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Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors

*Scott W. Howe**

I. INTRODUCTION

Criminal juries have an uncertain task. While we tout their constitutional role¹ in our justice system as the central fact finder,² we are unsure about their fact-finding function. The uncertainty focuses on the level of factual specificity at which jurors must concur to convict a defendant. On one hand, we do not expect juries to reach a collective vision of past events in perfect detail. Jurors legitimately may find guilt though they disagree on the precise

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1. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI. The Supreme Court has held this requirement of jury trial applicable to the states through the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. This provision is not applicable to the states through the Fourteenth Amendment. *See Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 211 (1916); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1876); *Melancon v. McKeithen*, 345 F. Supp. 1025, 1048 (E.D. La. 1972), *aff'd*, 409 U.S. 943 (1973).

2. Criminal juries are more than fact finders. Through their accepted authority to "nullify" a criminal law—to exonerate an indisputably guilty defendant—criminal jurors become judges of law itself. *See generally* Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS., Autumn 1980, at 51. Yet, our unwillingness to tell jurors of this nullification power reveals ambivalence over the role of criminal jurors as lawmakers. *See id.* at 53-56.

nature of the defendant's acts.³ On the other hand, we do expect convicting juries to agree with some specificity on the conduct warranting liability. A convicting jury must agree at least that the defendant has committed a particular crime.⁴ However, between these vague parameters lies a largely unsettled area of constitutional inquiry.⁵

Only recently has the potential for factual disagreement among criminal jurors begun to emerge as a prevalent constitutional claim. Courts applying common law principles have sometimes recognized the impropriety of a general verdict of guilt where evidence presented under a single charge embodies multiple bases for liability.⁶ However, in 1977 in *United States v. Gipson*,⁷ the United States Court of Appeals for the Fifth Circuit became the first federal court to reverse a conviction under the Constitution based on the potential for juror disagreement over the facts constituting the crime.⁸

3. See, e.g., *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring) ("Juries are typically called upon to render unanimous verdicts on the ultimate issues of a given case. . . . Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.").

4. See, e.g., *Schad v. Arizona*, 111 S. Ct. 2491, 2497-98 (1991) (plurality opinion) ("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, for example, would suffice for conviction.").

5. Courts and commentators also have paid little attention to the obligation of civil jurors to agree on the facts underlying their verdict. For an exception, 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 (1983). Analysis of the constitutional propriety of patchwork guilty verdicts in civil cases differs from that applicable in criminal cases, among other reasons, because of the belief that the risk of error should not be as evenly allocated in criminal cases as in civil cases. See *id.* at 530. In any event, analysis of the constitutional propriety of patchwork guilty verdicts in civil cases is beyond the scope of this Article.

6. See, e.g., *Lebkovitz v. State*, 14 N.E. 363 (Ind. 1887) (reversing conviction for selling intoxicating liquors); *State v. Brown*, 12 N.W. 318 (Iowa 1882) (reversing convictions of two defendants for assault); *Boldt v. State*, 38 N.W. 177 (Wis. 1888) (reversing conviction for selling intoxicating liquors); see generally FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES 97 (9th ed. 1884) ("should it happen that the evidence discloses several successive offenses, any one of which could sustain a conviction, the prosecution (unless the charge is for a continuous offence) must elect the offence which it will pursue; and when this is done, proof of the other offenses will be excluded").

7. 553 F.2d 453 (5th Cir. 1977).

8. See Note, *Right To Jury Unanimity On Material Fact Issues: United States v. Gipson*, 91 HARV. L. REV. 499, 499-500 (1977). According to one commentator:

In [*Gipson*], the first federal court to decide the issue, the United States Court of Appeals for the Fifth Circuit held that it violated the defendant's sixth amendment[] and statutory[] right to a unanimous jury verdict for the trial court to instruct the jurors that they could return a guilty verdict if every juror believed that the defendant had committed some prohibited act even though the jury did not unanimously agree which particular act the defendant had perpetrated.

Id.

Franklin Gipson had been convicted on a single count for "selling or receiving" a stolen vehicle.⁹ The relevant statute prohibited six acts, including the two specified in the count on which Gipson was found guilty.¹⁰ At the trial, the jurors had questioned the judge whether to convict they must agree on what conduct had occurred.¹¹ The judge had instructed them that concurrence on the facts was unnecessary for conviction as long as each juror concluded that Gipson had committed one or the other of the charged acts.¹² The Fifth Circuit disagreed. Writing for a unanimous panel, Judge John Minor Wisdom concluded that the charge upon which Gipson had been convicted contained two distinct offenses: housing a stolen vehicle ("receiving," "concealing," or "storing") and marketing a stolen vehicle ("bartering," "selling" or "disposing").¹³ The instruction had authorized jurors to convict Gipson without agreeing on which crime had occurred. The court reasoned that this procedure violated the Sixth Amendment guarantee of a jury trial,¹⁴

9. *Gipson*, 553 F.2d at 455.

10. The statute provided:

Whoever receives, conceals, stores, barter, sells or disposes of any motor vehicle or aircraft moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years or both.

18 U.S.C. § 2313 (1970).

Based on the same criminal episode, a grand jury charged Gipson in a separate count with "transporting" a stolen vehicle in interstate commerce under 18 U.S.C. § 2312 (1970). However, the jury acquitted him of that offense. *Gipson*, 553 F.2d at 455.

11. About an hour after retiring to deliberate, the jury delivered a note to the judge asking: "In Count Two, will he be guilty of all counts or will it be broken down?" *Gipson*, 553 F.2d at 455.

12. After receiving the note, the trial court instructed the jury, in part, as follows: A third question that may be the one that the jury is really asking is, must there be an agreement by all twelve jurors as to which act of those several charged in Count Two, that the defendant did. For example, would it be possible for one juror to believe that the Defendant had stored property, and another juror to believe that he had received property, and so on. If all twelve agreed that he had done some one of those acts, but there was not agreement that he had done the same act, would that support a conviction? The answer is yes. If each of you is satisfied beyond any reasonable doubt that he did any one of those acts charged, and did it with the requisite state of mind, then there would be a unanimous verdict, and there could be a return of guilty under Count Two of the indictment, even though there may have been disagreement within the jury as to whether it was receiving or storing or what.

Id. at 455-56.

13. *Id.* at 458. The Fifth Circuit previously had held that commission of an act that constituted any one of the six prohibitions expressed in the statute constituted a crime. *See, e.g., Weaver v. United States*, 374 F.2d 878, 880 (5th Cir. 1967).

14. *Gipson*, 553 F.2d at 459. The court also concluded that the procedure violated the defendant's statutory right under FED. R. CRIM. P. 31(a) to a unanimous jury verdict. *See id.* at 456.

which the court held required substantial juror agreement on the conduct warranting conviction.¹⁵

Following *Gipson*, criminal defendants raised a variety of challenges alleging the potential for juror disagreement over the facts underlying their convictions.¹⁶ Courts also began regularly reversing guilty verdicts based on these arguments, often citing *Gipson*.¹⁷ However, the *Gipson* decision

15. *Id.* According to the court:

Like the "reasonable doubt" standard, which was found to be an indispensable element in all criminal trials in *In re Winship*, the unanimous jury requirement "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." The unanimity rule thus requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required.

Id. at 457-58 (footnote and citations omitted).

16. The decision also generated written commentary. One author criticized it as unduly interfering with the legislature's authority to proscribe several acts in a single offense. See Trubitt, *supra* note 5, at 548 (criticizing the *Gipson* court for substituting its "own vague platonic sense of what constitutes an 'act' for a determination of legislative intent as to the singleness of an offense."). However, several commentators endorsed the decision, arguing that jury concurrence on facts at some level of specificity must underlie a guilty finding. See John R. Baumgarth, Note, *Application of Gipson's Unanimous Verdict Rationale to the Wisconsin Party to a Crime Statute*, 1980 WIS. L. REV. 597, 601 (approving *Gipson's* requirement that jurors agree on a conceptual act, like housing or marketing, while criticizing the court's failure to require agreement on a more specific act); Mark A. Gelowitz, *Jury Unanimity on Questions of Material Fact: When Six and Six Do Not Equal Twelve*, 12 QUEEN'S L.J. 66, 96 (1987) ("The *Gipson* approach . . . is at least a reasoned, principled response to [the problem of factual nonconcurrence] and is to be preferred to a blind adherence to the intention of the legislature."); Gary N. Gibbs, Note, *United States v. Gipson: Duplicitous Denies Right to Unanimous Verdict*, 1978 DET. C.L. REV. 319, 337 ("The most important contribution of *Gipson* is the recognition the Fifth Circuit . . . gave to [the dilemma created by duplicitous indictments]."); Barbara L. Lauer, Comment, *Jury Agreement and the General Verdict in Criminal Cases*, 19 LAND & WATER L. REV. 207, 211 (1984) ("Only when there was essential agreement on what the defendant did could the jury decide that the *actus reus* element of the crime had been proved beyond a reasonable doubt."); Note, *supra* note 8 at 501 ("The Fifth Circuit was correct in holding that the Sixth Amendment requires that a federal jury conviction rest upon a consensus on a specific *actus reus*, in addition to a general agreement on the guilt of the defendant."); Sally Wellman, Note, *Jury Instructions and the Unanimous Jury Verdict*, 1978 WIS. L. REV. 339, 342 ("The *Gipson* opinion properly assumes that proving each element of an offense beyond a reasonable doubt requires proving the specific act performed by the defendant.").

17. For a sample of federal court decisions, see *United States v. North*, 910 F.2d 843, 873-78 (D.C. Cir. 1990) (reversing conviction where evidence alleged that defendant committed several acts over course of several weeks that could have individually warranted liability under statute prohibiting one to willfully and knowingly conceal, remove, mutilate, obliterate, falsify or destroy records filed in a public office and where trial court refused to give a special factual concurrence instruction); *United States v. Duncan*, 850 F.2d 1104, 1110-14 (6th Cir. 1988) (reversing conviction where two false statements were proven in support of count charging

remained controversial. Some courts simply rejected its holding.¹⁸ Others distinguished it on questionable grounds.¹⁹ Even among judges and commentators who agreed with its premise that the Constitution mandates some level of factual agreement among convicting jurors, many noted the difficulty of articulating principles to define the level of factual specificity at which a convicting jury must concur.²⁰ Nonetheless, the *Gipson* ruling underscored the existence of a constitutional problem.

Recognizing the lower courts' need for guidance, the Supreme Court recently addressed a factual divergence problem for the first time in *Schad v. Arizona*,²¹ but offered little illumination. In *Schad*, a death-penalty case, the petitioner argued that his jury had been improperly allowed to convict him under Arizona's first-degree murder statute without agreeing on either a premeditation or a felony-murder theory.²² The Supreme Court ultimately rejected *Schad's* claim that the potential for divergence among jurors between the two theories violated the Constitution. However, the Court was itself

making and preparation of a tax return containing a false statement); *United States v. Beros*, 833 F.2d 455, 460-63 (3d Cir. 1987) (reversing conviction based on three separate transactions charged in same count as occasions of "embezzling, stealing, abstracting or converting to own use" union funds); *United States v. Payseno*, 782 F.2d 832, 837 (9th Cir. 1986) (reversing conviction based on three acts of extortion made to different persons at different times, some in person and some by telephone, offered to prove single count of extortion); *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) (reversing conviction where prosecution offered numerous mailings to prove single mail fraud count); *see also Horton v. United States*, 541 A.2d 604, 611 (D.C. 1988) (reversing conviction for assault where the record revealed several factual scenarios from which the jury could have found defendant's guilt).

18. *See, e.g., United States v. Bouquett*, 820 F.2d 165, 169 (6th Cir. 1987) (after distinguishing *Gipson* on grounds that Bouquette's alternatively-alleged acts did not fall within distinct conceptual groupings of acts under the relevant statute, declaring, in any event, that "this court does not require jurors to agree . . . as to a theory of guilt where a single generic offense may be committed by a variety of acts.").

19. *See, e.g., United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983) (where government proved multiple acts supporting liability under count charging possession with intent to distribute LSD, failure to instruct jurors that they must agree on the act constituting liability was not error; juror agreement on the underlying act could be "assumed" because no erroneous instruction was given and because the evidence was "simple and clear"); *State v. James*, 698 P.2d 1161, 1166 (Alaska 1985) (distinguishing *Gipson* holding on grounds that it only required jurors to agree on *actus reus* elements not on *mens rea* elements); *State v. Utter*, 582 P.2d 1296, 1299 (N.M. Ct. App. 1978) (where trial court instructed jurors on alternative methods by which they might find defendant guilty of child abuse resulting in death, no basis existed to assume that jurors had not agreed on method by which defendant committed the offense).

20. *See, e.g., Manson v. State*, 304 N.W.2d 729, 738-39, 741 (Wis. 1981) (Abrahamson, J., concurring) ("All agree that jury unanimity is required, but substantial doubt exists as to what the jury has to be unanimous about . . . Conceptual groupings, while dependant to an extent on the statutory language, are also dependent upon the facts in evidence. This makes the *Gipson* analysis difficult to apply."); Note, *supra* note 8, at 502 ("[I]t is difficult to imagine a theoretical framework that will infallibly determine which fact issues are material.").

21. 111 S. Ct. 2491 (1991).

