factual agreement from criminal juries"); Brian M. Morris, *Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases*, 62 MONT. L. REV. 1 (2001); Peter Westen & Eric Ow, *Reaching Agreement on When Jurors Must Agree*, 10 NEW CRIM. L. REV. 153, 153-54 (2007) (noting that the twelve Justices who participated in *Schad* and *Richardson* (discussed *infra* Part II.B) agreed "that the Constitution sometimes does and sometimes does not require that jurors concur on how offenses are committed" but disagreed about "when jurors are constitutionally required to concur, and where the requirement is located in the Constitution"); Elizabeth R. Carty, Note, *Schad v. Arizona: Jury Unanimity on Trial*, 42 CATH. U. L. REV. 355 (1993); James J. McGuire, Note, *Schad v. Arizona: Diminishing the Need for Verdict Specificity*, 70 N.C. L. REV. 936 (1992).

68. As the Court of Appeals for the District of Columbia observed in a 2008 opinion construing 18 U.S.C. § 641, which makes it a crime when a person "embezzles, steals, purloins, or knowingly converts to his use or the use of another" any "money, or thing of value of the United States," the question of whether stealing and knowing conversion are a single crime or are effectively two different crimes such that a jury must unanimously choose among them is an inherently "difficult" question to answer in light of "the division among the Justices as to how to resolve that question" reflected in *Schad*. *United States v. Hurt*, 527 F.3d 1347, 1356 (D.C. Cir. 2008). "Do fundamental fairness and rationality require that we treat stealing and knowingly converting as separate offenses? . . . [T]hat result is not obvious but instead depends on a mix-and-match examination of practice among the States, common law history, and certain factors left undefined in *Schad*'s plurality opinion." *Id.*

69. *Schad*, 501 U.S. at 651 (Scalia, J., concurring).

70. *Id.*

the endorsement of history” it was permissible to combine in one count the two different types of killing, finding that the notion of moral equivalency was thoroughly unpersuasive.<sup>71</sup> Justice Scalia’s concurrence suggests that he was prepared to go further than the plurality in imposing limits on the combination of alternatives in charges and in jury verdicts. For example, he opined that allowing a jury to convict a defendant of a novel felony “consisting of either robbery or failure to file a tax return,” if the jury split on which one of those two acts was established, would “seem contrary to due process.”<sup>72</sup> This example—although still fairly extreme—was still closer to the kind of criminal statutes that exist in the real world than the plurality’s hypothetical crime consisting of “embezzlement, reckless driving, murder, burglary, tax evasion, or littering.”<sup>73</sup>

#### B. *Richardson v. United States*

Notwithstanding its obvious flaws—and the fact that it was a plurality opinion—*Schad* remains the leading case on the question of what limits the Constitution places on alternative elements’ use. The Supreme Court has not directly revisited this issue since. The sole case since *Schad* that touched on similar questions was *Richardson v. United States*,<sup>74</sup> which involved a federal statute that made it a crime to engage in a “continuing criminal enterprise” (CCE).<sup>75</sup> *Richardson* was resolved, however, as a matter of statutory interpretation, which

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71. As Justice Scalia explained, [T]he petitioner here does not complain about lack of moral equivalence: He complains that, as far as we know, only six jurors believed he was participating in a robbery, and only six believed he intended to kill. Perhaps moral equivalency is a necessary condition for allowing such a verdict to stand, but surely the plurality does not pretend that it is sufficient. (We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the “moral equivalence” of those two acts).

*Id.*

72. *Id.* at 650. The dissenting Justices in *Schad* thought that the plurality erred by linking the question of whether the statute states a single offense in the abstract to the question of what the jury had to agree upon. Observing that the states were free to write their statutes to include alternative patterns of conduct under a single heading, Justice White wrote for the dissent that it violated due process to allow the prosecution “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.” *Id.* at 656 (White, J., dissenting). To hold otherwise ignored *In re Winship*’s holding that “due process mandates ‘proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged.’” *Id.* at 652 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (alteration in original).

73. *Id.* at 633 (majority opinion).

74. 526 U.S. 813 (1999).

75. 21 U.S.C. § 848 (2006).

the Supreme Court was at liberty to engage in (unlike in *Schad*) because the statute at issue was a federal offense rather than a state crime. But precisely because *Richardson* was a statutory ruling, it did not change the constitutional framework created by *Schad*.<sup>76</sup> It did, however, come down in the defendant's favor, and some of the language in the majority opinion suggests that the Supreme Court was receptive to a change in approach.

The question in *Richardson* was how to construe the term "violation," as used in the CCE statute, which requires the government to prove, among other things, that a defendant engaged in a "continuing series of violations,"<sup>77</sup> acting in concert with five or more persons over whom the defendant exercised supervisory authority. The lower courts had widely construed the word "series" as requiring at least three violations of the drug laws. The courts of appeals had divided, however, on the issue of whether a jury must unanimously agree on the particular transaction constituting each violation, or whether it could convict so long as each juror individually found that three such violations had been established. Consistent with the view adopted by the majority of the courts of appeals considering the question,<sup>78</sup> the district court in *Richardson's* case had instructed the jury that it did not have to agree on the particular three or more federal narcotics offenses committed by the defendant.<sup>79</sup>

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76. See Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 ST. LOUIS U. PUB. L. REV. 25, 31 n.22 (2002) (noting that, by leaving open the possibility that Congress could amend the continuing criminal enterprise (CCE) statute to make it clear that unanimity as to the requisite violations is not necessary, the Supreme Court in *Richardson* did nothing to change the constitutional landscape set by *Schad*).

77. 21 U.S.C. § 848(c)(2).

78. Only the Third Circuit had reached the opposite conclusion. See *United States v. Edmonds*, 80 F.3d 810 (3d Cir. 1996). Justice Alito was a judge on the Court of Appeals for the Third Circuit at the time, and he wrote a separate opinion concurring in part and dissenting in part. Applying *Schad*, then-Judge Alito thought that there was no need for a jury to agree unanimously on the three drug transactions constituting the series. Signaling how he might approach the issue were it to come before him on the Supreme Court, he criticized the majority for relying on the Fifth Amendment Due Process Clause. In then-Judge Alito's view, the Sixth Amendment was the more appropriate point of reference because it directly addressed the right to trial by jury. See *id.* at 833 n.6 (Alito, J., concurring in part and dissenting in part) ("Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of due process, must be the guide for analyzing these claims." (internal quotation marks and citations omitted)).

79. Because the government had introduced evidence of more than three drug transactions, it is actually possible that different jurors relied upon different drug transactions in finding that the government had met its burden of proof as to the requisite series.

The Supreme Court reversed.<sup>80</sup> The Court held that each violation was an element—as opposed to a means—as to which the jury must agree unanimously. The Court viewed Congress’s choice of the word “violation,” which has a legal ring to it, over other possible words like “act” or “conduct,”<sup>81</sup> as evidencing Congress’s intent to have the jury decide whether the defendant had actually violated a particular provision of law on each of the three alleged occasions. This was the textual basis for the Supreme Court’s decision. But the Court also invoked the canon of constitutional avoidance, observing that to hold otherwise would raise serious due process concerns of the type identified by *Schad*.<sup>82</sup> Because approximately ninety numbered sections of the federal criminal laws could be considered drug violations, the Court thought that allowing a jury to convict without agreeing on the three precise incidents constituting the requisite violations could mask “wide disagreement among the jurors about just what the defendant did, or did not, do.”<sup>83</sup> Against these concerns, the Justices found no indication in the legislative history of Congress’s intent to test the limits posited by *Schad*,<sup>84</sup> nor any support in history or tradition for the notion that criminal violations should be treated as means rather than as independent elements. Thus, the Supreme Court opted for the construction that would obviate the potential constitutional concerns.<sup>85</sup>

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80. *Richardson v. United States*, 526 U.S. 813, 824 (1999). The vote was 6–3. As in *Schad*, the Justices divided along unusual lines. Justice Breyer wrote the opinion for the Supreme Court, joined by Justices Rehnquist, Scalia, Souter, Stevens, and Thomas. Justice Kennedy wrote a dissenting opinion, joined by Justices Ginsburg and O’Connor.

81. *Id.* at 818.

82. *See id.* at 820 (citing portions of *Schad*, including Justice Scalia’s concurrence) (“[T]his Court has indicated that the Constitution itself limits a State’s power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. ‘We would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday.’” (citations omitted)).

83. *Id.* at 819.

84. *Id.* at 820.