22. *Id.* at 2496.

sharply divided; a four-Justice plurality,²³ with Justice Scalia concurring in the judgment,²⁴ ruled against *Schad*, while four others were prepared to rule in his favor.²⁵ Also, 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.²⁶

This Article outlines a general approach for evaluating factual nonconcurrence claims in criminal cases under the Constitution. These claims implicate three major questions. First, why does the Constitution ever require jurors to agree at a level more specific than whether the defendant is guilty of the charged crime? Two more questions arise if one concludes, as this Article contends, that factual concurrence is constitutionally required at a level more specific than simply whether the defendant committed a burglary, for example. At what level of factual specificity should courts require a shared vision among jurors? Is the Constitution violated when convicting jurors disagree, for example, on whether the burglary defendant entered the dwelling through a window or through the back door? Further, what level of risk of divergence must a defendant demonstrate to establish a constitutional right to special instructions on the need for factual concurrence?²⁷

The Article's thesis is that courts, including the majority and dissenting Justices in *Schad*, typically have obscured the underlying interests implicated by factual nonconcurrence claims. The problem²⁸ with factual disagreements among convicting jurors stems from the doubt that a divergence may reflect about whether the defendant committed any prohibited act. Nonetheless, some courts have failed to acknowledge a constitutional basis for sometimes requiring jury agreement on the facts underlying a guilty verdict.²⁹ Among

23. *Id.* at 2494 (opinion of Souter, J., joined as to Parts I and II, by Rehnquist, C.J., O'Connor, & Kennedy, JJ.).

24. *Id.* at 2505 (Scalia, J., concurring in part and concurring in judgment).

25. *Id.* at 2507 (White, J., dissenting, joined by Marshall, Blackmun, & Stevens, JJ.).

26. See *infra* notes 250-319 and accompanying text.

27. Questions also arise about what instructions or special verdict questions trial courts should employ to attempt to solve the potential for prohibited factual dissension among jurors. However, these are not particularly difficult problems. See *infra* notes 179-82 and accompanying text.

28. This problem implicates due process more than the Sixth Amendment right to jury trial. See *infra* note 36.

29. For example, in rejecting a claim that jurors should have been required to agree on the manner by which a theft offense was committed, one court stated:

[T]he law requires [agreement] only in the verdict, not in the rationale upon which the verdict is based. In the case *sub judice*, the statute sets forth various acts that constitute the crime of theft. As long as jurors unanimously agree that theft in some form was committed, nothing more is required.

Craddock v. State, 494 A.2d 971, 975 (Md. Ct. Spec. App. 1985); see also *People v. Failla*, 414 P.2d 39, 45 (Cal. 1966) (holding that in prosecution for burglary jurors "need not be instructed that to return a verdict of guilty they must all agree on the specific "theory" of the entry—i.e., what particular felony or felonies the defendant intended at the time."); *State v. Souhrada*, 204 P.2d 792, 796 (Mont. 1949) (declaring that in prosecution for manslaughter based on reckless

courts that have recognized the constitutional problem, many have required factual concurrence in only a few of the cases where theory warrants it.³⁰ Some courts also have tended to assume that convicting jurors reach a shared vision of the criminal act despite a potential for factual divergence.³¹ These decisions conflict with a conception of accuracy in the criminal process that "treats erroneous convictions as worse than erroneous acquittals."³²

The Article proceeds in four stages. Part II articulates the constitutional foundation for a factual concurrence mandate. Here, the Article explains why it is wrong to suggest, as some courts have, that convicting jurors need not agree on the underlying facts as long as they agree on the offender's guilt.³³ Part III focuses on the problem of translating the constitutional mandate into standards by which courts might appropriately distinguish those verdicts that are acceptable from those that the Constitution proscribes. The Article suggests decisional guides that can help protect against the conviction of the innocent without risking the exoneration of significant numbers of guilty defendants. Part IV explains why it is erroneous to assume that jurors strive to reach a shared vision of the criminal act where the opportunity for division over factual bases exists. The Article contends that a right to relief—through verdict questions and special instructions—arises whenever a case presents multiple factual bases for a finding of guilt at levels too general to meet the specificity requirements defined in Part III. Part V examines the Supreme Court's decision in *Schad*. Here, the Article explains why none of the *Schad* opinions articulates an appropriate approach to the resolution of factual nonconcurrence claims.

II. THE CONSTITUTIONAL BASIS FOR FACTUAL CONCURRENCE REQUIREMENTS

This Part addresses the Constitutional grounding for limiting factual disagreements among a jury voting to convict. The thesis is that due process incorporates a legality principle under which the government may not convict or punish a person whose conduct has not violated a criminal proscription. The factual concurrence mandate is an important concomitant to this legality ideal. Without a factual concurrence requirement, a jury could convict an accused of a crime despite a factual disagreement among jurors that undermines confidence that the defendant engaged in prohibited conduct. Thus a

driving, a verdict of guilty "may be justified upon either of two interpretations of the evidence, [and] the verdict cannot be impeached by showing that a part of the jury [could have] proceeded upon one interpretation, and part upon another"); *Holland v. State*, 280 N.W.2d 288, 292 (Wis. 1979) ("[Agreement] is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and . . . not . . . with respect to the alternative means or ways in which the crime can be committed.").

30. See *infra* notes 105-35 and accompanying text.

31. See *infra* notes 199-215 and accompanying text.

32. Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1420 (1991).

33. See authorities cited *supra* notes 19, 29.

limitation on factual disagreement among convicting jurors serves as an essential safeguard against conviction of the innocent.

A. Due Process, Legality and the Factual Concurrence Mandate

Suppose that a defendant named Adams is charged with an assault that occurred on or between Tuesday and Thursday. At trial, the prosecution presents evidence that Adams assaulted the complainant on Tuesday and again on Thursday.³⁴ Adams then testifies that he acted in self-defense on Tuesday and that the complainant simply fabricated the Thursday assault. Assume that we know how the jurors have reacted to this evidence.³⁵ Five members of the twelve-person jury conclude beyond a reasonable doubt that Adams committed the assault on Tuesday, but the other seven believe he acted in self-defense. Nonetheless, the seven jurors who would acquit on the Tuesday charge conclude beyond a reasonable doubt that Adams is guilty of the assault on Thursday. The other five doubt that any event involving Adams and the complainant transpired on that occasion. Can the twelve jurors convict Adams?

If the Constitution is concerned with protecting the innocent from conviction, a guilty verdict here must be improper. All jurors agree that Adams is guilty of an "assault." Yet, a conviction masks the doubts of a large number of the jurors that Adams engaged in any particular prohibited conduct.

Indeed, factual concurrence, though not specifically required by the Bill of Rights,³⁶ is inherent in our conception of due process. As applied in the

34. Assume that the defendant has been given a bill of particulars before trial specifying that the evidence presented will focus on these two events.

35. It would often be impossible to know whether jurors are divided between alternative factual bases for a guilty verdict. However, for purposes of understanding the factual divergence problem, it is useful to assume knowledge of how the jury has divided. It also is worth noting that jurors do sometimes ask the trial judge during their deliberations whether a guilty verdict is permissible based on factually divergent theories. See, e.g., authorities cited *infra* note 205.

36. Before *Schad*, courts generally grounded the constitutional proscription against factually divergent guilty verdicts on the Sixth Amendment right to jury trial, perhaps because the unanimity element of the jury trial right was the basis for the mandate articulated by Judge Wisdom in *United States v. Gipson*, 553 F.2d 453, 459 (5th Cir. 1977). See, e.g., *United States v. North*, 910 F.2d 843, 874 (D.C. Cir. 1990) (citing *Gipson*); *United States v. Duncan*, 850 F.2d 1104, 1110 (6th Cir. 1988) (citing *Gipson*); *United States v. Beros*, 833 F.2d 455, 461 (3d Cir. 1987); *State v. Benite*, 507 A.2d 478, 481-83 (Conn. App. Ct. 1986) (citing *Gipson*); *Smith v. United States*, 549 A.2d 1119, 1121 (D.C. 1988); *Johnson v. United States*, 398 A.2d 354, 369 (D.C. 1979) (citing *Gipson*). However, courts have not always clearly based the mandate on constitutional grounds. See, e.g., *United States v. Payseno*, 782 F.2d 832, 835 & n.5 (9th Cir. 1986) (arguably basing the mandate only on FED. R. CRIM. P. 31(a) which sets forth "a right to a unanimous jury verdict" in federal court).

However, it was doubtful even before *Schad* whether the Sixth Amendment jury-trial guarantee encompassed a right to factual concurrence among convicting jurors. The highly general language of the applicable provision does not demand such an interpretation: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI. In any event, in *Schad*, the Supreme Court unani-

criminal context, the Due Process Clauses are largely, though not exclusively, an attempt to fulfill what criminal law scholars have called the "legality" principle.³⁷ The essence of legality is the notion that an individual should not be convicted or punished for a crime unless she has engaged in conduct that was previously proscribed by positive law defining that conduct as criminal.³⁸ Factual concurrence is required by due process because it is an essential component of this legality ideal.³⁹

mously agreed that a factual concurrence mandate stems, not from the Sixth Amendment, but from the residual protections of due process. *See* *Schad v. Arizona*, 111 S. Ct. 2491, 2496-97 (1991) (plurality opinion of Souter, J.); *id.* at 2506-07 (Scalia, J., concurring); *id.* at 2508 (White, J., dissenting).

37. *See, e.g.*, JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 25 (1987); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 195 (2d ed. 1986); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79 (1968).

38. *See* DRESSLER, *supra* note 37, at 25 (declaring "the most basic principle of modern American criminal law jurisprudence" to be that "no conduct is criminal and punishable unless and until the legislature makes the conduct a crime"); LAFAVE & SCOTT, *supra* note 37, at 195 (declaring it a "basic premise of criminal law" that "conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal"); PACKER, *supra* note 37, at 79-80 ("The first principle, we are repeatedly told, is that conduct may not be treated as criminal unless it has been so defined by an authority having the institutional competence to do so before it has taken place.").

The general principle of legality finds expression in numerous doctrinal areas, including "the ex post facto prohibition, the rule of strict construction of criminal statutes, the void-for-vagueness doctrine, and the trend away from open-ended common law crimes." LAFAVE & SCOTT, *supra* note 37, at 195 (footnotes omitted); *see generally* Francis A. Allen, *A Crisis of Legality in the Criminal Law? Reflections on the Rule of Law*, 42 *MERCER L. REV.* 811 (1991); Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principal*, 29 *ARIZ. L. REV.* 385 (1987); John C. Jeffries, *Legality, Vagueness and the Construction of Penal Statutes*, 71 *VA. L. REV.* 189 (1985).

39. Existing debate over the moral theories justifying criminal punishment raises doubt whether the legality principle is ethically essential to a system of criminal law. *See generally* MICHAEL MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 233-43 (1984). Utilitarian rationales for the criminal sanction can justify the conviction and punishment even of individuals who are innocent of wrongdoing. *See* J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 67-73 (1973) (providing an explanation from a philosopher who advocates this view). For example, society might benefit by punishing an apparent wrongdoer, even if actually innocent, merely to deter others from wrongdoing. *See* MOORE, *supra*, at 238. At least in theory, society might also benefit from the punishment of an innocent though predictably dangerous person because he will be incarcerated and thus limited in his ability to commit crime. *See id.* at 238-39 (discussing hypothetical of accused in criminal trial who is innocent of charged offense but has been reliably determined by psychiatrist to have extremely dangerous propensities). Powerful arguments can also be made that retributive explanations for punishment are illogical. Retributivism in its most general form contends that punishment is warranted because the recipient deserves it apart from any social benefit that it produces. *See generally* MOORE, *supra*, at 235; PACKER, *supra* note 37, at 37. The philosophical problem is that retribution alone appears futile. Professor Bedau has described the conundrum confronting the pure retributivist:

It is difficult to understand how due process could not have the fulfillment of the legality principle as its central aim.⁴⁰ Surely, there are other goals that inhere in due process, such as the proscription of investigative methods that are unduly violative of human privacy or dignity.⁴¹ Those aims explain why the Fourth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment⁴² and why investigative methods that shock the conscience violate due process.⁴³ Yet, most of the adjudicative procedures required by due process do not bear significantly on those concerns. Notice of the charges and the right to jury trial are well-accepted components of due process.⁴⁴ According to one commentator,

Either he appeals to something else—some good end—that is accomplished by the practice of punishment, in which case he is open to the criticism that he has a nonretributivist, consequentialist justification for the practice of punishment. Or his justification does not appeal to something else, in which case it is open to the criticism that it is circular and futile.

Hugo Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 616 (1978); see also PATRICK J. FITZGERALD, *CRIMINAL LAW AND PUNISHMENT* 203-05 (1962) (arguing that retribution is not a sufficient justification for punishment).

The philosophical argument for a retributive theory of punishment, however, is that purely utilitarian rationales are unjust. See John Hospers, *Retribution: The Ethics of Punishment*, in *ASSESSING THE CRIMINAL* 181, 183 (Randy E. Barnett & John Hagel III eds., 1977) ("'[T]reatment in accord with desert' is probably the most frequently encountered definition of the term 'justice' itself."). Further, the philosophical justification for mixing retributive and utilitarian theories is debatable. It has been said that retributivism cannot operate merely as a limit on the utilitarian use of punishment; retributivism requires punishment when it is deserved whether or not it serves social ends. This view comes from Immanuel Kant, the most noted advocate of a purely retributive approach. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (1965). Thus, the *only* appropriate basis for punishment, under this view, is that the defendant deserves it.

Despite the difficulty of resolving this philosophical dispute, the important question for our purposes is merely whether due process incorporates a retributive limit, in the form of the legality principle, on the use of the criminal sanction. One need not resolve whether the Constitution also requires that a punishment serve a utilitarian function or whether, in practice, criminal punishment always does serve some utilitarian end. One need only ask whether due process aims to safeguard against the conviction and punishment of those who have broken no existing law.

40. See generally Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1680-87 (1987); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957), quoted *infra* note 70.

41. See Kadish, *supra* note 40, at 347.

42. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

43. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (in rejecting the propriety of stomach pumping to obtain narcotics that officers had seen Rochin swallow, the Court noted, "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained.").

44. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972) (Florida vagrancy ordinance held void for vagueness because it failed to provide a person of ordinary intelligence with notice that contemplated conduct was forbidden and because it encouraged

"Contemporary doctrine has added counsel,⁴⁵ confrontation,⁴⁶ compulsory process,⁴⁷ identification safeguards,⁴⁸ and immunity from double jeopardy⁴⁹ to the procedures due process requires."⁵⁰ The Court also has concluded that the Due Process Clauses protect against conviction except upon proof beyond a reasonable doubt of every fact necessary to establish a crime.⁵¹ These protections are connected with visions of civilized conduct, not because they safeguard directly against inherently unseemly action, but simply because they tend to promote the legality principle.⁵² What purpose do they serve if not to ensure that we only convict criminal lawbreakers?⁵³

arbitrary and erratic arrests and convictions); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (Sixth Amendment right to jury trial in criminal cases applies to states through the Due Process Clause of the Fourteenth Amendment).

45. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963).

46. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

47. See, e.g., *Webb v. Texas*, 409 U.S. 95, 98 (1972).

48. See, e.g., *United States v. Wade*, 388 U.S. 218, 227 (1967).

49. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

50. *Dripps*, *supra* note 40, at 1682 (footnote references in original but numbered differently).

51. This protection has both procedural and substantive elements. On the procedural side, there are two distinct lines of decisions enforcing this command. One line governs the use of presumptions to establish the prosecution's case. See, e.g., *Carella v. California*, 491 U.S. 263 (1989); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). The other controls jury instructions that shift the burden of proof on an element to the defense. See, e.g., *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *Cool v. United States*, 409 U.S. 100 (1972) (holding violative of due process an instruction that the jury must believe an accomplice's testimony for the defense beyond a reasonable doubt before giving it same effect as other testimony). The substantive counterpart is *Jackson v. Virginia*, 443 U.S. 307 (1979), which requires federal courts to reverse state convictions found not to be supported by sufficient evidence that the defendant engaged in proscribed conduct.

52. See *Dripps*, *supra* note 40, at 1682.

53. Professor *Dripps* has argued that even the Framers could not have held a purely procedural conception of criminal liability. According to Professor *Dripps*, the American common law courts at the time of the founding unquestionably possessed and exercised the authority to prevent a guilty verdict against one who had engaged in no wrongdoing. See *Dripps*, *supra* note 40, at 1682 n.94. "In their day, just as in ours, those whose conduct clearly had not broken a contemporary law" could not be convicted and punished "no matter how 'fair' the procedures." *Id.* at 1682 (footnotes omitted). Of course, to some extent the ability of prosecutors to pursue charges of a common law crime not previously acknowledged conflicted with legality ideals. Nonetheless, Professor *Dripps* points out that early American courts at least "retained the authority to determine the scope of the common law of crimes." *Id.* at 1683 n.94 (citing *Republica v. Teischer*, 1 Dall 335 (Pa. 1788)). Hence, Professor *Dripps* contends, the legality ideal was for the framers themselves central to the conception of due process. This view should hardly raise eyebrows. Indeed, to deny that the Due Process Clauses aim to serve the legality ideal is to urge that the Bill of Rights authorizes, even conspires in, an essentially lawless inquiry into whether a defendant should be punished.

Of course, the nature of a factual concurrence requirement turns in some respects on just how much protection we aim to provide innocent defendants against erroneous convictions. The issue raised here focuses on the extent to which the Constitution distributes the risk of error toward erroneous acquittals over erroneous convictions. Does due process aim to give criminal defendants an outcome advantage or merely to put the parties in a state of neutrality?⁵⁴

A factual concurrence mandate of some kind is constitutionally required as long as due process does not permit guilt-weighted decisional standards regarding the elements of crime. A concurrence mandate simply recognizes that when jurors disagree over materially different bases for liability, the disagreement creates some doubt that any punishable act occurred. The degree of doubt as to the accuracy of a particular theory of liability depends on the relative numbers of jurors who disagree about whether the theory is accurate. Yet, without some factual concurrence mandate, a jury can convict even when fewer than half the jurors agree on a basis for the guilty verdict. That situation can arise whenever the evidence presents more than two materially different factual bases for a conviction.

Even when the evidence under a single charge encompasses only two materially different bases for liability, ignoring a possible division among convicting jurors between the bases reflects a guilt-weighted approach to error allocation. Where half the jurors reject each theory, the offender's guilt is too doubtful even if one assumes a neutral approach.⁵⁵ In civil cases, where the principal goal is overall error reduction rather than error allocation, the burden rests on the moving party to prove the allegations by a preponderance of the evidence.⁵⁶ This means that in cases of equipoise, the defendant prevails. Analogously, an equal split among criminal jurors as to the basis for liability should result in an acquittal even if one assumes society is striving for neutrality.⁵⁷

Moreover, it is hardly polemical to observe that due process favors *innocence-weighted* decisional standards for determining the existence of elements

54. The discussion in this section assumes that the different factual bases for liability exist at a level too general to satisfy the factual specificity requirements of the concurrence mandate. For discussion of how to define the level of factual specificity upon which an adequate number of convicting jurors must concur, see the discussion *infra* notes 136-77 and accompanying text.

55. However, the view as to when relief is warranted on appeal could differ from when it is warranted at trial. See *infra* notes 179-219 and accompanying text discussing defendant's burden to show risk of prejudice as a prerequisite to establishing constitutional error and grounds for relief.

56. See Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 3 n.4 (1990) ("Only this standard treats the cost of factual error against the defendant and the cost of factual error against the plaintiff as equal (except at the point of equipoise, where the defendant prevails.)").

57. There is no dispute that due process prohibits *guilt-weighted* decisional standards for determining the existence of the elements of a crime. See Stacy, *supra* note 32, at 1434. That view is implicit in the notion that the legality ideal is central to due process adjudication in criminal cases. See *supra* notes 36-53 and accompanying text. This conclusion confirms that the Constitution must demand factual concurrence among criminal jurors in some circumstances.

of a crime.⁵⁸ It is part of our legal tradition that conviction of the innocent is far more abhorrent than exoneration of the guilty.⁵⁹ The Justices of the

58. Some have noted that the balance of advantage at the beginning of the trial in criminal cases actually weighs heavily in favor of the prosecution. See Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960). The defendant's handicap results from such factors as the natural inference of guilt that arises simply because the defendant has been formally charged with an offense, *id.* at 1162, and from the prosecution's investigative and general resource advantage. See George H. Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFF. L. REV. 22, 40 (1955). On this view, many procedural protections that are afforded the accused at trial can find justification as simply an effort to rectify the pre-existing imbalance rather than to give the criminal defendant a decided advantage. The question is, however, whether due process protections in the criminal context aim to accomplish no more than this equalization function. For a discussion contending that this view is not clearly wrong, see Stacy, *supra* note 32, at 1421-35. But see, e.g., Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1307 (1977) ("In reducing the likelihood of an erroneous conviction, the reasonable doubt rule does not, however, simply restore an accurate balance; it is also understood to introduce a deliberate imbalance, tilting the scales in favor of the defendant.").

It is well-settled, however, that for facts that may determine guilt or innocence but that are nonetheless deemed not to constitute "elements" in a jurisdiction, like an affirmative defense of insanity, the jurisdiction may employ guilt-weighted decisional standards. See authorities cited *infra* note 154.

59. Even before the drafters wrote the Constitution, Blackstone found it uncontested that the criminal defendant should have the margin of advantage: "[T]he law holds that it is better that ten guilty escape, than that one innocent suffer." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PUBLIC WRONGS 358 (1962). This view continues today. Professor Kadish has stated:

One [objective of due process] is the goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished. It is not of crucial importance whether the individual tried is in fact guilty or innocent, but it is of crucial concern that the integrity of the process of ascertaining guilt or innocence never be impaired. If in this effort to insure that none but those guilty be convicted, many guilty go free, the price is not too great in the long view of democratic government. If there is any consideration basic to all civilized procedures it is this, no matter how disparate the means chosen to give it effect.

Kadish, *supra* note 40, at 346; see also HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 190 (1966) ("Trial by jury is not an instrument of getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted.") (quoting Lord Devlin); MCCORMICK ON EVIDENCE 962 (Edward W. Cleary ed., 3d ed. 1984) ("[S]ociety has judged that it is significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free."); Dripps, *supra* note 40, at 1715 ("The procedures incorporated by the due process clause are not animated by a scientific preference for minimizing erroneous judgments, but by a political preference for minimizing erroneous convictions."); Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395, 414 (1989) ("the law is less tolerant of wrongful convictions than wrongful acquittals"); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1073 (1968)

United States Supreme Court themselves have at times endorsed this innocence-weighted view.⁶⁰ *In re Winship*,⁶¹ which held that due process requires that guilt be proven beyond a reasonable doubt, provides the clearest articulation of that position. Justice Brennan's opinion for the Court was "a tour de force of the general constitutional arguments that can be made for . . . an innocence[-]weighted approach."⁶² In a relatively short opinion, Justice Brennan covered "the widest possible territory, appealing to history, consensus, precedent, and policy."⁶³ There also can be no doubt that he advocated giving the accused the outcome advantage:

There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.⁶⁴

As Justice Harlan underscored in his concurrence, "the requirement . . . [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."⁶⁵

("one of the fundamental feelings of our society is that it is far more serious to convict an innocent man than to let a guilty man go free."); Stith, *supra* note 56, at 4 ("In the Anglo-American tradition, the social cost of factual error against the [criminal] defendant . . . is deemed greater than the social cost of factual error against the government."); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 461 (1989) ("Whether treated as a moral, constitutional, or popular sentiment inquiry, the greater injustice is almost universally seen in the conviction of the innocent.") (footnotes omitted); Underwood, *supra* note 58, at 1307 (noting existence of a "value choice" favoring reduction in "the chance of convicting innocent people, even if the result is to reduce the chance of convicting guilty people as well"); Ralph K. Winter, Jr., *The Jury and the Risk of Nonpersuasion*, 5 LAW & SOC'Y REV. 335, 340 (1971) ("Given, among other considerations, the seriousness of the criminal sanctions which result from a conviction, we want our mistakes to be in the form of acquittals.").

60. Of course, the Due Process Clause does not demand every conceivable protection possible to prevent the conviction of the innocent. "[O]nly abolition of the criminal law could satisfy that demand." Dripps, *supra* note 40, at 1679; *see also* Grano, *supra* note 59, at 417 (noting that the balance of advantage favoring the criminal defendant "cannot become too large without undermining the entire system").

61. 397 U.S. 358 (1970).

62. Stacy, *supra* note 32, at 1422.

63. *Id.*

64. *Winship*, 397 U.S. at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

65. *Id.* at 372 (Harlan, J., concurring).

Moreover, other decisions of the Court also warrant this innocence-weighted view, particularly *Jackson v. Virginia*, 443 U.S. 307 (1979), which held that a federal habeas corpus petition alleging insufficient evidence to support a state conviction requires the federal court to conduct a de novo review of the record under the *Winship* standard. *See generally* Dripps, *supra* note 40, at 1715-16 (discussing various protections afforded criminal defendants in Supreme Court decisions, including the right to a jury trial and the right to counsel, which serve to allocate errors away from convictions rather than to ensure overall accuracy in the criminal

The holding in *Winship* underscores, as the author has demonstrated, that concerns about innocence arise whenever the evidence presented to a jury provides even two materially different bases for a guilty verdict.⁶⁶ In that situation, a jury could convict although no more than half of the jurors concur on a particular factual foundation.⁶⁷ Where jurors are evenly divided between materially divergent bases for liability, a reasonable doubt exists that the offender engaged in prohibited conduct.⁶⁸

A factual concurrence mandate therefore must inhere in due process as a protection against erroneous convictions. In cases where materially different bases for liability appear,⁶⁹ the requirement becomes crucial to "the integrity of the process of ascertaining guilt or innocence."⁷⁰ Further, if such a mandate is properly limited, it imposes no undue prejudice on the prosecution

adjudicatory process); Stith, *supra* note 56, at 4-5 (demonstrating that decisions allowing criminal defendants to appeal convictions but disallowing the government to appeal acquittals essentially allocates most of the risk of legal error by the trial court on the government).

Professor Stacy has recently noted indications that an emerging majority on the Supreme Court may be implementing a conception of adjudicatory accuracy organized around overall error reduction. See generally Stacy, *supra* note 32. Professor Stacy contends that a variety of the Court's recent decisions on constitutional criminal procedure are best explained on this view, see *id.* at 1405-21, and that the view is not clearly unconstitutional. See *id.* at 1421-36. At the same time, Professor Stacy concedes that one "might plausibly argue that the Justices have not given error-avoidance preeminence but rather have opted for a conception only modestly innocence-weighted." *Id.* at 1420.

66. See *supra* text accompanying notes 55-57. The Court's opinion in *Winship*, holding that due process mandates a proof-beyond-a-reasonable-doubt standard in criminal cases, also reveals rather specifically the Court's recognition of the need for factual concurrence among convicting jurors. The Court stated that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364 (emphasis added). This passage implies that there must be concurrence among a substantial majority of the jurors as to the facts underlying a guilty verdict, not simply as to the conclusion of guilt.

The holding in *Winship*, however, does not tell us very much about the level of factual specificity upon which convicting jurors must agree. Resolution of that problem turns largely on other considerations. Regarding how we should define the level of factual specificity at which jurors must agree, see *infra* notes 137-76 and accompanying text.

67. See *supra* note 56 and accompanying text.

68. This possibility was noted long ago by a Kansas court:

If evidence was introduced tending to prove twelve or more different offenses, the jury might find [the defendant] guilty without any two of the jurors agreeing that he was guilty of any particular one of such offenses. One juror might believe that he was guilty of one offense, another juror of another, and so on with respect to all the jurors and all the offenses; each juror believing that the defendant was guilty of some one of the offenses which the evidence possibly tended to prove, but no two jurors agreeing that he was guilty of the same identical offense.

State v. Crimmins, 2 P. 574, 577 (Kan. 1884).