85. The dissent found no support in the CCE statute for the majority’s conclusion that Congress intended each violation to be considered an independent element, nor did it find any potential conflict with *Schad*. According to the dissent, *Schad* stood for the proposition that “jurors need not agree on all of the means the accused used to commit an offense” and that the violations constituting the “series” in the CCE statute were mere means. *Id.* at 828 (Kennedy, J., dissenting). Moreover, the dissent noted that the majority opinion did not persuasively explain why it was that each violation had to be decided unanimously by the jury but that the underlying facts satisfying other numerical thresholds incorporated into the CCE statute (such as the identity of the five or more persons involved in the enterprise) did not have to be unanimously decided by the jury. Finally, the dissent found nothing irrational or fundamentally unfair in construing the CCE statute to not require unanimity as to the underlying drug transactions

The Supreme Court also made some interesting observations about the practical effects of its ruling. First, the Court rejected the notion that its decision would make it too hard for the government to use the CCE statute successfully on account of the difficulty that government witnesses (frequently low-level employees in the drug trade) would often have in pinpointing specific transactions. The Court doubted that the government would in fact find it too difficult to establish specific transactions, since the government's witnesses often included law enforcement agents, who do keep records. However, the Supreme Court suggested that if the government did have trouble establishing to the jury's unanimous satisfaction the existence of at least three specific transactions, such difficulty tended to "cast doubt upon the existence of the requisite 'series,'" and therefore the defendant's guilt.<sup>86</sup> Thus, a defendant might very well be guilty of some narcotics offense, but if the government was unable to persuade a jury unanimously of three specific prior transactions, then the defendant may in fact not be guilty of violating the CCE statute and should not be convicted.

Considering the other side of the same coin, the Supreme Court observed that a contrary ruling would likely have a negative impact on the quality of the jury's deliberations and the reliability of its verdict. As the Supreme Court explained, in a CCE case, the government very well may "seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations."<sup>87</sup> If the jury need not decide which three at a minimum have been proven, the jurors can "avoid discussion of the specific factual details of each violation."<sup>88</sup> With no requirement that they focus upon specific factual detail, the jurors indeed might fail to do so, instead "simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire."<sup>89</sup> Thus, the jurors might find the defendant guilty of violating the CCE statute without sufficient engagement with the question of whether the evidence actually established all of the elements of that particular offense.

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and sensed no "illicit attempt" on the part of Congress "to avoid the constitutional requirement of jury unanimity." *Id.* at 825-37.

86. *Id.* at 823 (majority opinion).

87. *Id.* at 819.

88. *Id.*

89. *Id.*

### C. Upstream and Downstream Effects of *Schad* and *Richardson*

*Schad* and, to a lesser extent, *Richardson* both bear some of the blame for the pervasive presence of alternative elements in criminal statutes. As the Supreme Court's first and last words on the subject, these cases do not exert much pressure on legislatures to limit the number of alternative elements contained within the statutory definition of an offense. *Schad* posited that in theory there was a point at which such combinations would offend the Due Process Clause, but the Supreme Court has not yet identified a real statute that has hit that point. *Richardson* did not change that picture: Although the Supreme Court stated that the CCE statute raised potential constitutional concerns, it ultimately decided that case on the basis of its interpretation of a fairly unique statutory provision. In sum, the Supreme Court has never invalidated a criminal statute on the grounds that the statute violated the Due Process Clause by impermissibly combining alternative elements.

One might argue that the due process limitations posited by *Schad* have about as much bite as the Supreme Court's rarely invoked vagueness doctrine, which in theory exerts pressure on legislatures to avoid writing statutes in terms so broad that the conduct they criminalize cannot be readily identified.<sup>90</sup> If a legislature enacts a statute that the Supreme Court deems vague, it runs the risk that the Court will strike down the statute on its face or limit its application to exclude conduct that the legislature (and prosecutors) wished to encompass within the statute. But, in fact, the pressure exerted by *Schad* is even less powerful than the pressure exerted by the Supreme Court's vagueness doctrine. Although it may be true that statutes are infrequently voided for vagueness, they are on occasion—and *sometimes* is more often than *never*.<sup>91</sup> Thus, although legislatures

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90. See Stuntz, *supra* note 7, at 559–61. As John Jeffries has explained, vagueness doctrine is the operational arm of legality. It requires that advance, ordinarily legislative crime definition be meaningfully precise—or at least that it not be meaninglessly indefinite. As the Supreme Court stated in an early and oft-quoted formulation, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”

John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) (footnote omitted) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

91. The Supreme Court's recent decision in *Skilling* demonstrates that vagueness review is not totally lacking in bite. See *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010) (holding that the “honest services statute,” 18 U.S.C. § 1346, was unconstitutionally vague, and limiting it to schemes involving bribes or kickbacks).

may have incentives to enact statutes that are broad and open-textured,<sup>92</sup> the vagueness doctrine operates as a countervailing pressure on that force (albeit a relatively weak one), pushing toward more specificity.<sup>93</sup> But, thanks to *Schad*, the doctrine that ought to prevent legislatures from achieving similar statutory breadth by enumerating many alternative and specific ways of committing an offense is even weaker. This dynamic can partially explain the current state of our criminal codes.

*Schad* also bears much of the responsibility for the rules allowing prosecutors to combine alternative elements in a single charge and to submit all alternatives to the jury without requiring the jury to unanimously agree on one of them. That is because *Schad* viewed these two issues as essentially inseparable, both turning on whether the legislature intended the various alternatives to constitute mere means of committing a single offense or distinct offenses. Since it is often unclear what the legislature intended (and since *Schad* gives legislatures good reasons to avoid considering any indication of intent to create separate offenses), the inquiry into legislative intent in contested cases will usually yield the answer that the statute creates a single offense. Thus, in the nearly two decades since *Schad* was decided, courts have frequently cited *Schad* to hold that a disputed portion of a statute creates alternative means, which may be combined in a single charge, and that a jury need not unanimously agree on the same means—as opposed to holding that the statute creates independent elements signifying distinct crimes.<sup>94</sup> There is, therefore, a direct line between

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92. See Buell, *supra* note 7, at 1518–19; Stuntz, *supra* note 7, at 560.

93. See Stuntz, *supra* note 7, at 561 (“[V]agueness doctrine actually accents the tendency to create more crimes.”).

94. See, e.g., *United States v. Seher*, 562 F.3d 1344, 1362 (11th Cir. 2009) (holding that a jury need not agree on a defendant’s motive for engaging in a financial transaction, as set forth in the federal money laundering statute); *United States v. Stewart*, 433 F.3d 273, 319 (2d Cir. 2006) (holding that a jury need not agree on whether a defendant made a false statement or concealed a material fact, as set forth in the false statements statute); *United States v. Powell*, 226 F.3d 1181, 1196 (10th Cir. 2000) (holding that a jury need not agree on which verb characterizes a defendant’s conduct, as set forth in the federal kidnapping statute); *United States v. James*, 172 F.3d 588, 593 (8th Cir. 1999) (holding that a jury need not agree on which verb in the federal gun trafficking statute a defendant violated); *United States v. Kim*, 196 F.3d 1079, 1083 (9th Cir. 1999) (holding that a jury need not unanimously agree on which verb under the federal aiding and abetting statute describes a defendant’s conduct); see also *United States v. Rigas*, 605 F.3d 194, 207–12 (3d Cir. 2010) (en banc), discussed *supra* note 44 (holding that the federal conspiracy statute, 18 U.S.C. § 371, set forth a single offense capable of being committed in two ways: (1) conspiring to defraud the United States or (2) conspiring to commit an offense against the United States).

*Schad* and the broad application of criminal statutes in a great number of cases.<sup>95</sup> For example, the Sixth Circuit formerly included a “unanimity of theory” instruction in its model charges<sup>96</sup> but deleted it after *Schad* in favor of a charge specifically instructing juries that they need *not* agree on the means by which a defendant committed the offense.<sup>97</sup> *Schad* and its logic have also been applied outside of *Schad*’s original context (of considering different statutory alternative bases for criminal liability) to a situation that is more closely analogous to the question presented in *Richardson*: whether a jury must agree on which of several underlying facts or acts satisfies a particular element of the crime. Not surprisingly, the result frequently has been that the jury need not so agree.<sup>98</sup>