69. See, for example, the Adams hypothetical discussed *supra* at text accompanying notes 34-35.

70. Kadiš, *supra* note 40, at 346.

or burden on trial courts.⁷¹ Hence, it is only appropriately viewed as basic to a "commitment to fairness in the criminal process."⁷²

Indeed, the fundamental importance of a factual concurrence mandate as a protection for the innocent is demonstrated by the acceptance of its core tenet. For example, it is safe to say that agreement exists that a conviction for "crime" based on proof of a burglary on one day and an assault on another would violate due process.⁷³ Likewise, a consensus exists that a patchwork guilty verdict based on evidence of two alleged assaults committed on separate days, as in the Adams hypothetical,⁷⁴ would violate due process.⁷⁵ The explanation for these conclusions is that conviction in such cases poses a potential for the condemnation and punishment of the innocent.

71. See *infra* notes 177, 207-09 and accompanying text.

72. See John E. Nowak, *Foreword Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 402 (1979); see also *Medina v. California*, 112 S. Ct. 2572, 2577 (1992) (quoting *Patterson* with approval); *Patterson v. New York*, 432 U.S. 197, 202 (1977) (indicating that test in criminal context is whether a state's practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."); Kadish, *supra* note 40, at 340-63 (rejecting a fixed due process theory based on appeal to historical usage in favor of a flexible concept of due process based on a method of rational inquiry aimed at identifying fundamental values).

73. The Supreme Court recognized as much in *Schad v. Arizona*, 111 S. Ct. 2491 (1991). The four dissenters unquestionably agreed with this conclusion. See *id.* at 2509-10 (White, J., dissenting). The four plurality justices also were explicit on this point:

[I]t is an assumption of our system of criminal justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental" . . . that no person may be punished criminally save upon proof of some specific illegal conduct. Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses, . . . 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, for example, would suffice for conviction.

Id. at 2497-98 (footnotes omitted). Justice Scalia, who concurred separately, also indicated that he would find conviction in this situation violative of due process. See *id.* at 2506-07.

While the *Schad* plurality and Justice Scalia recognized the due process foundation for a factual concurrence mandate, none of these Justices noted that this procedural limitation is required because of its importance in protecting those who are innocent of proscribed conduct. For further discussion of the problems produced by the Court's failure to explain the due process basis for the factual concurrence mandate, see *infra* text accompanying notes 299-320.

74. See *supra* text accompanying notes 34-35.

75. See, e.g., *Schad*, 111 S. Ct. at 2507 (Scalia, J., concurring in part and concurring in judgment) ("We would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday . . ."); see also *United States v. Holley*, 942 F.2d 916, 925-29 (5th Cir. 1991) (noting the impropriety of a general guilty verdict on a charge under which the evidence suggested wholly separate incidents that could have given rise to liability); *Johnson v. United States*, 398 A.2d 354, 369 (D.C. 1979) (same); cf. authorities cited *supra* note 6 (revealing that such a patchwork guilty verdict was prohibited at the common law).

B. How Many Jurors Must Concur?

Clarifying the number of convicting jurors who must agree on the basis for a guilty verdict remains essential.⁷⁶ This question will rarely weigh on the resolution of factual nonconcurrence claims at post-conviction stages, because reviewing courts will rarely know how the jury may have divided between divergent bases for liability.⁷⁷ Nonetheless, the question does bear on what instructions should be given a jury at trial to *prevent* an improper division. If a wide divergence among jurors is required to raise a reasonable doubt, a simple majority of jurors voting to convict on a particular factual basis might suffice. On the other hand, if any dissent among jurors were thought equivalent to a reasonable doubt, even an eleven-to-one divergence on material facts would be unacceptable.

Supreme Court decisions regarding the number of jurors who must agree on the ultimate guilty verdict provide the most compelling authority concerning the number of convicting jurors required to agree on a factual basis for guilt. These opinions reveal that for a twelve-person jury due process generally does not require unanimity; however, these same decisions imply that due process always demands the concurrence of more than a simple majority.

Three Supreme Court cases that focus on issues of verdict agreement among criminal jurors are particularly relevant. In *Johnson v. Louisiana*⁷⁸ and *Apodaca v. Oregon*,⁷⁹ the Court addressed the constitutionality of state laws allowing less-than-unanimous guilty verdicts in noncapital trials where twelve-person juries are empaneled. Louisiana allowed conviction on the vote of at least nine jurors, while Oregon required a minimum of ten. In both cases, the Court upheld the state practice by a five-to-four vote.⁸⁰ On twelve

76. Regarding the appropriate remedy at the trial level, see *infra* notes 177-79 and accompanying text. As for why this question is less important to whether a conviction should be reversed on appeal, see *infra* notes 207-09 and accompanying text.

77. The uncertainty does not warrant reviewing courts in assuming that the required number of convicting jurors have agreed on the factual basis for a guilty verdict where multiple factual bases supporting liability appear. See *infra* notes 204-09 and accompanying text.

78. 406 U.S. 356 (1972).

79. 406 U.S. 404 (1972).

80. The breakdown of the Justices was the same in both cases. In *Johnson*, however, there was a majority opinion, while in *Apodaca*, Justice Powell, a member of the *Johnson* majority, concurred only in the judgment. Justice Powell's differing positions in the two cases stemmed from the differing nature of the issues presented. *Johnson* raised only the question whether the Due Process Clause itself mandated that more than nine jurors agree on the defendant's guilt to support a conviction. *Johnson*, 406 U.S. at 357-58. No issue existed about whether the Sixth Amendment right to a jury trial implied such a requirement and whether it applied, in turn, to the states through the Due Process Clause. While the Court had previously held the Sixth Amendment right to a jury trial applicable to the states through due process, see *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), *Johnson* had conceded that *Duncan* was not applicable because the trial in *Johnson* had occurred before *Duncan* was decided. *Johnson*, 406 U.S. at 365. In *Apodaca*, however, petitioner's principal claim was that the Sixth Amendment right to jury trial implied a unanimity requirement that was applicable to the states through due process.

member juries, the majority concluded that not-guilty votes of two or even three jurors simply do not create a reasonable doubt about guilt.⁸¹ However, Justice White, writing for the Court in *Johnson*, appeared to find the Louisiana practice valid only because a "substantial majority" of the jurors were convinced of guilt.⁸² In a concurring opinion, Justice Blackmun also emphasized this requirement and suggested that he would reject a practice of requiring less than two-thirds of the jurors, and perhaps less than three-quarters, to sustain a conviction.⁸³ Several years later, in *Burch v. Louisiana*,⁸⁴ the Court also held that where a six-person jury is empaneled—and the Court previously had

Apodaca, 406 U.S. at 404. The plurality in *Apodaca* rejected the proposition that the Sixth Amendment imposed such a requirement even for federal courts. *Id.* at 410-14. Justice Powell declined to join the plurality opinion because he believed that unanimity was part of the Sixth Amendment right operable in federal courts, but that it was not so fundamental as to warrant application against the states through the Due Process Clause of the Fourteenth Amendment. *Id.* at 369-75.

81. *See, e.g., Johnson*, 406 U.S. at 360.

82. According to Justice White:

Of course, the State's proof could be regarded as more certain if it had convinced all 12 jurors instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors a substantial majority of the jury were convinced by the evidence. In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt.

Id. at 362.

83. Justice Blackmun was less than clear on just where he would draw the line:

I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As Mr. Justice White points out, . . . "a substantial majority of the jury" are to be convinced. That is all that is before us in each of these cases.

Id. at 366 (Blackmun, J., concurring).

84. 441 U.S. 130 (1979).

upheld six-person juries for noncapital trials⁸⁵—a conviction requires that all jurors find the defendant guilty.

Due process should require at least the same number of jurors to concur on the factual foundation for guilty verdicts as the number due process requires on the verdicts themselves.⁸⁶ There is no persuasive reason for allowing fewer jurors to concur on the facts than the number required by due process to reach the conclusion that the defendant is guilty. Hence, it appears that two-thirds and perhaps three-quarters of the jurors on a twelve-person jury must agree on the material facts to convict; as the jury size decreases to six, the requirement becomes unanimity.⁸⁷

85. In *Williams v. Florida*, 399 U.S. 78, 86 (1970), the Court held that Florida's refusal to impanel more than the six jurors required by state law for a robbery trial "did not violate petitioner's Sixth Amendment rights [to a "jury trial"] as applied to the States through the Fourteenth." *Id.* at 86.

The Court refused in *Ballew v. Georgia*, 435 U.S. 223 (1978), to allow juries of less than six in cases where a jury is required. While conceding that the line between five and six members was difficult to explain, a majority of the Justices concluded that sufficient questions existed about the proper functioning of a five-member jury to warrant drawing the line at six. *See id.* at 239 (opinion of Blackmun, J.); *id.* at 245-46 (opinion of Powell, J.); *id.* at 245 (opinion of White, J., concurring on the ground that a jury of less than six would infringe the fair-cross-section requirement of the Sixth and Fourteenth Amendments); *id.* at 246 (opinion of Brennan, J., joining opinion of Blackmun, J., to the extent that it held that juries in criminal trials must contain more than five persons to satisfy the Sixth and Fourteenth Amendments).

As regards when a jury trial is required, the Court has concluded that any "nonpetty offense" triggers the Sixth Amendment jury-trial provision. *See Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). Moreover, in *Baldwin v. New York*, 399 U.S. 66 (1970), where appellant had been denied a jury trial for a misdemeanor punishable by a year in prison, a plurality declared that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id.* at 69 (opinion of White, J., joined by Brennan, J., and Marshall, J.). Justice Black, joined by Justice Douglas, concluded that the right to jury trial applies to prosecution for even petty crimes. *See id.* at 75; *see also Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989) (in holding Sixth Amendment right to jury trial unavailable to person charged with driving under influence of alcohol, unanimous Court concludes that presumption exists against jury trial right for crimes carrying a maximum penalty of six months imprisonment and that presumption can be overcome only by showing that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are "so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."). For criminal contempt cases, the penalty actually imposed governs unless the legislature has specified the maximum punishment. *See Frank v. United States*, 395 U.S. 147, 149 (1969).

86. The Court's decisions on jury size and unanimity-versus-quorum rules have been the subject of substantial empirical research. For a good summary and interpretation, see MICHAEL J. SAKS, *JURY VERDICTS* (1977).

87. Unanimity as to the conclusion of guilt is often required by some law other than the federal Constitution. For example, Rule 31(a) of the Federal Rules of Criminal Procedure requires that a jury verdict in a federal criminal trial be unanimous. Similar rules apply in state jurisdictions, and unanimity as to a guilty verdict is also required by several state constitutions in some circumstances. *See, e.g.,* LA. CONST. art. VII, § 41 (requiring unanimity among jurors in a capital trial), *quoted in Johnson v. Louisiana*, 406 U.S. 356, 358 n.1 (1972). Because these

There also remains one category of cases where the Constitution may require unanimous agreement among twelve jurors as to the facts for a conviction—capital trials. A legislature has never authorized a reduction in the number of jurors who must vote for guilt in capital trials. The Supreme Court also has distinguished the cases in which it has approved a conviction by fewer than twelve votes as noncapital.⁸⁸ This position coincides with the Court's repeated caution that in capital cases both the guilt and sentencing hearings must be structured to promote heightened reliability in the verdict.⁸⁹ To ensure enhanced reliability, the Court has mandated safeguards in the capital context that it has not required in noncapital cases.⁹⁰ Hence, it may be that unanimity as to the verdict of guilt is required by due process in death

unanimity requirements do not stem from the federal constitution, however, they do not suggest what the federal constitution requires regarding agreement among jurors on the factual basis for a guilty verdict.

Courts might appropriately require jurors to agree unanimously on the factual basis for a guilty verdict even though the Constitution would not require that level of agreement. *See infra* note 177.

88. *See Burch*, 441 U.S. at 131-32 & n.1 (noting that state constitution required unanimous twelve-person jury verdict in capital cases); *Apodaca*, 406 U.S. at 406 n.1 (same); *Johnson*, 406 U.S. at 358 n.1 (same); *Williams v. Florida*, 399 U.S. 78, 103 (1970) ("In capital cases, . . . it appears that no State provides for less than 12 jurors a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty.").

89. *See Beck v. Alabama*, 447 U.S. 625, 638 n.13 (1980) (noting that death is qualitatively different from other punishments so that heightened reliability is required of the guilt determination); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) ("qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (because "death is a different kind of punishment from any other which may be imposed[,] it is "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"); *id.* at 363 (White, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion) (because death is qualitatively different than any other punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case")); *see also Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights").

90. *See, e.g., Beck*, 447 U.S. at 638 & n.14 (holding that states may not proscribe the provision of lesser-included-offense instructions in capital trials; reserving ruling on whether the same requirement applies in noncapital cases); *Lockett*, 438 U.S. at 604 (plurality opinion) (holding Ohio capital sentencing statute unconstitutional for its excessive restriction on the consideration of mitigating circumstances though no requirement for consideration of mitigating circumstances exists in noncapital cases); *Gardner*, 430 U.S. at 362 (rejecting practice of keeping certain information given to capital sentencer from the defendant though the same practice is not proscribed in noncapital context); *Woodson*, 428 U.S. at 305 (rejecting mandatory penalty statute in death-penalty context though mandatory sentencing statutes are permitted in noncapital cases); *cf. Turner v. Murray*, 476 U.S. 28, 36-38 (1986) (holding that in capital case involving interracial crime, defendant is entitled automatically upon request to voir dire of venirepersons regarding their potential racial prejudices though no such right exists in noncapital cases).

penalty cases. If so, it is also logical to require unanimity concerning the factual basis for the guilty verdict.⁹¹

This discussion has demonstrated that the Constitution sometimes proscribes convicting jurors from disagreeing on the factual basis for a guilty verdict. It is simply wrong to suggest, as some courts have, that criminal jurors need only agree on the defendant's guilt of a specified crime.⁹² Of course, it is still necessary to clarify at what level of factual specificity we will require a shared vision among convicting jurors. It also is essential to clarify what burden the criminal defendant will bear to show the potential for juror dissension over material facts to merit relief at trial or on appeal. The next two Parts address these questions respectively.