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95. One recent example of *Schad*’s broadening effect on criminal liability is provided by *People v. Conroy*, a New York case in which a defendant was convicted of larceny based on a charge alleging two different theories of larceny under state law: (1) larceny by false pretenses and (2) larceny by embezzlement. 861 N.Y.S.2d 46 (App. Div. 2008), *leave to appeal denied*, 11 N.Y.3d 735 (2008), *cert. denied*, 129 S. Ct. 579 (2008). The facts supporting each theory were distinct. To support the false pretenses theory, the jury had to find that the defendant, a lawyer, aided and abetted a client who obtained money from a third individual by making false statements. Under the embezzlement theory, the jury had to find that the defendant aided and abetted that third individual in connection with a different scheme: to embezzle money from a fund that this person controlled. The jury was instructed that it did not have to agree on a theory of the larceny. Citing *Schad*, the appellate court affirmed the conviction, holding that even if the two theories of guilt were based on different facts, they represented different means of committing the same offense. *See id.*
96. *See* SIXTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL, § 8.03A (1991).
97. *See* SIXTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL, §§ 8.03, 8.03A (2009) (explaining that 8.03A “Unanimity of Theory” was withdrawn “in view of” *Richardson* and *Schad*); *id.* § 8.03B (“Unanimity Not Required—Means”).
98. *See, e.g.*, *United States v. Hart*, 635 F.3d 850, 855–56 (6th Cir. 2011) (construing the federal child enticement statute, 18 U.S.C. § 2422(b), to hold that a jury need not agree on the sex offense chargeable under state law which a defendant used the instrumentalities of interstate commerce to entice the child to commit); *United States v. Lee*, 317 F.3d 26, 35–40 (1st Cir. 2003) (holding that a jury need not agree on the fifteen “access devices” the defendant possessed to meet the statutory threshold under the federal credit card fraud statute, 18 U.S.C. § 1029(a)(3)); *United States v. Kayode*, 254 F.3d 204, 214 (D.C. Cir. 2001) (holding that a jury need not agree on five false identification documents possessed by a defendant under 18 U.S.C. § 1028(a)(3)); *United States v. Verrechia*, 196 F.3d 294, 301 (1st Cir. 1999) (holding that a jury need not agree on which gun the defendant possessed under the felon in possession statute, 18 U.S.C. § 922(g)(1)); *United States v. Hernandez-Albino*, 177 F.3d 33, 40 (1st Cir. 1999) (holding that a jury need not agree on which gun the defendant used or possessed under 18 U.S.C. § 924(c)); *United States v. Correa-Ventura*, 6 F.3d 1070, 1087 (5th Cir. 1993) (same). *But see* *United States v. Mannava*, 565 F.3d 412, 415–16 (7th Cir. 2009) (reaching contrary result regarding 18 U.S.C. § 2422(b) by applying *Richardson v. United States*, 526 U.S. 813 (1999)). Courts have also applied *Schad* to hold that a jury need not agree on at least one overt act committed in furtherance of one of a conspiracy’s objects. *See, e.g.*, *United States v. Griggs*, 569 F.3d 341, 343 (7th Cir. 2009); *United States v. Kozeny*, 664 F. Supp. 2d 369, 393–94 (S.D.N.Y. 2009); *United States v. Stone*, 323 F. Supp. 2d 886, 892 (E.D. Tenn. 2004). A similar expansion has taken place in state courts. *See, e.g.*, *State v. Shackelford*, 247 P.3d 582, 602–04 (Idaho 2010) (holding that the

### III. ENLISTING THE POST-*APPRENDI* ROBUST JURY TRIAL RIGHT

In stark contrast to the doctrinal muddle represented by *Schad* and *Richardson* (which the Supreme Court has not ventured into since 1999), the Supreme Court has in the last decade articulated a well-defined vision of the right to trial by jury, as well as a test for applying this right, in *Apprendi* and its progeny. As set forth below, the *Apprendi* line of cases is in tension with *Schad* and *Richardson* and could provide the doctrinal hook to revisit the path not taken in *Schad*.

#### A. The Constitutional Right to Trial by Jury

The right to trial by jury is twice protected in the Constitution. Article III provides that “[t]he Trial of all Crimes, except in cases of Impeachment, shall be by jury.”<sup>99</sup> The Sixth Amendment similarly provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”<sup>100</sup> Throughout its storied history, the right to trial by jury has been lauded as the “bulwark” between the accused and the state: the last line of defense against “arbitrary action” by the “corrupt or overzealous prosecutor” or by the “compliant, biased, or eccentric judge.”<sup>101</sup> The jury serves as yet another safeguard in the complex system of checks and balances created by the framers—this one designed to protect the individual from unfounded criminal charges.<sup>102</sup> According to Blackstone’s *Commentaries*, the right to trial by jury ensures that “the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous

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jury need not agree on which overt act the defendant committed in furtherance of a conspiracy); *State v. Gardner*, 89 N.E.2d 995, 1011 (Ohio 2008) (holding that the jury need not agree on which “criminal offense” the defendant intended to commit inside the structure as a prerequisite to a burglary conviction). As one state supreme court justice wrote in recent years, for a time it seemed possible to discern “alternative means” cases from “multiple acts” cases, but the lines have gotten blurred as the logic of the one has been applied to the other. Carol A. Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 WASHBURN L.J. 275 (2005).

99. U.S. CONST. art. III, § 2, cl. 3.

100. U.S. CONST. amend. VI.

101. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); see also *Williams v. Florida*, 399 U.S. 78, 100 (1970) (“The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government.”).

102. *Duncan*, 391 U.S. at 156 (stating that the founders’ “[f]ear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence”).

suffrage of twelve of [the defendant's] equals and neighbors, indifferently chosen and superior to all suspicion."<sup>103</sup> Trial by jury "reflects a profound judgment about the way in which law should be enforced and justice administered."<sup>104</sup>

In modern times, the jury's role in criminal cases has largely been confined to factfinding—checking the truth of every accusation made by the government.<sup>105</sup> Of course, because juries retain the power to acquit no matter how strong the evidence is, they also continue to serve an important function as the community's conscience. But the jury's first duty is to make sure that the prosecution has presented sufficient evidence of the defendant's guilt. Pursuant to *In re Winship*,<sup>106</sup> the Supreme Court's seminal decision enshrining the constitutional status of the proof beyond a reasonable doubt standard, this means that the jury must find that the government has met its burden of proof beyond a reasonable doubt as to each fact necessary to constitute the offense charged (the elements of the offense). No matter how reprehensible the jurors may find the defendant or his or her conduct, their duty is to convict only if the evidence is sufficient to establish the charges in the particular case before them. The jury's consideration of the evidence in light of the elements of the charges serves the principles of legality and due process by ensuring that a defendant will only be subject to criminal sanction for violations of positive laws<sup>107</sup> that have been alleged in the charges in the particular case, against which the defendant has had the opportunity to defend.<sup>108</sup>

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103. *Id.* at 151–52 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–50 (Thomas M. Cooley ed., 4th ed. 1899)).

104. *Id.* at 155. For an excellent, comprehensive review of the right to trial by jury and how it directly addressed some of the abuses of power experienced by the founders, see JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003).

105. Although juries at one time had the power to decide questions of law, in *Sparf v. United States*, 156 U.S. 51 (1895), the Supreme Court concluded that juries did not have such a right and that legal questions were reserved for the courts. This has been the widely accepted division of responsibilities ever since. See ABRAMSON, *supra* note 104, at 30–37 (describing that throughout the eighteenth century, the prevailing view was that jurors could decide questions of law as well as questions of fact, but by the end of the nineteenth century, the jury was "duty-bound to follow judicial instructions and to enforce the law whether it agreed with it or not").

106. 397 U.S. 358 (1970).

107. As Kyron Huigens has written, "We impose punishment because a person has violated a prohibitory norm that has been properly adopted as a positive law." Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 425 (2002).

108. While it may be true, as William Stuntz has written, that the defense in any criminal case is more likely to be that the defendant did not do it than that the conduct does not meet the legal definition of the offense, there are nevertheless a significant number of cases—especially in the federal system—in which such a defense is made. See Stuntz, *supra* note 7, at 565 ("The most

The jury is valued not just because it serves as an independent check on the prosecution, but also because we trust that the unanimous verdict of twelve people, reached after deliberation, will be more reliable than the decision of one, two, or six people—or of any number of persons who are not required to agree. As Jeffrey Abramson has written, “[c]ommon sense alone tells us that public confidence in the accuracy of verdicts is greater when the verdict is unanimous.”<sup>109</sup> And this common sense proposition is borne out by empirical and experimental research, which shows that unanimity rules force jurors to deliberate longer than they would otherwise,<sup>110</sup> that the quality of juries’ deliberations improve with time and additional consultation with jurors holding contrary views,<sup>111</sup> and that the size of a jury affects its

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common defense argument at trial is that the government has the wrong defendant, not that the defendant’s behavior fails to satisfy the legal definition of the crime”). For example, in a great number of prosecutions under 18 U.S.C. § 924(c), a defendant will dispute that the evidence shows that he or she “used,” “carried,” or “possessed” a gun within the specific provisions of the federal firearms laws (in connection with another qualifying crime). That is because simple possession of a gun, for example, is not sufficient to establish the crime. And due to the requirement of a nexus with interstate commerce to provide a basis for federal jurisdiction, simple possession may not establish *any* federal crime. Similarly, in many federal fraud cases, including mail fraud, wire fraud, and securities fraud, the basic facts about the defendants’ conduct are not in dispute; rather, all that is in dispute is whether the defendants had the intent to defraud that the statutes required.