III. DEFINING THE MATERIAL FACTS UPON WHICH CONVICTING JURORS MUST AGREE

Articulating the general constitutional basis for a factual concurrence requirement does not provide useful rules about the level of factual specificity at which convicting jurors should agree. We must still translate the constitutional demand for protection of the innocent into materiality standards. For example, in a burglary case, is it enough that a sufficient number of jurors agree that the defendant committed a burglary of a given residence or must they agree with some specificity about when and how the burglary occurred? This Part criticizes the prevailing standard applied by courts before *Schad* for defining the material facts upon which jurors must agree and outlines an alternative standard.⁹³

91. Just as issues about factual concurrence exist at the guilt trial, questions can be raised about the level of factual unanimity required among jurors as to the existence of an aggravating circumstances at the capital sentencing trial. These questions are complicated by the absence of any constitutional requirement of juror sentencing at capital sentencing hearings, *see, e.g., Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (affirming capital sentencing by judge rather than by jury), and by the uncertainty whether due process mandates that the capital offender retain any outcome advantage at the capital sentencing stage. *See, e.g., Walton v. Arizona*, 497 U.S. 639, 649 (1990) (affirming state practice of imposing on capital offender the burden of persuasion regarding the existence of mitigating circumstances sufficient to call for imposition of sentence of life imprisonment rather than death at the capital sentencing trial). It is settled that unanimity cannot be required as to the existence of a particular mitigating circumstance that would augur against a death sentence. *See McKoy v. North Carolina*, 494 U.S. 433, 444 (1990).

The particular problems raised by factual nonconcurrence at the capital sentencing inquiry are beyond the scope of this Article.

92. *See, e.g.,* authorities cited *supra* notes 18, 29.

93. Description and critique of the Supreme Court's opinion in *Schad* is reserved until Part IV. *See infra* notes 250-320 and accompanying text.

A. A Preliminary Note on the Slippery Slope Contention

Professor Schauer has cautioned on the need for care in the use and evaluation of the "slippery slope" metaphor in legal argument.⁹⁴ Of course, a slippery slope contention is one in which a proposed resolution of an instant case is not itself troublesome but is claimed nonetheless to be unacceptable because of the possibility that permitting it will lead to an intolerable result in another currently hypothetical but potentially real case.⁹⁵ A pure slippery

94. See generally Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

The "slippery slope" metaphor as an effort in persuasion is not confined to legal argumentation and neither are its critics all lawyers. See BROOKE NOEL MOORE & RICHARD PARKER, *CRITICAL THINKING: EVALUATING CLAIMS AND ARGUMENTS IN EVERYDAY LIFE* 188-89 (1989) (noting and criticizing the use of slippery slope arguments in non-legal contexts).

95. Schauer, *supra* note 94, at 364-65, 368-69.

Professor Schauer notes that the slippery slope argument should be distinguished from several potential impostors, including an actual argument against the instant case, an argument from excess breadth, and an argument from added authority. The argument against the instant case is one that essentially claims that the proposed resolution in the instant case is itself bad. For example, one may argue against the death penalty for burglary as itself a cruel and unusual punishment. This is not a slippery slope argument at all. It is essentially a claim that the proposed resolution in the instant case would bring us near the bottom of the slope. Of course, one might mix this argument with another that claims that even if the death penalty for burglary is not itself wrong, to allow the death penalty for burglary will lead to the use of the death penalty as a punishment for shoplifting and jaywalking, which virtually all would agree is wrong. Nonetheless, it is the latter argument and not the former one that employs the slippery slope metaphor. See *id.* at 365.

The argument from excess breadth amounts to a claim that the principle or rule offered in support of the proposed resolution of the instant case also would embrace the danger case. For example, one might reject Judge Wisdom's statement in *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir. 1977), that agreement is required on "just what a defendant did" as too broad because it would never allow disagreement over any aspect of the defendant's actions. This is not a slippery slope argument.

The problem of excess breadth can be remedied by narrowing the principle wholesale until it no longer includes the danger cases or by specifically designating the danger cases as exceptions to the stated principle. . . . Some form of narrowing or exclusion . . . is not a response, however, that defeats a slippery slope objection

....

Schauer, *supra* note 94, at 366. The slippery slope form claims that *despite* the possibility for linguistic distinction between an instant case and an envisioned danger case, permitting the proposed resolution in the instant case "will nevertheless lead to, or increase the likelihood of, the danger case." *Id.* at 369.

The argument from added authority is one that many would view as encompassed by the slippery slope form, but that Professor Schauer distinguishes by its more "jurisdictional" character. The argument simply warns against "allowing the decisionmaker to enter a given decisional sphere" because it "inevitably increases the likelihood of a wide range of possible future events, one of which might be the danger case." *Id.* at 367. An argument that asserts only that the assumption of authority to decide a particular kind of case increases the likelihood of a feared result in some hypothetical future case is not enough to constitute "the pure version of the slippery slope argument." *Id.* at 368. This added authority argument does not include the

slope contention builds on the risk of mistakes in interpreting the meaning of an opinion in the instant case resulting from problems like linguistic imprecision in the formulation of rules and limited comprehension by subsequent decisionmakers.⁹⁶ The slippery slope argument becomes relevant once we recognize the existence of human biases, deficiencies of understanding and the need for rules and standards of limited complexity. Nonetheless, Professor Schauer persuasively contends that slippery slope arguments ought to be viewed skeptically and that their proponents ought to be required to prove that more than the normal potential for a breakdown in linguistic boundaries or in understanding exists, because risk of those effects is always present in legal decisionmaking.⁹⁷

One might easily imagine a slippery slope argument offered to rebut a factual nonconcurrence claim. Assume that a court is faced with the situation presented in the Adams hypothetical posed in the previous Part.⁹⁸ Adams was charged with assault, and the evidence suggested two separate acts occurred on separate days that each arguably provided the factual foundation for a guilty verdict. The analysis concluded that to allow a conviction when jurors were widely divided between those two bases for liability was simply to ignore the serious doubt, reflected in the division, that Adams engaged in any prohibited conduct.

Instead of the Adams hypothetical, assume a second factual divergence scenario. Suppose that a defendant named Barnes is charged with an assault against a person on Tuesday. One witness saw the incident and thought that Barnes struck the complainant on the side of the head with the butt of a dark-colored pistol. Another witness testifies that she saw Barnes strike the complainant on the side of the head with a blackjack, not a pistol. No more

qualities that characterize a pure slippery slope contention, which, Professor Schauer demonstrates, build on special potential for skewed risk functions in the area under interpretation based on problems like linguistic imprecision in the formulation of rules and limited comprehension by subsequent decisionmakers. *Id.* at 370-76.

96. For a recent example of the application of the slippery slope or "thin edge of the wedge" argument to euthanasia legislation, see Yale Kamisar, *When Is There a Constitutional "Right To Die"? When Is There No Constitutional "Right To Live"?*, 25 GA. L. REV. 1203 (1991).

97. According to Professor Schauer:

Many slippery slope claims, whether in law or in popular discourse, are wildly exaggerated. As a result, it is possible for the cognoscenti to sneer at all slippery slope arguments and to assume that all slippery slope assertions are vacuous. But things are not quite so simple. It is true that the phenomenon of the slippery slope is not strictly logical and that a slippery slope effect is always in logical and linguistic theory eliminable. But as long as law and life are inhabited by people with human weaknesses of bias and deficiencies of understanding, who govern with laws of limited complexity, then claims of slippery slope effect will not necessarily be invalid. Still, slippery slope claims deserve to be viewed skeptically, and the proponent of such a claim must be expected to provide the necessary empirical support. This empirical support provides the supplement necessary to complete the structure of a slippery slope argument.

Schauer, *supra* note 94, at 382.

98. See *supra* text accompanying notes 34-35.

than seven jurors agree on the weapon employed. Nonetheless, all of the jurors agree that Barnes committed an act that constituted an assault on the complainant, although they do not agree precisely on the nature of that act.

Is conviction for assault proper despite the factual divergence among jurors? Surely it is. Here, the disagreement among jurors concerns a detail so trivial that it creates no doubt that Barnes engaged in conduct proscribed by the relevant statute. The trial court should not tell jurors they must resolve what object Barnes used to strike the complainant before they may render a guilty verdict.

Now return to the Adams case. Both the prosecution and the defense might agree that a wide division among twelve, convicting jurors between the two bases for the assault charge against Adams actually reflects grave doubt that Adams engaged in any prohibited conduct. Nonetheless, despite the lack of any direct objection to factual concurrence instructions in Adams' case, the prosecution could contend that to allow the proposed remedy would increase the likelihood that future decisionmakers will conclude that in the Barnes case as well, jurors should be told they must concur in resolving the factual dispute presented before reaching a guilty verdict. That is the slippery slope form of argument. Some commentators state, "[If] you let the camel get its nose in the tent, there's no stopping the rest of it from coming in."⁹⁹

Although slippery slope arguments often are unfounded, factual nonconcurrence claims seem to invite them. The central problem that these claims present is how to articulate materiality standards that mediate between the competing dangers of convicting too many innocent defendants and exculpating too many guilty ones.¹⁰⁰ Although we know we are pursuing innocence weighted standards for determining the existence of elements of crime, there remains a problem of ambiguity. Rules or standards that define which factually disparate bases for guilt pose due process concerns find expression on the margin only in vague and abstract terms. For example, it is not terribly precise to say that we should require agreement where disagreement would raise "a reasonable doubt" that the offender engaged in prohibited conduct.

At the same time, special problems may impede efforts to fashion precise rules to differentiate material from immaterial facts.¹⁰¹ The special problems

99. MOORE & PARKER, *supra* note 94, at 189.

100. Cf. Sundby, *supra* note 59, at 459 ("How we extend the presumption of innocence is an issue of balancing society's interest in controlling crime and society's interest in not convicting innocent individuals.").

101. According to one commentator:

To the extent that the possibility of a breakdown in linguistic boundaries or in understanding is *always* present, the slippery slope argument collapses into a general plea for caution in the face of an uncertain future. But to the extent that some breakdowns appear more likely than others, or to the extent that some pressures leading to breakdown appear particularly great, then the slippery slope claim may be premised on something more than undifferentiated risk aversion. Some subjects may involve a greater than normal likelihood of mistakes. And in some areas, certain mistakes are more likely to be made than others.

Schauer, *supra* note 94, at 376.

arise because factual nonconcurrence claims come in an extraordinary array of unique contexts. When faced with a particular factual nonconcurrence claim, it is easy for a court to envision hundreds, if not thousands, of other such claims involving a plethora of crimes and factual divergence scenarios.¹⁰² The court could resolve whether the factual differences in each particular case envisioned appeared material or immaterial. Yet, the slippery slope argument builds on the contention, quite applicable here, that neither general rules nor highly individualized responses to each of those cases will do much to inform future decisionmakers of how to resolve nonconcurrence problems not specifically addressed.¹⁰³

The slippery slope claim, however, depends also on an additional contention: The definitional difficulty in this setting presents a distorted risk that courts will impose factual materiality requirements too beneficial to criminal defendants. Precisely this sort of assertion has been offered as a reason not to require juror agreement at demanding levels of factual specificity.¹⁰⁴ It is here that the slippery slope contention for restrictive

102. For example, assume a defendant is charged with storing a stolen car under 18 U.S.C. § 2313 (1970). *See supra* note 10. A court might confront whether it is a material difference that one witness claims the defendant always kept the car in his garage while another witness claims the defendant always kept the car in a warehouse several miles away. The court could reach a decision about whether this factual difference is important enough that jurors ought to be required to coalesce on its resolution before returning a guilty verdict. Yet, the court might also posit, for example, a similar case in which one witness claimed a stolen car was always parked in the defendant's driveway while another witness claimed that the car was always parked on a public street near the defendant's home. The court might next imagine a similar case in which one witness claimed a stolen car was parked in the defendant's driveway while another witness claimed he kept the stolen car parked in his garage. It might then posit the problem presented in the *Gipson* case, which was discussed at the outset of the Article. *See supra* notes 7-15 and accompanying text. It is fair to say that "[r]elatively small deviations in the factual setting can make a great difference in whether or not a fact issue is material." Note, *supra* note 8, at 502 n.27.

103. *See* Note, *supra* note 8, at 502 ("[S]ince the set of material issues changes composition with the facts of each case, precedents cannot necessarily be used to construct a clear definition of materiality.").

104. One commentator has warned: "Once [agreement among jurors] is required at a level of specificity deeper than the statutory language, the court is on a slippery slope that will require actual unanimity even on trivial details." Trubitt, *supra* note 5, at 550. This commentator reiterated the slippery slope contention as a basis for rejecting the *Gipson* decision: "Regardless of whether the *Gipson* ad hoc approach could be successful in the long run, given the ratchet effect of stare decisis, the decision [regarding what are material facts] should be left to the legislature." *Id.* at 550 n.461.

Courts also have expressed concern over the perceived slippery slope involved in defining factual materiality. *See, e.g.,* *State v. Rasmussen*, 68 P.2d 176, 185 (Utah 1937) (Wolfe, J., concurring) (asking, rhetorically, "How far up the trunk and branches of the evidence tree must this [agreement] extend?"). This fear of the slippery slope surely also underlies the decisions of other courts that have rejected such claims without offering clear explanations. *See, e.g.,* *State v. Bryan*, 245 P. 102, 104 (Kan. 1926) (where defendant was charged with extortion under statute that listed several ways in which intimidation might occur, held that jurors need not agree on whether defendant intimidated with threats of accusation of crime or threats to injure physical-

rules deserves critical evaluation. The question is whether there really exists a distorted risk of misinterpretation that would run in favor of criminally accused persons. If not, despite the problem of ambiguity in articulating materiality standards, there is no slippery slope operating.

B. Defining the Line

This subpart criticizes the prevailing view among courts that have sought to define factual materiality for nonconcurrence problems and outlines an alternative approach. It is worth clarifying at the outset that there is more to this criticism of prevailing doctrine than a contention that the line drawn to distinguish material from immaterial facts does not follow an obvious demarcation revealed by nature. Because factual nonconcurrence claims fall in an array between the competing dangers of convicting the innocent and acquitting the guilty, any distinctions drawn between close cases may appear arbitrary. Hence, "Where do you draw the line?" is always a question that can be asked to support a claim for deciding cases near the margin differently. However, the contention here is not simply that courts typically have drawn the line arbitrarily, but that they have drawn it in a way that is clearly wrong.