109. ABRAMSON, *supra* note 104, at 203.

110. *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 175 (1986) (noting that juries required to be unanimous take longer to make decisions and that “[j]urors take a subtle message from the instruction that they need not be unanimous,” deliberating less carefully than they might otherwise and with less attention to minority viewpoints); REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 173–74 (1983) (concluding that majority rule juries tend to vote early and to organize discussion around reaching a verdict, whereas juries requiring unanimity tend to defer voting and focus on the evidence at the outset of their discussions); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272–73 (2000) (summarizing research showing that once the requisite majority is reached in juries not requiring unanimity, deliberation generally ceases).

111. *See* Taylor-Thompson, *supra* note 110, at 1273 (summarizing a mock criminal jury study finding that the verdicts of unanimous juries reached the “accurate” verdict, according to legal experts’ view of the evidence, more often than nonunanimous juries). Some scholars have used probabilistic models drawing upon the implications of strategic voting by jurors to theorize that unanimous juries may in fact reach less reliable verdicts. *See, e.g.*, Timothy Feddersen & Wolfgang Pesendorfer, *Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts Under Strategic Voting*, 92 AM. POL. SCI. REV. 23 (1998). However, empirical research continues to support the superiority of unanimity rules. *See* Serena Guarnaschelli, Richard D. McKelvey & Thomas R. Palfrey, *An Experimental Study of Jury Decision Rules*, 94 AM. POL. SCI. REV. 407 (2000) (concluding, after mock jury experiments testing the Feddersen-Pesendorfer hypothesis, that there are fewer incorrect convictions under unanimity rule than under majority rule).

deliberations as well, with more jurors increasing the thoroughness of the deliberations.<sup>112</sup>

### B. The *Apprendi* Revolution

The Sixth Amendment right to trial by jury has thus always been understood to provide an important procedural check on the government's ability to impose criminal law sanctions. The jury trial right ensures that a defendant who insists upon it has the right to contest the government's charges in open court and to have a jury of his or her peers decide the truth of the accusations. It serves the defendant's and the public's interests in its transparency and in preventing convictions that are not supported by the evidence. It exerts a pressure against the application of criminal law, representing a significant hurdle that the government must clear before convicting a defendant.

In the *Apprendi* line of cases, the Supreme Court reaffirmed this right against what it considered unwarranted encroachment. The specific context for these cases were statutory schemes that removed from the jury the authority to decide factual questions that could raise the maximum sentence a defendant could receive for a particular course of conduct.<sup>113</sup> *Apprendi* itself involved a

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112. See, e.g., Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 463–69 (2008) (summarizing empirical studies finding that larger juries are more likely to contain members of a minority group than are smaller juries; that larger juries deliberate longer and more accurately recall evidence than do smaller juries; and that larger juries are more likely to result in minority viewpoints being seriously considered by the jury as a whole). Smith and Saks also report the results of a mock civil jury study revealing that larger juries were more likely to be consistent in their verdicts than smaller juries. See *id.* at 467; see also Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 698 (1975) ("Current knowledge justifies the general conclusion that where the verdicts of six- and twelve-member juries diverge, the verdicts of twelve are likely to be of somewhat higher quality than the verdicts of six, and are likely to be superior with respect to other important values.").
113. *Apprendi*'s immediate precursor was *Jones v. United States*, 526 U.S. 227 (1999), in which the Supreme Court construed the federal carjacking statute. The statute was a "nested statute," providing escalating maximum penalties depending on the degree of injury resulting to the victim. See King & Klein, *supra* note 25, at 1492 (citing 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 327 (1866)). Jones was convicted by a jury of carjacking but was sentenced to a twenty-five year sentence (well in excess of the fifteen year sentence authorized by the basic version of carjacking) based upon the district court's finding by a preponderance of the evidence that the victim had suffered serious bodily injury. The Supreme Court ruled that each of the facts set forth in the statute giving rise to an additional quantum of punishment should be construed as additional elements that must be decided by the jury. The Supreme Court did not go so far as to hold that the Constitution required this interpretation. Rather, it held that the alternative construction would raise serious constitutional questions and invoked the doctrine of constitutional avoidance. This option was not available to the Supreme

New Jersey hate crimes law that authorized a judge to increase the sentence for certain offenses based upon a finding by a preponderance of the evidence that the offense was motivated by racial animus.<sup>114</sup> Charles Apprendi had pleaded guilty to two firearms offenses, including one based on shooting into the home of an African American family. Whereas the maximum penalty that he faced for this offense under the firearms statute was ten years of imprisonment, Apprendi was sentenced to twelve years pursuant to the hate crimes law, after the court found that the shooting was motivated by racial animus. On appeal, the New Jersey Supreme Court construed the hate crimes law as having created a sentencing factor for the judge's determination at sentencing—rather than having created an element to be determined by a jury at trial or an element to which a defendant must admit in the context of a plea—and affirmed the sentence.

The U.S. Supreme Court reversed, finding that the law, so construed, was unconstitutional. Citing the historical importance of the jury as “the great bulwark of [our] civil and political liberties”<sup>115</sup> and the structural “guard against a spirit of oppression and tyranny on the part of rulers,”<sup>116</sup> the Supreme Court stated that trial by jury served these functions by requiring that “the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.”<sup>117</sup> The Court found no precedent at common law for allowing a judge to increase a defendant's sentence beyond the maximum penalty authorized for the crime of conviction. To the contrary, the Court pointed out that the historical practice prior to the nineteenth century was to tie specific penalties to specific crimes, without any discretion for the judge at sentencing.<sup>118</sup>

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Court the next year in *Apprendi* because *Apprendi* involved a state statute. Intriguingly, *Richardson* was decided the same year as *Jones*, utilizing a similar approach. But whereas the Supreme Court expanded upon *Jones* the very next year, in *Apprendi*, the Supreme Court has not returned to the *Schad-Richardson* line of cases since 1999. The progress of the *Jones-Apprendi* line of cases may hold some clues for what *Schad-Richardson*'s progeny might look like, particularly if they were to breed with the *Apprendi* line.

114. *Apprendi v. New Jersey*, 530 U.S. 466, 468–69 (2000).

115. *Id.* at 477 (alteration in original) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

116. *Id.*

117. *Id.* (alteration in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)) (citing *Duncan v. Louisiana*, 391 U.S. 145, 151–54 (1968)).

118. *Id.* at 479–82.

The Supreme Court saw nothing wrong with allowing a judge to take into account certain factors, including those specified by the legislature, in determining where within a prescribed range of penalties a particular defendant should be sentenced (something that the Supreme Court noted had been done since the introduction of sentencing ranges in the nineteenth century). However, the Court drew a categorical distinction between those practices and the kind of sentencing laws of which the hate crimes law at issue in *Apprendi* was representative. In the Court's view, these new types of laws effectively created aggravated versions of other crimes but "remove[d] from the jury the assessment of facts that increase the prescribed range of penalties . . . [Facts which] must be established by proof beyond a reasonable doubt."<sup>119</sup>

Anticipating the inevitable critique that *Apprendi*'s bright-line rule could be subverted by legislative redrafting making all offenses punishable by a maximum of life imprisonment, the Supreme Court evaluated that possibility as being "remote."<sup>120</sup> The Court said (albeit in a footnote):

Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged to "make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides.<sup>121</sup>

Thus, the Supreme Court posited that although *Apprendi* itself would not preclude legislatures from raising statutory maximum penalties in order to avoid the restraints announced by *Apprendi*, the normal political processes would be sufficient to prevent that from happening.<sup>122</sup>

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119. *Id.* at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999)).

120. *Id.* at 490 n.16.

121. *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 228–29 & n.13 (1977) (Powell, J., dissenting)). Nancy J. King and Susan R. Klein have written that this footnote "explains why the formalism of the *Apprendi* rule is not pointless after all." It requires, in effect, that lawmakers who wish "to lessen the government's burden in obtaining . . . penalties for an individual offender . . . be clear with their constituents and their fellow lawmakers about the degree of discretion they are delegating to judges and about the extent of punishment they are authorizing for an offense." King & Klein, *supra* note 25, at 1486–87.