1. Requiring Distinct Crimes: Deference to a Purported Legislative Intent

Among courts that have acknowledged that factual divergence among convicting jurors can violate the Constitution, many have held that a legitimate nonconcurrence claim exists only if the evidence under a single charge reveals two or more separate crimes.¹⁰⁵ Further, courts often have claimed that their

ly); *State v. Souhrada*, 204 P.2d 792, 796 (Mont. 1949) (in manslaughter case based on reckless driving of automobile, jurors need not agree on the act or omission demonstrating recklessness).

105. See, e.g., *People v. Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903) (rejecting claim that convicting jurors should have been required to agree on either premeditation or felony-murder theories in finding defendant guilty of first-degree murder); *Cook v. State*, 741 S.W.2d 928, 934-36 (Tex. Crim. App. 1987) (en banc) (rejecting claim that jury should have been required to agree on the kind of felony that supported felony-murder conviction), *rev'd and remanded on other grounds*, 488 U.S. 807 (1988); *State v. Franco*, 639 P.2d 1320, 1323-24 (Wash. 1982) (rejecting claim that convicting jurors should have been required to agree on alternative methods of violation specified in statute concerned with driving while under the influence of drugs or alcohol); see generally Lauer, *supra* note 16; Tim A. Thomas, Annotation, *Requirement of Jury Unanimity as to Mode of Committing Crime Under Statute Setting Forth the Various Modes by Which Offense May Be Committed*, 75 A.L.R. 4TH 91 (1990).

Some appellate courts seem to have limited relief to those cases in which there was insufficient evidence of one of the separate-crime theories. See, e.g., *Boulder v. Commonwealth*, 610 S.W.2d 615, 617 (Ky. 1980) (reversing conviction). However, reversal actually is unwarranted in such cases as there is no basis to believe that a reasonable juror would convict based on a theory for which there is insufficient evidence rather than one for which adequate evidence appears. See *Griffin v. United States*, 112 S. Ct. 466, 474 (1991) (holding that due process does not require that a general guilty verdict on a multiple-object conspiracy be set aside if the evidence is inadequate to support conviction based on one of the objects).

conclusions do not rest on their own notions of what is a single crime.¹⁰⁶ Instead, they purport to defer largely to the intent of the legislature, derived from an examination of relevant statutes.¹⁰⁷

This distinct-crimes standard will identify some nonconcurrence problems. First, if a single count alleges a violation of a statute that defines multiple prohibited acts deemed to be separate crimes, this standard will reveal the nonconcurrence problem. For example, assume that a single statute defines both larceny and knowingly receiving stolen property as prohibited acts, and that these are deemed separate crimes on grounds that a larcenist cannot himself be a "receiver" of stolen property.¹⁰⁸ If an indictment charges that the defendant violated the statute in that he committed both of the prohibited acts and if some evidence at trial suggests that he stole certain goods while other evidence suggests that he received the same goods from someone else, a potential divergence problem exists. One large segment of the jury might conclude that the defendant stole the property himself. Another large segment of the jury might conclude that the defendant did not steal the property but that he did receive it from another person, knowing it was stolen. Because these are deemed separate crimes, under the separate-crimes test, the

^{106.} See, e.g., *Ward v. State*, 758 P.2d 87, 91-92 (Alaska 1988); *State v. Dixon*, 622 P.2d 501, 508-09 (Ariz. Ct. App. 1981); *State v. Arndt*, 553 P.2d 1328, 1331-32 (Wash. 1976) (en banc).

^{107.} One of the few commentaries on the factual nonconcurrence problem advocates that courts follow this approach:

[I]t is apparent that the appropriate method for resolving patchwork-verdict questions is to first determine whether the legislature intended to create a single offense or many. Courts that attempt to rely solely upon their own judgment to distinguish between acts that may properly form a patchwork verdict and those that may not frequently come to grief.

Trubitt, *supra* note 5, at 553-54. Trubitt does suggest that courts at times may reject legislative efforts to create single offenses out of what he characterizes as "intrinsically separate" offenses. *Id.* at 558.

^{108.} For an example of this kind of statute, see MASS. GEN. L. ANN. ch. 266, § 28 (West 1990), which states, "Whoever steals a motor vehicle . . . , [or] receives . . . a motor vehicle . . . knowing . . . the same to have been stolen . . ." is punishable under the statute. In *Commonwealth v. Dellamano*, 469 N.E.2d 1254 (Mass. 1984), the Massachusetts Supreme Judicial Court declared that these are distinct crimes that should be charged in separate counts. *Id.* at 1255. This conclusion was based on an old decision, *Commonwealth v. Haskins*, 128 Mass. 60 (1880), which dealt with the more general statute defining larceny of property and knowingly receiving stolen property. In *Haskins*, the jury returned a guilty verdict on counts charging both offenses, and the defendant appealed on grounds that convictions for both offenses were inconsistent. *Id.* at 60. The Massachusetts Supreme Judicial Court concluded that:

By that record it appears that there had been the larceny of a cow, and but one larceny of that cow. The defendants were charged in one count of the indictment with such larceny, and in the second count with having received her knowing her to have been thus stolen. It is certain that the defendants could not be guilty upon both counts, because in law the guilty receiver of stolen goods cannot himself be the thief; nor can the thief be guilty of a crime of receiving stolen goods which he himself had stolen.

Id. at 61.

jurors would not be allowed to pool the guilty votes to arrive at a guilty verdict.¹⁰⁹

Second, the distinct-crimes standard will identify a factual nonconcurrency problem where the evidence offered in support of a single charge reveals two incidents so distinct that they constitute separate crimes although they are of the same kind.¹¹⁰ The nonconcurrency problem here can arise even if the relevant statute prohibits only one act.¹¹¹ The Adams hypothetical presented earlier exemplifies this problem.¹¹² Although only one kind of prohibited act was involved—assault, the evidence suggested two acts so separate that they amounted to distinct crimes.¹¹³ Under the distinct-crimes standard, jurors could not properly patch together guilty votes based on those two alleged offenses.¹¹⁴

Courts, however, have more often employed the separate-crimes test to reject rather than to recognize the validity of factual divergence claims. Frequently, courts have found that separate acts, prohibited by a single statute, are merely different methods of committing a single crime rather than separate crimes, and, thus, that jurors can pool guilty votes based on the different prohibited acts suggested by the evidence.¹¹⁵

For example, the Washington Supreme Court rejected a factual nonconcurrency claim on this rationale in *State v. Franco*.¹¹⁶ There, the defendant was convicted of driving while under the influence of intoxicating liquor under a statute that proscribed driving a vehicle either (1) with at least a 0.10

109. See also *United States v. Starks*, 515 F.2d 112, 117-18 & n.9 (3d Cir. 1975) (potential for improper factual divergence existed where single count alleged different acts that were separate crimes under the Hobbs Act and government presented evidence in support of both prohibited acts), *rev'd on other grounds*, 431 U.S. 651 (1977); *State v. Benite*, 507 A.2d 478, 481-85 (Conn. App. Ct. 1986) (potential for improper factual divergence existed where single count alleged conceptually-severable methods articulated in statute for committing burglary, but error in failing to require agreement held harmless).

It is not apparent why due process requires concurrence if the "separate" crimes carry the same penalty and if the inability to resolve which one occurred does not raise a doubt that one or the other occurred. Indeed, this Article argues that the separate-crimes test is an unrefined measure of factual materiality. See *infra* notes 123-35 and accompanying text; see also *infra* notes 166-68 and accompanying text.

110. See, e.g., *Johnson v. United States*, 398 A.2d 354, 369-70 (D.C. 1979) (court finds factual nonconcurrency problem where defendants were alleged to have pushed a woman partially out of a fifth-story window, and, after driving the woman around for several minutes, to have thrown her into the Potomac river).

111. However, courts often have allowed some multiple similar acts to be proven under a single charge on grounds that certain crimes, such as assault, are "continuous" in nature. See *infra* note 123 and accompanying text.

112. See *supra* text accompanying notes 34-35.

113. See, e.g., *State v. Brown*, 12 N.W. 318, 319 (Iowa 1882) (reversing conviction of two defendants for assault where evidence revealed two incidents occurring several minutes apart that each could have provided basis for liability).

114. See, e.g., authorities cited *supra* note 6.

115. See, e.g., *infra* notes 121-23 and authorities cited therein.

116. 639 P.2d 1320, 1323-24 (Wash. 1982).

percent blood alcohol level as measured by certain prescribed methods; (2) while under the influence of or affected by liquor or any drug in some appreciable degree; or (3) while under the combined influence or effect of liquor or any drug in some appreciable degree.¹¹⁷ These prohibited acts are distinguishable events that do not necessarily overlap in their occurrence. For example, a juror could conclude that a breathalyzer test of the defendant registered a blood alcohol level of 0.10 percent but still find that the defendant was not sufficiently influenced or affected in his driving by his consumption of liquor or any other drug to violate the second or third provisions. Likewise, a juror could also conclude that a defendant did not have the required blood alcohol level, but was nonetheless appreciably affected by the consumption of alcohol or by some other drug, such as marijuana, or their combination. Further, different jurors listening to the same evidence could reach differing conclusions. Indeed, this possibility appeared plausible given the evidence in *Franco*.¹¹⁸ The Washington court nonetheless rejected the argument that the potential for members of the jury to combine guilty verdicts on these differing theories created a problem. "Only if the statute describes several separate and distinct offenses," the court said, "must there be [agreement among jurors] as to each separate crime."¹¹⁹ Moreover, the court found no reason to view the

117. *Id.* at 1321-22. The statute at the time read as follows:

Driving while under influence of intoxicating liquor or drug—What constitutes. A person is guilty of driving while under the influence of intoxicating liquor or any drug if he drives a vehicle within this state while:

- (1) He has 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood or other bodily substance made under RCW 46.61.506 as now or hereafter amended; or
- (2) He is under the influence of or affected by intoxicating liquor or any drug; or
- (3) He is under the combined influence of or affected by intoxicating liquor and any drug.

The fact that any person charged with a violation of this section is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this section.

WASH. REV. CODE § 46.61.502 (1979), *quoted in Franco*, 639 P.2d at 1321-22. The Washington Supreme Court also had made clear that guilt under the second or third provisions required proof that the defendant was affected or influenced "in some appreciable degree" by the use of alcohol or drugs or their combination. *See, e.g., State v. Hurd*, 105 P.2d 59, 61-62 (Wash. 1940); *State v. Hansen*, 546 P.2d 1242, 1243 (Wash. Ct. App. 1976).

118. *Franco*, 639 P.2d at 1321. *Franco's* breathalyzer test purportedly measured 0.10, but *Franco* claimed to have had too few drinks over too extended a period to have produced even that result. *Id.* In addition, while the police officer testified that, after being stopped, *Franco* appeared to sway and performed a "finger-to-nose" test poorly, *Franco* testified that "I wouldn't call it a buzz, but I felt alcohol, but it wasn't a strong effect." *Id.* Hence, some jurors could have convicted on the theory that the breathalyzer test was 0.10 % while others convicted on the theory that, although the breathalyzer result could have been inaccurate, *Franco* was appreciably affected by alcohol in operating the car.

119. *Id.* at 1324.

different provisions in the statute as defining separate crimes rather than merely "alternate ways of committing the crime entitled DWI."¹²⁰

Courts have employed the same reasoning to reject factual nonconcurrency claims in a variety of contexts. For example, they have held that jurors may disagree whether a defendant was a principal or an accessory to a crime, yet still convict him of the offense.¹²¹ They have held that convicting jurors need not agree on the underlying overt acts that demonstrate a conspiracy.¹²²

120. *Id.* at 1323.

The court declared that, when the legislative intent is otherwise unclear, the tests for determining whether a statute describes a single offense committable in more than one way or describes multiple offenses are as follows: "(1) the title of the act, (2) a readily perceivable connection between the various acts set forth, (3) whether the acts are consistent with and not repugnant to each other and (4) whether the acts may inhere in the same transaction." *Id.* at 1322. Regarding the statute at issue in *Franco*, the court declared that "[a]ll the tests for a single offense are clearly met" and noted that the Washington legislature had not stated an intent that one be subjected to multiple penalties for violating multiple provisions of the statute. *Id.* at 1322-23.

Many courts have used similar reasoning to reject factual nonconcurrency claims involving a single statute defining various modes by which the statute is violated. *See, e.g.,* United States v. UCO Oil Co., 546 F.2d 833, 835-38 (9th Cir. 1976) (statute proscribing false statements and fraudulent concealment of material facts were not separate crimes so that jurors need not agree in reaching guilty verdict on which act defendant committed), *cert. denied*, 430 U.S. 966 (1977); Ward v. State, 758 P.2d 87, 91-92 (Alaska 1988) (statute on driving under the influence similar to that addressed in *Franco*); State v. Dixon, 622 P.2d 501, 508-09 (Ariz. Ct. App. 1980) (juror agreement not required as to which of several subsections of consolidated theft statute defendant violated because not separate crimes); Wells v. Commonwealth, 561 S.W.2d 85, 87-88 (Ky. 1978) (convicting jurors need not agree on which forms of assault defendant committed under assault statute setting forth two prohibited acts); Rice v. State, 532 A.2d 1357, 1360-61 (Md. 1987) (theft statute that proscribed stealing and receiving stolen property merely set forth alternative means of committing single crime so that convicting jurors need not agree on which act defendant committed); State v. Arndt, 553 P.2d 1328, 1331-32 (Wash. 1976) (*en banc*) (acts set forth disjunctively in statute prohibiting welfare fraud are alternative means of committing single offense so that agreement among convicting jurors as to one of them not required). For additional authorities, see Thomas, *supra* note 105.