122. Indeed, although many predicted that Congress and state legislatures would react to *Apprendi* by raising statutory maximums across the board, in reality those predictions have largely been unrealized. Congress has not passed any such legislation. See Kate Stith, *The*

*Apprendi*'s progeny make it clear that the Supreme Court meant what it said in *Apprendi*: The Sixth Amendment and the Due Process Clause require the submission to a jury, for determination of proof beyond a reasonable doubt, of any fact (with the exception of a prior conviction)<sup>123</sup> that increases the maximum sentence to which a defendant may be exposed, unless the defendant waives his or her right to a jury determination of that fact. This is the case whether the legislature calls the fact an "element," a "sentencing factor," or—as Justice Scalia memorably quipped in *Ring v. Arizona*—"Mary Jane."<sup>124</sup> What matters for the *Apprendi* analysis is not the label attached to a fact by a legislature or a court, but rather the effect of a finding of that fact on the defendant's potential maximum sentence.

Consistent with that approach, in 2002, the Supreme Court extended *Apprendi*'s holding to facts making a defendant eligible for the death penalty

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*Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1495 (2008) (noting that "[w]hile Congress has the constitutional authority to undo both halves of the *Booker* decision, it appears for the moment to have moved on to other concerns" (footnote omitted)). Most state legislatures have responded by requiring jury determinations of aggravating facts, returning to indeterminate sentencing, or officially declaring their sentencing guidelines to be advisory. See Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775 (2008); Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It May Yet Be Mended*, 77 U. CHI. L. REV. 367, 461 (2010); Barbara Tombs & Jeffrey R. Edblad, *The Application of Blakely v. Washington in Minnesota: An Analysis of State v. Shattuck and State v. Houston*, 32 WM. MITCHELL L. REV. 1263, 1266–67, 1275–79 (2006); Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to Blakely v. Washington*, 18 FED. SENT'G REP., Oct. 2005, at 7; see also *Cunningham v. California*, 549 U.S. 270, 294 (2007) (describing state legislative responses to *Blakely* and *Booker*).

123. The caveat for the fact of a prior conviction comes from *Almendarez-Torres v. United States*, 532 U.S. 224 (1998), which involved the federal statute making it a crime for an alien to reenter the United States without permission of the Attorney General after having previously been deported. The basic version of that crime is punishable by up to two years of imprisonment, but an additional provision in the statute provides for a penalty of up to twenty years of imprisonment if the alien was deported following a conviction for an aggravated felony. The Supreme Court interpreted the statute as having created but one offense, construing the provision regarding a prior deportation as a sentencing factor to be determined by the sentencing judge based upon a preponderance of the evidence, rather than as an element that must be alleged in the indictment (the narrow issue in the case) and proven to a jury beyond a reasonable doubt. To date, the Supreme Court has not overruled *Almendarez-Torres*, but it has limited it to prior convictions. If the Supreme Court were to revisit the constitutional basis for *Schad*, it could limit *Schad* to its facts based on the unique historical status of felony murder (an approach suggested by Justice Scalia's *Schad* concurrence), much as the Supreme Court has, post-*Apprendi*, solved the problem of *Almendarez-Torres* by citing the unique historical status of recidivism as a sentencing factor.

124. 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

in *Ring v. Arizona*.<sup>125</sup> In 2004, the Court extended *Apprendi*'s holding in *Blakely v. Washington*<sup>126</sup> to hold unconstitutional the imposition of a sentence higher than the top of the statutory "standard range" for the defendant's crime, because that imposition was based upon a judicial finding of aggravating facts, which were neither admitted by the defendant at his guilty plea nor determined by a jury. And in 2005, in the decision that turned federal criminal practice upside down for some time,<sup>127</sup> the Supreme Court held in *United States v. Booker*<sup>128</sup> that the U.S. Sentencing Guidelines were unconstitutional to the extent that the federal sentencing statute had made them binding on the federal courts.<sup>129</sup> The Supreme Court held that the Guidelines could not be reconciled with *Apprendi*'s basic principles because, regardless of the applicable statutory maximum penalty for the offense of conviction, the Guidelines in fact created the effective maximum penalty for *Apprendi* purposes, based on facts found by a judge rather than by a jury. Although the Supreme Court recognized, as it had in *Jones*, *Apprendi*, and *Blakely*, that its ruling might "impair the most expedient and efficient sentencing of defendants," it held firm to its conclusion that "the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in

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125. The same day that the Supreme Court decided *Ring*, it also decided *Harris v. United States*, 536 U.S. 545 (2002). At issue in *Harris* was the federal firearms statute, 18 U.S.C. § 924(c), which provides graduated mandatory minimum penalties based on whether a gun was used, brandished, or discharged. The Supreme Court held, as a matter of statutory construction, that these gradations represented sentencing factors and that the offense so defined did not violate due process under the principle laid out in *Apprendi* because it did not authorize an increased maximum penalty based on a judge-made finding. *Harris*, 536 U.S. at 552–57.

126. 542 U.S. 296 (2004).

127. The practical impact of *Booker* was immediate. On the day the case was decided, the Supreme Court remanded approximately four hundred affected cases to the courts of appeals, and thousands of previously sentenced federal inmates began to seek reconsideration of their pre-*Booker* sentences. ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT OF THE *BOOKER* CASE ON THE WORKLOAD OF THE FEDERAL JUDICIARY 2 (2006). The federal judiciary requested \$91.3 million in supplemental funding to deal with the increased workload attributable to *Booker*-related litigation. *Id.*

128. 543 U.S. 220 (2005).

129. In the so-called remedial opinion of the *Booker* decision, the Supreme Court severed and excised the provision of the federal sentencing statute, 18 U.S.C. § 3553, that made the U.S. Sentencing Guidelines (the Guidelines) mandatory. This targeted incision otherwise left the Guidelines intact to advise district judges regarding the appropriate sentence for a particular offender. It also left intact the requirement under the federal sentencing statute that judges consider the Guidelines before imposing a sentence, as well as the requirement that all sentences be subject to appellate review for reasonableness.

the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.”<sup>130</sup>

### C. The Tension Between *Apprendi* and *Schad*

The literature analyzing *Apprendi* and its progeny is voluminous and diverse. Some scholars have praised the Supreme Court’s decisions; others have criticized the Supreme Court for not going further and requiring a jury decision on facts subjecting a defendant to a mandatory minimum punishment.<sup>131</sup> Some have applauded the end of binding sentencing schemes, which they view as improperly constraining judges’ discretion to impose the punishment they see as just in individual cases; others have lamented the reintroduction of discretionary sentencing, viewing discretion as something that invariably leads to inconsistency and unfairness in how like defendants are treated—the very evils that the Sentencing Guidelines and similar state sentencing regimes sought to address.<sup>132</sup> Still others have argued that, despite all their language of homage to the jury, the *Apprendi* cases do not actually increase the power of juries, but they instead put more power in the hands of prosecutors<sup>133</sup> and judges.<sup>134</sup>

For the purposes of this Article, it is not necessary to enter into these debates. No matter who has the better argument, *Apprendi* creates a tension with *Schad* that may be helpful in ameliorating the most insidious effects of the Supreme Court’s current alternative elements doctrine. There are three notable aspects of this tension. The first concerns the vision of the jury. One of the critical, and sound, insights at the heart of the *Apprendi* line of cases is the notion

130. *Booker*, 543 U.S. at 244. In *Cunningham v. California*, 549 U.S. 270 (2007), the Supreme Court further applied *Apprendi* to require a jury determination of facts that permitted imposition of an “upper term” sentence under California’s determinate sentencing law. But in *Oregon v. Ice*, 555 U.S. 160 (2009), the *Apprendi* “train” finally lost steam, with a majority of the Supreme Court holding (over the dissent of four Justices, including Justice Scalia) that *Apprendi* did not require a jury determination of facts necessary under state law to impose consecutive, rather than concurrent, sentences for multiple offenses. See *Blakely*, 542 U.S. at 333 (Breyer, J., dissenting) (referring to *Apprendi* as an “oncoming . . . train”). The *Ice* majority reasoned that the issue presented in *Ice* did not “implicate the core concerns that prompted our decision in *Apprendi*,” namely the “encroachment . . . by the judge upon facts historically found by the jury” nor a “threat to the jury’s domain as a bulwark at trial between the State and the accused.” *Ice*, 555 U.S. at 169.

131. See, e.g., Barkow, *supra* note 104.

132. See, e.g., Bowman, *supra* note 122.

133. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001).

134. See, e.g., Bertrall L. Ross, II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 725 (2006).

that the jury serves its constitutional function when it grapples with the facts presented by the government and decides—after deliberation and only once it has reached unanimity—whether the facts add up to some previously defined crime. Legislative machinations, whether they take the form of dividing offenses into “elements” and “sentencing enhancements” or into “elements” and “means,” ought not to be countenanced to the extent that they interfere with the jury’s constitutional function. Because the question of guilt precedes a fortiori any question of punishment, devices that undermine the quality and reliability of the jury’s determination of guilt ought to be viewed with at least as much skepticism as devices that impact punishment. And *Richardson* gave voice to the insight that submitting alternative means to the jury will frequently do precisely that. When we allow the jury to disagree about how the basic elements of the crime are satisfied, we allow the jury to shorten its deliberations, to avoid engaging with the specific evidence,<sup>135</sup> and potentially to convict because “where there is smoke there must be fire.”<sup>136</sup> Indeed, it would be very odd to look carefully at the degree to which the jury authorizes punishment while being relatively cavalier about the extent to which the jury has found guilt. Thus, although *Apprendi* may not directly call *Schad* into doubt, the two cases certainly look strange standing side by side in terms of their vision of the jury and the extent to which the Supreme Court is willing to embrace rules prioritizing “the interest in fairness and reliability protected by the right to a jury trial” over “the interest in concluding trials swiftly.”<sup>137</sup>

The second aspect of this tension has to do with style. Whereas the Supreme Court in *Schad* went to great lengths to uphold the state’s statutory scheme, citing the state legislature’s greater competence to define the content of its criminal laws, there is no such deference in the *Apprendi* line. This is true even when state criminal laws are at issue, as in *Apprendi*, *Ring*, and *Blakely*. To the contrary, the Supreme Court’s approach in *Apprendi* and its progeny is self-consciously aggressive,<sup>138</sup> announcing repeatedly that it will look past

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135. See 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, 532–33 (1983) (noting the danger that a jury permitted to disagree about the underlying facts will “cut its deliberations short instead of thrashing out disagreements about the historical facts”).

136. *Richardson v. United States*, 526 U.S. 813, 819 (1999).

137. *United States v. Booker*, 543 U.S. 220, 244 (2005).

138. In their dissents in *Blakely*, Justice O’Connor referred to *Apprendi* as a “rigid rule that destroys everything in its path,” *Blakely v. Washington*, 542 U.S. 296, 321 (2004) (O’Connor, J., dissenting), and Justice Breyer referred to it as an “oncoming train,” *id.* at 333 (Breyer, J., dissenting). Although the Justices were referring to the effects of *Apprendi* on settled sentencing

legislative labels and even legislative intent in determining what facts must be submitted to the jury consistent with the Sixth Amendment.<sup>139</sup> In contrast, *Schad*'s go-slow approach looks old-fashioned and more stylistically reminiscent of the Supreme Court's first sentencing factor case, *McMillan v. Pennsylvania*,<sup>140</sup> and the burden-shifting cases, *Mullaney* and *Patterson*, which rested to a far greater extent than did *Apprendi* and its progeny on state legislative determinations of which facts constitute the elements of an offense.<sup>141</sup> Part of the change may be attributable to the fact that the Supreme Court since *Apprendi* does not appear to be concerned about determining which facts are elements for all purposes; the Court has instead focused on which facts must be considered elements "for *Apprendi* purposes." This is, of course, quite different from the approach taken in *Schad*, in which the Supreme Court seemed stymied by the need to come up with a unified approach to what constitutes an element. If it is permissible, as *Apprendi* suggests it is, to conceive of a category of "limited purposes elements," then it ought to be easier to embrace a rule requiring juries to agree on at least one alternative element without getting spooked by the possible consequences of such a rule in other contexts.

The third notable aspect of this tension concerns the Supreme Court's willingness to engage in line-drawing. One of the reasons why the Supreme Court in *Schad* did not offer a single test for determining when the combination of means offends due process is that the Supreme Court could not conceive

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regimes, this image is also an apt description of *Apprendi*'s tone, especially contrasted with *Schad*'s relative timidity.

139. See W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 124 (2011) ("Within the criminal realm, *Apprendi* is clear: function, not form, is all that matters."); W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 896 (2009) ("*Apprendi* is not a formal doctrine but a functional one that looks past the formal taxonomy of a criminal statute to the way it operates."); Jenny E. Carroll, *The Jury's Second Coming*, GEO. L.J. (Seton Hall Pub. Law Research Paper No. 1486188) (manuscript at 6), available at <http://ssrn.com/abstract=1486188> (noting that *Apprendi* "rebuffed" the distinction between "sentencing factors" and "true 'elements' . . . in the clearest possible terms, noting that 'the relevant inquiry is one not of form, but of effect'" (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000))).
140. 477 U.S. 79 (1986).
141. Others have noticed this shift in style as well. See, e.g., Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 52 (2006) (noting the "remarkable about-face" represented by *Apprendi* and *Blakely*, with "federalism and separation of powers" and "practical considerations" taking a "back seat to the historic role of the jury in criminal justice" and "defendants' rights"); Bowman, *supra* note 122, at 458 (remarking upon the total absence in *Apprendi*, *Blakely*, and *Cunningham* of the Supreme Court's traditional "solicitude for state sovereignty" in the administration of criminal justice).

of an intellectually defensible test. The Court explicitly rejected an approach, known as the “distinct conceptual groupings” test, which had been adopted by the Fifth Circuit in *United States v. Gipson*<sup>142</sup> and had proven to be highly influential for other courts prior to *Schad*.<sup>143</sup> Pursuant to that test, a court would look at the verbs in a given statute and divide them into distinct conceptual groupings. Thus, for example, the *Gipson* court divided the six acts in the federal statute prohibiting transactions in stolen vehicles (receiving, concealing, storing, bartering, selling, or disposing of a stolen vehicle) into two “distinct conceptual groupings,” one consisting of “receiving, concealing, and storing” and the other consisting of “bartering, selling, and disposing,” and held that the Sixth Amendment required that the jury agree on one of the groupings as capturing the defendant’s actions.<sup>144</sup> Unanimity was not required as to which act within a single grouping best described the defendant’s conduct because “the acts within each grouping are not conceptually distinct” and “distinguishing among the acts within each grouping presents characterization problems.”<sup>145</sup>

In *Schad*, the Supreme Court rejected this approach because it was “too indeterminate to provide concrete guidance to courts faced with verdict specificity questions.”<sup>146</sup> Moreover, one could always characterize the conduct prohibited by a statute at a higher level of generality such that all of the statutory verbs fell within a single grouping. For example, all of the verbs in the statute at issue in *Gipson* could be reconceived as falling into one, a more general category of “trafficking in stolen vehicles.”<sup>147</sup> Absent an “*a priori* standard to determine what level of generality is appropriate,” the Supreme Court thought that analyzing a statute for “distinct conceptual groupings” was meaningless.<sup>148</sup>

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142. 553 F.2d 453 (5th Cir. 1977).

143. *Gipson*’s progeny included *United States v. Duncan*, 850 F.2d 1104, 1112–14 (6th Cir. 1988); *United States v. Beros*, 833 F.2d 455, 460–62 (3d Cir. 1987); *United States v. Ryan*, 828 F.2d 1010 (3d Cir. 1987); *United States v. Schiff*, 801 F.2d 108, 114–15 (2d Cir. 1986); *United States v. Payseno*, 782 F.2d 832, 835–37 (9th Cir. 1986); *United States v. Peterson*, 768 F.2d 64, 66–67 (2d Cir. 1985); *United States v. Ferris*, 719 F.2d 1405 (9th Cir. 1983); *United States v. Echeverry*, 698 F.2d 375, 376–77 (9th Cir. 1983), *modified*, 719 F.2d 974, 975 (9th Cir. 1983); *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981); *United States v. Murray*, 618 F.2d 892, 898 (2d Cir. 1980); *State v. Boots*, 780 P.2d 725 (Or. 1989).

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

145. *Id.*

146. *Schad v. Arizona*, 501 U.S. 624, 635 (1991).

147. *Id.* (quoting *Mason v. State*, 304 N.W.2d 729, 741 (Wis. 1981) (Abrahamson, J., concurring)).

148. *Id.* at 634 n.5. Justice Souter also disagreed with the Fifth Circuit’s characterization of the problem presented as one arising under the Sixth Amendment right to trial by jury rather than under the Due Process Clause, although the characterization issue was in his view a distinction without a difference.

But the Court in *Schad* was equally unwilling to take a different path that would have provided clear guidance: requiring unanimity as to any alternative means set forth in the statute. For example, in a case in which a defendant was charged with murder pursuant to a statute defining murder as a “willful, deliberate or premeditated killing,”<sup>149</sup> such a rule would require the jury to reach unanimity on one of the three: willful, deliberate, or premeditated. The Supreme Court found that this kind of “maximum verdict specificity”<sup>150</sup> was “absurd,” impractical, and contrary to legislative intent.