The same rationale has been used to hold that convicting jurors need not agree as between a felony-murder theory and a premeditated-murder theory under statutes that define first degree murder to include both kinds of murder. *See, e.g.,* People v. Nicholas, 169 Cal. Rptr. 497, 510-11 (Ct. App. 1980); People v. Travis, 525 N.E.2d 1137, 1146-48 (Ill. App. Ct. 1988), *cert. denied*, 489 U.S. 1024 (1989); James v. State, 637 P.2d 862, 865-66 (Okla. Crim. App. 1981). For an early decision to this effect and of considerable authority in shaping the law on this issue, see People v. Sullivan, 65 N.E. 989, 989-90 (N.Y. 1903). Of course, the United States Supreme Court concluded in *Schad v. Arizona*, 111 S. Ct. 2491, 2496-504 (1991), that the Constitution does not require convicting jurors to agree on which of these two forms of murder a defendant committed when a single statute proscribes both of them. For a critique of the Supreme Court's decision, see *infra* notes 298-320 and accompanying text.

121. *See, e.g.,* State v. Carothers, 525 P.2d 731, 735-37 (Wash. 1974) (*en banc*); State v. Wixon, 631 P.2d 1033, 1042 (Wash. Ct. App. 1981); Holland v. State, 280 N.W.2d 288, 290-93 (Wis. 1979), *cert. denied*, 445 U.S. 931 (1980).

122. *See, e.g.,* United States v. Sutherland, 656 F.2d 1181, 1202 (5th Cir. 1981), *cert.*

They have concluded that jurors need not agree on which of multiple acts occurring in what the court views as a single transaction constitute the charged offense on the theory that the crime was of a "continuous" nature and, thus, still "single."¹²³

Searching for separate crimes, however, is a crude approach to determining factual materiality. First, the notion of legislative intent as a basis for finding a single crime and, thus, the absence of any requirement of agreement among convicting jurors, is usually fiction. It may sometimes appear that the legislature intended separate acts prohibited in a single statute to be separate crimes, as when differing punishments are specified. However, it is virtually never apparent that a legislature intended that conceptually severable acts set forth in a criminal statute be viewed as a single crime for purposes of the concurrence problem.¹²⁴ An inference that the legislature intended various modes of conduct to be viewed as a single crime for concurrence purposes typically only reflects a court's pre-existing conclusion that convicting jurors ought not to have to agree on one or more of the modes in finding the defendant guilty.¹²⁵

More fundamentally, the distinct-crimes test bears little relation to the reason for limiting factual divergence among convicting jurors, which is to ensure that the defendant engaged in prohibited conduct. Whether distinct theories of intoxication under a statute prohibiting driving while intoxicated are deemed to be distinct crimes or merely alternative means of committing a single crime, if an adequate number of jurors cannot agree on one or more of the theories, grave doubt exists that any such theory is true.¹²⁶

denied, 455 U.S. 949 (1982).

123. *See, e.g.*, *Gray v. United States*, 544 A.2d 1255, 1256-59 (D.C. 1988) (convicting jurors need not agree on which of two acts of intercourse in a park provided basis for rape charge although they occurred several minutes apart, were separated by an alleged act of oral sodomy and by an interruption due to the approach of strangers); *Turnbow v. State*, 451 P.2d 387, 389-90 (Okla. Crim. App. 1969) (convicting jurors need not agree on which of two acts of intercourse provided basis for rape charge although they occurred several minutes apart and were separated by an alleged act of oral sodomy); *Steele v. State*, 523 S.W.2d 685, 686-87 (Tex. Crim. App. 1975) (convicting jurors need not agree as to which of two acts of intercourse, one occurring in the complainant's car and the other in her bedroom, provided basis for rape conviction); *cf. United States v. Ferris*, 719 F.2d 1405, 1406-07 (9th Cir. 1983) (opinion by Kennedy, J.) (no requirement that jurors be told they must agree on which of multiple instances of LSD possession over two-month period formed basis for guilty verdict on drug-possession charges).

124. *See, e.g., Franco*, 639 P.2d at 1322-23 (failing to point to any legislative history indicating legislative intent regarding the unanimity question, but nonetheless finding a single offense); *see also Baumgarth, supra* note 16, at 614 ("It is troublesome to say that in the party to a crime situation the legislature intended, by specifying multiple theories of participation, that a jury may unanimously find participation even though they are unable to agree upon the manner of participation.").

125. *See, e.g., United States v. Canino*, 949 F.2d 928, 947-48 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992) (finding a Congressional intent that jurors need not agree on defendant's predicate acts to render guilty verdict for maintaining a continuing criminal enterprise).

126. Moreover, even if a legislature manifested a clear intent to allow jurors to pool guilty

An effort to define material facts by a distinct-crimes test will provide inadequate protection for defendants, moreover, even if courts abandon the fictional notion that they are following legislative intent. Judge Wisdom failed to recognize this point in his *Gipson* opinion.¹²⁷ The statute in question in *Gipson* prohibited receiving, concealing, storing, bartering, selling or disposing of a motor vehicle in interstate commerce, with knowledge that it was stolen.¹²⁸ Judge Wisdom concluded that these six prohibited acts fell into "two distinct conceptual groupings": "housing" and "marketing."¹²⁹ He declared that, because the three prohibited acts falling within each grouping were "sufficiently analogous" to each other, convicting jurors would not have to agree on which act within the grouping the defendant had committed.¹³⁰

Judge Wisdom's effort to define distinct crimes by an extralegislative standard immediately suggests an argument that legislatures, not courts, should decide what are distinct crimes. One could answer Judge Wisdom's effort by contending that the factual divergence between the two groupings themselves should be ignored on grounds that legislators could have viewed all six prohibited acts as part of the broader crime of "trafficking" in stolen vehicles. Why shouldn't the courts simply look for a way of articulating a general prohibition that will encompass the more particular prohibitions that are embodied in a single statute? This very kind of argument was offered in response to *Gipson*.¹³¹ However, in the end the question of who should

votes in such circumstances, that legislative desire would not resolve the constitutionality of the action. The Constitution sets minimum standards that restrict legislative action so that the legislature cannot be thought the arbiter of what the Constitution demands. A conclusion to the contrary would "fl[y] in the face of a course of judicial history reflected in an unbroken line of opinions that have interpreted due process to impose restraints on the procedures government may adopt in its dealings with its citizens. . . ." *In re Winship*, 397 U.S. 358, 372 n.5 (1970) (Harlan, J., concurring).

In a different context, Professor Radin has explained why extreme deference to legislative judgment is an inapt method of constitutional analysis:

[C]onclusive reliance on these indicators either through substantive definition or extreme judicial deference is circular. Constitutional doctrine may not be formulated by the acts of those institutions which the Constitution is supposed to limit. To glean a list of permissible punishments from those enacted by legislatures either assumes that legislators never enact a punishment they think is, or may be, cruel or allows the legislature to define permissible punishments by its enactments. Such a view removes any role for a constitutional check.

Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1036 (1978).

127. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). The decision is discussed *supra* text accompanying notes 7-15.

128. See 18 U.S.C. § 2313 (1970). See *supra* note 10 for text of statute.

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

130. *Id.*

131. See, e.g., Trubitt, *supra* note 5, at 549 ("[I]t is difficult to see how a court could determine that 'housing' and 'marketing' are ultimate acts in some metaphysical or constitutional sense, and thus prohibit the legislature from including them in the single offense of 'trafficking.'"); Note, *supra* note 9, at 501 ("it is true that each juror believed that *Gipson* had 'trafficked' in a

define what constitutes a single crime versus what constitutes separate crimes simply misses the point because the distinct-crimes test does not appropriately define the material facts upon which convicting jurors should concur.¹³²

Indeed, Judge Wisdom's notion of what constitutes a distinct crime is an inadequate test for ensuring agreement on the existence of prohibited conduct. Either of Judge Wisdom's groupings could encompass different factual bases for liability, so that the jurors' inability to agree as between them would create substantial doubt as to whether any prohibited conduct occurred. For example, consider a hypothetical in which one witness testifies that the defendant bought and received an allegedly stolen car at his mother's home in Birmingham, while another witness maintains that the defendant bought and received the car at his own home in Mobile. These two versions each could be thought to fall within not only the single "grouping" that Judge Wisdom calls "housing" but also within the particular prohibition in the statute regarding "receiving." Nonetheless, that convicting jurors cannot agree upon either scenario reveals doubt that either one is true. Unless there is other evidence that the defendant received a stolen car, there exists reasonable doubt that the defendant engaged in prohibited conduct.

As this last hypothetical demonstrates, evidence of conduct that is appropriately chargeable as a single crime may nonetheless encompass separate alleged acts that each could warrant liability. For another example, assume a trial of a defendant on a single count of drug possession. A police officer testifies that she received a tip from an undisclosed informant that the defendant was standing on a street corner smoking crack cocaine. Upon arresting the defendant, the officer found a pipe in his pocket, and expert witnesses testify that the pipe bore the defendant's fingerprints and contained a very small amount of cocaine. The officer also testifies that a few minutes after arresting the defendant, she found several packets containing what was later established to be cocaine in an area where she had seen the defendant toss several small objects as she had approached him. However, the defense is that the cocaine in the pipe was not a usable amount and, therefore, not a proper basis for conviction and that the packets of cocaine on the ground had been thrown down by someone else. In this situation, the jurors ought not to be able to convict until a substantial majority can agree on whether the crime stems from the cocaine in the pipe or the cocaine on the ground. Absent agreement on either theory, there is grave doubt that the defendant engaged in any prohibited conduct. Nevertheless, the distinct-crimes test would allow the jury to return a guilty verdict despite the disagreement simply because the defendant was chargeable with only one crime.

One final example confirms that the distinct-crimes approach is unrefined. Consider a statute that proscribes certain conduct committed in the course of several other kinds of crime. For example, assume that a defendant is charged under a typical felony-murder statute based on different felony theories—rape

stolen vehicle").

132. However, how to define what is a separate crime remains a serious ambiguity embodied in the distinct-crimes approach to resolving factual materiality. See *supra* text at notes 123-25.

and robbery.¹³³ The testimony reveals that the defendant killed a woman in her apartment. There is weak evidence that the defendant raped her. Likewise, there is weak evidence that the killer took something of value from the woman. Even under the distinct-crimes test, we would not allow the jury to pool together guilty votes based on the rape and the robbery to find the defendant guilty of rape or robbery; guilty votes could not be pooled together because the verdict would encompass distinct offenses. (Of course, the explanation should be that if a substantial majority of the jury could not agree on which crime the defendant committed, doubt would exist that he is guilty of either of them.) Should the prohibition against pooling votes on these different crimes change simply because different felonies can satisfy one element of a crime called felony murder? Viewing this situation differently is illogical if the goal of limiting factual disagreement is to protect those whose guilt of the prohibited conduct is doubtful. Nonetheless, under the distinct-crimes test, the jury could convict the defendant of felony murder although no more than half the jurors agreed on which felony the offender committed; under the felony-murder statute, the different felonies could be deemed merely alternative modes of committing a single crime.¹³⁴

In sum, the distinct-crimes standard of factual materiality does not relate closely to the reasons for prohibiting factual nonconcurrence among convicting jurors. The standard will sometimes identify a factual nonconcurrence problem. Yet, even where the evidence does not reveal separately chargeable offenses, there is potential for disagreement about the factual basis for a guilty verdict reflecting doubt that any prohibited conduct occurred.¹³⁵

133. The California statute defining murder provides a typical definition of felony murder: *All murder which is perpetrated by . . . any . . . kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289 is murder of the first degree; and all other kinds of murders are of the second degree.*

CAL. PENAL CODE § 189 (West Supp. 1993) (emphasis added).

134. The Texas Court of Criminal Appeals reached precisely this conclusion in *Cook v. State*, 741 S.W.2d 928, 935-36 (Tex. Crim. App. 1987) (affirming conviction and death sentence where jury rendered a general guilty verdict of felony murder after hearing evidence and instructions on five felony theories; court found that the different felonies were simply alternative modes of committing felony murder, and there was enough evidence to support at least one of the theories), *rev'd and remanded on other grounds*, 488 U.S. 807 (1988).

135. This discussion also indicates why rules regarding what constitute single crimes in other contexts are inappropriate measures for rejecting a nonconcurrence claim as illegitimate. Questions about the "singleness" of criminal acts arise when a defendant claims a departure between the proof at trial and the proof relied upon by the grand jury that indicted him. *See, e.g., Stirone v. United States*, 361 U.S. 212, 219 (1960) (reversing conviction based on divergence in proof). Likewise, such questions arise in claims involving the Double Jeopardy Clause. *See* U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . ."). This protection "consist[s] of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *United States v. DiFrancesco*,

One might attempt to justify the distinct-crimes approach, as some have, on grounds that the effort to distinguish material facts from trivial details is a slippery slope that provides no better doctrinal toeholds.¹³⁶ However, whether that view is warranted depends in part on whether other materiality standards could better protect innocent defendants without exonerating disproportionately large numbers of guilty ones. The analysis now turns to that question.

2. Focusing on the Particular Facts of Individual Cases

There are better measures of factual materiality than the distinct-crimes test. Courts should focus on case-specific evidence from a juror's perspective rather than on what is a "single" crime in the abstract. The initial question in

449 U.S. 117, 129 (1980) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). However, a factual nonconcurrence problem that casts doubt on the offender's guilt can arise even under what is unquestionably a single offense under any of these tests.