In the *Apprendi* line, the Supreme Court embraced a bright-line rule, even though it clearly frustrated legislative intent and has been characterized by many as absurd. As in *Schad*, the Supreme Court was unwilling to create a test that would have allowed individual judges to decide subjectively “how far is *too far*.”<sup>151</sup> The *Schad* Court had declined to let individual judges decide whether statutory alternative means were sufficiently conceptually close to be submitted to the jury without a requirement of unanimity. In the *Apprendi* line of cases, the Supreme Court declined to let individual judges decide how much more punishment (beyond that authorized solely by the jury’s verdict) ran afoul of the Sixth Amendment. But whereas the Supreme Court’s solution in *Schad* was to simply decline to state a rule, it had the opposite response in *Apprendi*. Though its bright-line rule—that any fact increasing the maximum sentence to which a defendant may be subject must be found by the jury—stood directly contrary to expressed legislative intent in many cases, upended decades of settled sentencing practices, and called into doubt the legality of countless sentences that had already been imposed, the *Apprendi* Court did not let these considerations stop it from announcing the rule that it thought the Constitution required. Again, the contrast with *Schad* is striking.

#### IV. A PRACTICAL AND NORMATIVE ASSESSMENT OF AN *APPRENDI*-INSPIRED APPROACH

The *Apprendi* line of cases thus suggests a different approach to the questions alternative elements present than the approach the Supreme Court took in *Schad*. If conceived of primarily as a danger to the right to trial by jury, alternative elements—or at least their submission to the jury without a requirement that the jury agree on at least one of them—can be hooked up to the *Apprendi* train

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149. *Id.* at 636 n.6 (emphasis added).

150. *Id.* at 635, 636 n.6.

151. *Blakely v. Washington*, 542 U.S. 296, 308 (2004).

without too many legal gymnastics. Indeed, prior to *Schad*, most of the courts that considered the constitutional issues alternative elements present viewed them as primarily implicating the Sixth Amendment right to trial by jury. It may very well be, then, that history will look back on *Schad* as an example of a time when the Supreme Court made the wrong choice between two paths.

But even if *Apprendi* is never formally viewed as abrogating *Schad*, its insights, style, and comfort with bright-line rules—regardless of the practical consequences—offers a way forward in thinking about alternative elements. The *Apprendi*-inspired solution is obvious: (1) treat each statutory alternative as what it appears to be, an alternative element, if each one is sufficient in and of itself to satisfy a necessary component of the crime, and (2) require a jury to agree unanimously on at least one of the available alternatives for each component of the crime. Courts would then be released from the necessity of trying to divine what is a means as opposed to an element. Prosecutors worried about the jury dividing among the available means, when the alternatives are closely related, could then make a strategic choice to submit only one of them. And the danger that a jury would convict a defendant without sufficiently grappling with the evidence and statutory basis for guilt would then be significantly lessened.

This approach may sound radical, but in many practical respects, it is not radical at all. It is in fact consistent with how some states and federal courts of appeals have approached the issue despite *Schad*, although they have done so inconsistently and on unsure doctrinal footing (in the case of federal courts) or—in the case of state courts—based upon their state constitutions or common lawmaking authority.<sup>152</sup> Indeed, notwithstanding *Schad*'s “discrediting” of *Gipson*,<sup>153</sup> *Gipson* and the case law it inspired in the various courts of appeals prior to *Schad* continue to be cited by some courts and in some model jury instructions,<sup>154</sup> even as courts acknowledge *Gipson*'s imperfection and circularity.

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152. See, e.g., *Commonwealth v. Plunkett*, 664 N.E.2d 833, 837 (Mass. 1996) (holding generally as matter of common law that “in cases involving more than one theory on which the defendant may be found guilty of a crime, separate verdicts on each theory should be obtained”); *Commonwealth v. Berry*, 648 N.E.2d 732, 742 (Mass. 1995) (holding as matter of common law that a jury should be required to unanimously agree on theory of first-degree murder); *Ngo v. State*, 175 S.W.3d 738, 740, 749 n.44 (Tex. Crim. App. 2005) (holding that the Texas Constitution required a jury to unanimously agree whether the defendant committed credit card abuse by “stealing,” “receiving,” or “fraudulently presenting” the credit card).

153. *United States v. Verbitskaya*, 406 F.3d 1324, 1334 (11th Cir. 2005).

154. Several of the courts of appeals still include some version of a “unanimity of theory” instruction in their model jury instructions. See, e.g., FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL, § 1.25 (2001) (Unanimity of Theory); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS, CRIMINAL, § 7.9 (2003) (Specific Issue Unanimity). This approach

The *Apprendi*-inspired approach to alternative elements is also consistent with prosecutors' approach in many cases—or at least with official Department of Justice policy. In fact, the U.S. Attorneys' Manual (the Manual) cites to *Gipson* (and, notably, not to *Schad*) in its section providing guidance on how to properly plead an alternative elements offense in an indictment. Consistent with Federal Rule of Criminal Procedure 7(c), the Manual directs Assistant U.S. Attorneys to charge, in the indictment, offenses that may be committed in a number of ways in the conjunctive if supported by the evidence—unless “the alternative means of committing an offense fall into ‘two conceptual groupings’ which are mutually exclusive and could result in an obviously non-unanimous verdict.”<sup>155</sup> This is clearly correct insofar as it goes. But it does not go far enough, in that it addresses only “mutually exclusive” alternatives (whereas many alternative elements are not mutually exclusive) and does not explicitly address how a jury should be instructed about alternatives included within the indictment. (No other portion of the Manual addresses these concerns.). Nevertheless, I think that most prosecutors, who generally take it seriously that their duty is to “do justice”<sup>156</sup> and not simply to win convictions, appreciate the implicit danger

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is also recommended in SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, CRIMINAL, § 9-7A (2010) (Unanimity of Theory), and in KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL, § 13-07 (6th ed. 2009) (Unanimity—Explained). However, such charges are given inconsistently and are most commonly given when a court perceives a danger that the jury might disagree as to which underlying acts the defendant committed or as to which acts constitute the offense for which the defendant has been charged, rather than as to which statutory alternative has been proven. See, e.g., *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007) (“A specific unanimity instruction is required if it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts.” (citations and internal quotation marks omitted)); *United States v. Gonzalez*, No. 00 CR 447 DLC, 2002 WL 77082, at \*3 (S.D.N.Y. Jan. 22, 2002) (holding that no specific unanimity instruction was required absent “a genuine danger of jury confusion” (quoting *United States v. Schiff*, 801 F.2d 108, 115 (2d Cir. 1986)) (internal quotation marks omitted)); *United States v. Wecht*, Criminal No. 06-0026, 2008 WL 723315 (W.D. Pa. Mar. 14, 2008). Because of *Schad*, failure to give a specific unanimity charge will rarely be cause for reversal, even when multiple theories of guilt relying on different facts have been advanced.

155. UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 227, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00227.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00227.htm) (last visited Sept. 22, 2011) (quoting *United States v. Gipson*, 553 F.2d 453, 458 (5th Cir. 1977)).

156. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt that shall not escape or innocence suffer.”); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate”); STANDARDS FOR PROSECUTION FUNCTION, Standard 3-1.2(c) (“The

of not requiring a jury to agree on at least one statutory alternative or theory of the defendant's guilt.<sup>157</sup> But prosecutors too deserve clearer guidance in this area.

Prosecutors may indeed reap practical benefits from seeking greater clarity in the basis for a jury's verdict. The recent case of *Conrad Black*, in which the government suffered a setback before the Supreme Court, shows why.<sup>158</sup> *Black*, who was the chief executive officer of Hollinger International, was convicted after a four-month trial of charges alleging both conventional property fraud and honest services fraud. The jury was instructed on both types of fraud, but—over the defense's objection—was not instructed that it had to unanimously agree on at least one type of fraud. The Supreme Court, having held in *United States v. Skilling*<sup>159</sup> (decided the same day as *Black*) that the honest services provision was unconstitutionally vague as written and that it required a limiting construction different from the instruction given to the jury in *Black*'s case, reversed *Black*'s conviction and remanded it to the Seventh Circuit for harmless error review.<sup>160</sup> To save the convictions on remand, the

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duty of the prosecutor is to seek justice, not merely to convict"); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612–13 (1999).

157. The *Hurt* case, discussed *supra* note 68, provides a good example of a prosecutor who appreciated the implicit danger of submitting an alternative elements charge without a specific unanimity instruction. The case involved a charge under 18 U.S.C. § 641 that the defendant had stolen and converted two government checks. The prosecutor initially suggested that the trial court instruct the jury that it had to agree on at least one theory to convict: "I mean, six can't say, we think he stole it, and six say, he converted it and therefore there's a conviction." *United States v. Hurt*, 527 F.3d 1347, 1354 (D.C. Cir. 2008). The trial judge responded that he did not think such an instruction was legally required (although the court opined that the defense would probably be "delighted" with that instruction), and the prosecutor withdrew the suggestion. See also *United States v. Perea*, No. CR 09-1034 JB, 2010 WL 2292937, at \*3 n.2 (D.N.M. May 21, 2010) (noting the prosecutor's acquiescence to a unanimity of theory charge in a case alleging a violation of a federal assault statute, notwithstanding the lack of binding precedent that such a charge was required).

158. See *Black v. United States*, 130 S. Ct. 2963 (2010).

159. 130 S. Ct. 2896 (2010).

160. Anticipating the vulnerability of the honest services provision, the prosecutors in the *Black* case initially requested that the district court provide a special verdict form to the jury so that the jury could indicate which theory or theories provided the basis for its verdict. The defense agreed in principle to a special verdict form, but the parties could not agree on the procedure to be used. Their disagreement centered largely on whether the special verdict form should be submitted to the jury at the outset of its deliberations, as the government requested, or only after the jury had indicated that it had found the defendant guilty, the procedure favored by the defense. See *Black*, 130 S. Ct. 2963. The trial court ultimately did not submit any special verdict form, and—although it did not instruct the jury specifically that it need not reach unanimous agreement on the theory of fraud supporting a verdict—neither did it specifically instruct the

government had to establish that all twelve jurors necessarily convicted solely on the basis of the conventional fraud theory—a burden made heavier by the district court’s failure to give a specific unanimity charge.<sup>161</sup>

But to even suggest the *Apprendi*-inspired rule is, of course, to recognize that it could easily be circumvented by legislatures. Offenses that today contain several alternative elements could be redrafted more broadly. The statute at issue in *Gipson*, for example, which required proof that the defendant received, concealed, stored, bartered, sold, or disposed of a stolen car, could be redrafted (as Justice Souter noted in *Schad*) to simply prohibit trafficking in stolen vehicles. From a notice perspective, one could argue that this substitution is worse in that it will not be as clear on the face of the statute exactly what conduct will fall within the criminal prohibition. But this concern should not be overstated—only at the margins will it be unclear what conduct that would have clearly fallen within one of the six categories in the original statute does not clearly fall within the broader statute. Moreover, to the extent that notice is the concern, the loss of specificity in any one statute could be outweighed by an overall net gain in accessibility if a critical mass of previously lengthy and complex criminal statutes were revised such that the criminal code as a whole would be rendered shorter and simpler.<sup>162</sup>

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jury that it must agree unanimously on a theory of guilt. See Trial Transcript at 15,158–94, *United States v. Black*, 05 CR 727-1 (N.D. Ill. June 27, 2007) (on file with author).

161. See Appellants’ Joint Circuit Rule 54 Statement at 20–21, *United States v. Black*, Nos. 07–4080, 08–1030, 08–1072, 08–1106 (7th Cir. Aug. 16, 2010) (on file with author) (arguing that, because the jurors were not instructed on the necessity of agreeing on at least one theory of fraud, the convictions had to be reversed unless the court was satisfied beyond a reasonable doubt that not even a single juror had voted to convict based on the flawed theory). On remand, the Seventh Circuit held that only one of the two fraud convictions that were submitted survived harmless error review. See *United States v. Black*, 625 F.3d 386, 393–94 (7th Cir. 2010). By contrast, the Fifth Circuit recently affirmed on remand all of the convictions of Jeffrey Skilling, concluding beyond a reasonable doubt that the jury verdict would have been the same even if the jury had not been instructed on the invalid honest services theory of Skilling’s guilt. See *United States v. Skilling*, 638 F.3d 480, 488–89 (5th Cir. 2011). Evidencing the ongoing influence of *Gipson* in the Fifth Circuit, at Skilling’s trial—unlike in Conrad Black’s—the district court meticulously instructed the jury that it had to unanimously agree on at least one theory of guilt as to each count in which multiple theories of guilt were advanced. See Jury Instructions, *United States v. Skilling*, Crim. No. H-04-025 (S.D. Tex. May 15, 2006) (on file with author). This issue may have had no actual effect on the courts’ decisions on remand: Neither opinion mentioned the presence or absence of a specific unanimity instruction, and the harmless error review in which the courts engaged was by definition driven by the particular facts of each case. But the distinction is intriguing nevertheless.

162. Such recodification efforts are underway in Kentucky and Illinois and are aimed at simplifying those states’ criminal codes and at eliminating duplicative offenses. The reports prepared by commissions in both states found that the criminal codes could be dramatically reduced in

As for the breadth concern, if such reforms were pursued, it is true that some statutes could indeed become broader. But not every statute containing alternative elements will be susceptible to being “rounded up.” For example, it would be hard to come up with a single term that would encompass the various motives set forth in a number of federal criminal statutes that would still survive vagueness review.<sup>163</sup> For such statutes, the most likely legislative response to an *Apprendi*-inspired approach (if prosecutors objected to requiring a jury to agree on at least one of the alternatives unanimously)<sup>164</sup> would be to drop the element entirely—in which case juror disagreement about the defendant’s motive, for example, would be irrelevant for Sixth Amendment and due process purposes because it would no longer be an element of the offense. But, of course, that choice comes with other consequences; in some cases, the mental state alternatives are what distinguishes a particular crime from other crimes of a more general nature (for example, first-degree murder from second-degree murder in *Schad*), or it is sometimes the motive element that provides the basis for federal jurisdiction.<sup>165</sup> Therefore, a rewrite option might actually prove illusory.

As for those laws that are rewritten more broadly, at least the choice represented therein would be transparent. The status quo is troubling in part because, with respect to a great number of offenses, the *Schad* framework allows defendants to be convicted even though their conduct may not fit within existing categories of fairly specific laws—at least not to the unanimous satisfaction of twelve jurors. It may be that, as a society, we prefer to include those defendants within the coverage of the criminal law and to see them convicted. But that decision ought to be overt and must be made after public discussion. It should not be the by-product of legal doctrines that “mask” what are in effect

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terms of both the number of offenses and the number of words used to define those offenses. See Robinson et al., *supra* note 23, at 738 n.137. Paul Robinson and Michael Cahill have argued that prosecutors ought to embrace this type of criminal code revision because a new code with “fewer, but more general, offenses” would close existing loopholes, “eliminate complexities and ambiguities that introduce unpredictability,” and would be “easier to explain to juries.” See Robinson & Cahill, *supra* note 21, at 646–47.

163. For example, the three different motives set forth in the money laundering statute, 18 U.S.C. § 1956, or the two different motives set forth in the Violent Crimes in Aid of Racketeering Act, 18 U.S.C. § 1959(a), discussed *supra* note 35, would be difficult to encompass in a single term.
164. Prosecutors are widely considered to be the most effective lobbyists for changes to the criminal laws. See Barkow, *supra* note 21, at 728–29; Richman & Stuntz, *supra* note 19, at 610. But, as discussed *supra* in notes 156–161 and accompanying text, there are compelling reasons to believe that prosecutors would *not* object to a requirement that jurors unanimously agree on at least a single theory of guilt.
165. See, e.g., 18 U.S.C. § 924(c)(1)(A) (2006); *id.* § 1959(a) (Violent Crime in Aid of Racketeering Act), discussed *supra* note 35.

substantive policy choices.<sup>166</sup> Thus, it may be that a reexamination of the alternative elements doctrine will force us to confront more directly what it is that we choose to make criminal (or subject to federal sanction), as well as the words that we use to define the resulting offenses. But that is how it should be. Our criminal laws are deserving of such exacting attention to detail. If strict insistence upon criminal procedural rights can be enlisted in the service of better criminal law substance, that is a path worth pursuing.

### CONCLUSION

In an era of advisory rather than mandatory sentencing guidelines, the focus of participants in the criminal justice system, commentators, and the courts may be drawn back to the substantive criminal law.<sup>167</sup> That would be a good thing, because the substantive criminal law—especially federal criminal law—is in need of revision. As this Article has demonstrated, alternative elements statutes represent an understudied aspect of criminal law's pathology. Drawing on some of the broader insights in *Apprendi* and its progeny, this Article has explored the possibility of requiring jury unanimity as to each alternative element used to satisfy the necessary components of an offense. Such a proposal is not as radical as it might seem and would be more consistent with the jury's constitutional function than the governing doctrinal framework. It could even provide the impetus for much-needed substantive criminal law reform.

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166. *Apprendi v. New Jersey*, 530 U.S. 460, 490 n.16 (2000).

167. See O'Sullivan, *supra* note 10, at 719–20, 725 (arguing that *Booker* may provide an impetus for substantive reform of the federal criminal laws because it will “restore the substantive criminal code to its former importance”).