Factual nonconcurrence problems also must be distinguished from mere questions of appropriate pleading. At the pleading stage, rules on duplicity (pleading multiple offenses in a single count) sometimes are said to require a determination of what is a "single" crime. *See, e.g., United States v. Alsobrook*, 620 F.2d 139, 143 (6th Cir.), *cert. denied*, 449 U.S. 843 (1980). The dangers from duplicitous pleading include "the possibility that the defendant may not be properly notified of the charges against him, that he may be subjected to double jeopardy, that he may be prejudiced by evidentiary rulings during the trial and that he may be convicted by a less than unanimous verdict." *Id.* at 142. Yet, because the dangers from duplicity can be alleviated through actions other than redrafting of the charging papers, rules as to what is a "single" offense for duplicity purposes often "may not be helpful in deciding what is a 'single offense' for patchwork verdict purposes. . ." Trubitt, *supra* note 5, at 545; *see also Alsobrook*, 620 F.2d at 143 (noting that, while trial court properly allowed pleading of multiple criminal acts in single count, it appropriately instructed jurors on need for agreement as to which act provided the basis for any guilty verdict).

136. *See, e.g., Trubitt, supra* note 5, at 550. In making this contention, Trubitt at times argues that courts should require no more factual specificity than that recited in the language of the criminal statute. *See id.* at 553-54; *supra* note 107. However, that standard really does not accurately define the line that he attempts to draw between material and immaterial facts.

Trubitt actually argues for a highly restrictive view of factual non-concurrence problems. Indeed, he argues that courts can ignore factual distinctions articulated in the language of criminal statutes when they deem them not to constitute separate crimes. *See Trubitt, supra* note 5, at 548-49 (discussing *Gipson* decision). Of course, this view requires a standard for singleness that comes from a source other than the language of the statute. Trubitt also suggests that courts could sometimes reject legislative efforts to embody multiple crimes under a single prohibition. This position also assumes an extra-legislative standard for deciding what is a single crime. However, Trubitt asserts only that the standard should be whether the crimes are "intrinsically separate," which he says courts should resolve based on the "logical, historical and/or linguistic interrelatedness" of the multiple prohibitions. *Id.* at 557-58. Nonetheless, this suggestion is qualified by Trubitt's additional assertion that the identification of such separate crimes in a single statute should be "rare." Trubitt seems to argue that as long as there is some generic term more specific than the word "crime" that can encompass multiple prohibited acts articulated in a single statute, they should be viewed as simply alternative means of committing a single crime. *See id.* at 557.

each instance should be simply whether the evidence presented under a single charge reveals conceptually severable factual bases for liability. There is a second, more difficult inquiry: When do such factual disparities undermine the conclusion that the defendant engaged in criminal conduct? At this second stage, the test for distinguishing important from insignificant disparities cannot be stated in a single, bright-line rule. Nonetheless, the inability to articulate a precise rule that will produce clear outcomes for all cases does not suggest that courts should avoid confronting these questions.

a. Identifying Conceptually Severable Factual Bases for Liability

The starting point for identifying a factual nonconcurrency problem should be to ask simply whether the evidence suggests conceptually severable facts that provide a basis for liability. Any effort to define a more rigid materiality standard will fail to identify all instances of potential factual disagreement that undermine confidence in a defendant's guilt.

Some courts, most notably the District of Columbia Court of Appeals during the early 1980s, have urged that factual materiality should be measured by whether the evidence reveals distinct "incidents" giving rise to liability.¹³⁷ Under this approach, if evidence presented under a single charge reveals events separated by time or other factors and each justifies liability, a factual divergence claim exists. The focus proceeds from the jury's perspective rather than based on abstract legal tests regarding what constitutes multiple versus single crimes.

The distinct-incidents test may highlight a few factual divergence problems that the distinct-crimes standard will not. For example, in cases like the hypothetical presented earlier concerning the possession of separate quantities of cocaine,¹³⁸ some courts have applied the distinct-incidents test

137. See, e.g., *Derrington v. United States*, 488 A.2d 1314, 1335 (D.C.) (factual nonconcurrency problems are cognizable "where one charge in the indictment encompasses two separate incidents"), *cert. denied*, 486 U.S. 1009 (1985); *Burrell v. United States*, 455 A.2d 1373, 1379 (D.C. 1983) (no nonconcurrency problem although there were multiple versions of how murder occurred, because "there was but one offense based on a single incident"); *Barkley v. United States*, 455 A.2d 412, 415-16 (D.C. 1983) (theft of items to which defendant offered different defenses raised no cognizable nonconcurrency claim because the evidence was "founded in just one set of factual circumstances not separated by time or intervening incidents"); *Hawkins v. United States*, 434 A.2d 446, 449 (D.C. 1981) (finding plain error because "one charge encompasses two separate incidents," so that the judge should have instructed the jury "that if a guilty verdict is returned the jurors must be unanimous as to which incident or incidents they find the defendant guilty. . ."); cf. *United States v. Peterson*, 768 F.2d 64, 67 (2d Cir.) (potential nonconcurrency problem arose where some heroin found on co-felon and other heroin found in wall nearby because these were conceptually distinct "instances of possession"), *cert. denied*, 474 U.S. 923 (1985).

The District of Columbia Court of Appeals subsequently expanded its test for determining factual materiality to include conceptually severable acts that are essential to the guilty verdict. See *infra* notes 141-42 and accompanying text.

138. See *supra* text accompanying notes 132-33.

to identify conceptually severable bases for liability.¹³⁹ At the same time, the distinct-incidents test provides a relatively clear standard to combat any perceived slippery slope argument. If courts are required to identify units of evidence that each comprise a distinct "incident," they will not likely begin demanding agreement among jurors in resolving inconsistencies on minor details.

The problem with the distinct-incidents test, however, is really the same as with the distinct-crimes standard. The distinct-incidents test overlooks many of the cases where juror disagreement on the facts reflects doubt that any prohibited conduct occurred. For example, this test would not readily identify a factual divergence problem in the *Franco* case, involving multiple methods of driving under the influence of alcohol or drugs, or in the hypothetical involving the felony-murder based on different felony theories.¹⁴⁰ In these cases, it is difficult to discern multiple distinct "incidents" that give rise to liability; they appear only to involve one event. Yet, in both situations, the failure of a substantial majority of jurors to agree on either basis for liability would cast doubt on the validity of either basis. Indeed, the District of Columbia Court of Appeals ultimately rejected the distinct-incidents approach because it failed to identify as factual nonconcurrency problems cases in which the evidence suggests conceptually severable bases for liability that are not easily characterized as separate "incidents."¹⁴¹ Hence, while a slight improvement over the distinct-crimes test, the distinct-incidents standard

139. See, e.g., *Peterson*, 768 F.2d at 68 (potential nonconcurrency problem arose where some heroin found on co-felon and other heroin found in wall nearby, but any error waived by lack of objection); *Hawkins*, 434 A.2d at 449 (finding plain error where evidence revealed some cocaine on defendant's person and some on the ground, because judge failed to instruct jury that to convict they must agree as to which incident or incidents they find the defendant guilty).

140. Cf. *Burrell*, 455 A.2d at 1379-80 (no nonconcurrency problem although there were multiple versions of how murder occurred, because there was really only "a single incident"); *Barkley*, 455 A.2d at 415-16 (no nonconcurrency problem although defendant presented different defenses to charge of theft involving several items because the evidence was "founded in just one set of factual circumstances not separated by time or intervening incidents").

141. In *Scarborough v. United States*, 522 A.2d 869, 870 (D.C. 1987) (en banc), the court overruled earlier decisions, particularly *Barkley*, that had indicated that even conceptually severable bases for liability did not create a non-concurrency problem where those severable bases arose from only one incident. In *Barkley*, the appellant was convicted of stealing several items from the victim's apartment. *Barkley*, 455 A.2d at 414. *Barkley* raised separate defenses regarding the separate items. *Id.* He conceded taking a stereo amplifier, but defended that taking on a claim of right. *Id.* He denied participating in the taking of other items, claiming that a co-defendant was solely responsible. *Id.* The court had rejected *Barkley's* nonconcurrency claim under the distinct-incidents test, noting that the thefts "are founded in just one set of factual circumstances not separated by time or by intervening incidents. The evidence as to each theory of liability is the same. There was but one offense based on a unitary event . . ." *Id.* at 415. However, in *Scarborough*, the court rejected the *Barkley* holding and rationale, noting that the nonconcurrency question should turn "on whether each act alleged under a single count" was separately cognizable "by reference to separate allegations and/or to separate defenses—whenever it occurred." *Scarborough*, 522 A.2d at 873.

still finds its ultimate justification in the fear that to go farther inevitably would lead courts to demand concurrence on immaterial details.

An alternative approach, advocated by several courts, is to ask whether the evidence presented under a single charge reveals distinct "acts" giving rise to liability. In modifying the distinct-incidents test, the District of Columbia Court of Appeals seemed to adopt this standard.¹⁴² This test is more appropriate than the distinct-incidents test because it can identify more true factual nonconcurrence problems.

The superiority of the distinct-acts standard can be demonstrated through a simple hypothetical.¹⁴³ Assume a defendant is being tried on a single charge of assault with a dangerous weapon. The complainant testifies that he waited for the defendant outside the defendant's apartment building to speak with him regarding a disputed matter. The complainant claims that when the defendant walked out the front door and the complainant first began to speak, the defendant struck him in the head with a wrench and, then, as the complainant was fleeing, chased him several feet and struck him again with the wrench in the back. However, the defendant takes the stand and claims that, at the front door of the building, he was attacked by the complainant and merely hit him in self-defense and that the complainant is simply lying when he says the defendant later chased him and hit him from behind. In this context, the jurors should not be allowed to convict the defendant if a substantial majority cannot agree on whether the assault occurred based on the blow to the head or the blow to the back. Without substantial agreement as to which of these acts constitutes a crime, grave doubt exists that the defendant engaged in any prohibited conduct.¹⁴⁴ Nonetheless, the distinct-

142. See *Scarborough*, 522 A.2d at 873 (nonconcurrence question should turn "on whether each act alleged under a single count" was separately cognizable "by reference to separate allegations and/or to separate defenses—whenever it occurred"). The District of Columbia Court of Appeals, nonetheless, has continued to apply the distinct-incidents test at times to reverse convictions on non-concurrence grounds. See, e.g., *Smith v. United States*, 549 A.2d 1119, 1123 (D.C. 1988) (applying distinct-incidents standard to reverse a conviction for possession of marijuana based on one bag of marijuana allegedly purchased from defendant and several other packets that defendant allegedly was seen throwing on the ground); *Brown v. United States*, 542 A.2d 1231, 1233-34 (D.C. 1988) (distinct-incidents test used to reverse conviction for possession of marijuana based on marijuana in cigarette defendant allegedly was smoking and two other tinfoils of marijuana laced with phencyclidine that defendant allegedly was seen discarding before arrest).

143. This hypothetical is based on *Horton v. United States*, 541 A.2d 604 (D.C. 1988), in which the District of Columbia Court of Appeals applied a distinct-acts test to reverse convictions for assault when jurors could have disagreed on which of two alleged shots fired by the defendant constituted an assault. *Id.* at 610-11.

144. The hypothetical would become more difficult to resolve if self-defense were deemed a defense on which the defendant bore the burden by a preponderance of the evidence. The Supreme Court upheld the practice of placing the burden on the defense to prove self-defense by a preponderance in *Martin v. Ohio*, 480 U.S. 228, 236 (1987). The absence of self-defense thus clearly is not necessarily an elemental fact to which the innocence-weighted view applies.

Yet, even if the absence of self-defense were not deemed an elemental fact in the jurisdiction, the hypothetical would present a danger of improper juror division. For example,

crimes test would not identify the problem because the defendant is appropriately charged with only one count of assault based on the complainant's testimony. Likewise, the distinct-incidents test would not readily identify the problem because the encounter is not easily described as two distinct incidents.¹⁴⁵

A distinct-acts test, however, also presents problems. This standard ignores that crimes have mental state elements and often circumstance and result elements too.¹⁴⁶ The distinct-acts test will not identify potential nonconcurrence problems when convicting jurors agree on the defendant's act, but disagree on other facts required to establish the crime.

It is not difficult to posit how factual divergence on a necessary fact relating other than to the defendant's acts could arise or to see why such a dis-

seven jurors might have concluded that the defendant acted in self defense when he struck the first blow but believed that he was guilty based on the second alleged blow. Yet, five jurors might have doubted that he struck the second blow. In this situation, even if the defendant bore the burden to establish self-defense, he has established it sufficiently as to the first blow. At the same time, five dissents reflect too much doubt that the alleged second blow occurred.

145. In *Burrell v. United States*, 455 A.2d 1373 (D.C. 1983), the District of Columbia Court of Appeals had concluded in an arguably analogous context that, under the distinct-incidents test, no nonconcurrence problem existed. In *Burrell* the appellant was convicted of murder based on his killing of the victim during an argument over money that began in the victim's front yard. *Id.* at 1375. The prosecution and defense witnesses differed on how the altercation had occurred. *Id.* at 1375-76. The prosecution witnesses testified that the appellant stabbed the victim first and the victim then hit the appellant over the head with a pipe. *Id.* at 1375. The defense witnesses testified that the victim attacked the appellant before the appellant stabbed him. *Id.* There was potential for different jurors to find the appellant guilty on different factual theories. Some could have concluded that the appellant stabbed the victim before any attack by the victim. Others could have concluded that, while the victim attacked the appellant first, the appellant was not justified in using deadly force in response to that attack. Nonetheless, although there were multiple versions of how the murder occurred, the court of appeals concluded that because "there was but one offense based on a single incident," the jurors need not have agreed on the factual basis for a guilty verdict. *Id.* at 1380.

146. As Professors Dix and Sharlot have noted:

Actus reus might be defined as simply the physical activity which a person must perform in order to incur liability for a crime. But then the often-repeated statement that *mens rea* and *actus reus* make a crime ignores the fact that many crimes require proof of other types of matters, such as certain results that must occur (the victim's death in homicide offenses, for example) and attendant circumstances that must exist (such as "nighttime" in burglary).

It is also possible to define *actus reus* as including all nonmental elements—the physical activity, any results that must occur, and any circumstances that must exist. Cohen, *Actus Reus*, in 1 *Encyclopedia of Crime & Justice* 15 (1983) ("the *actus reus* designates all the elements of the criminal offense except the *mens rea*"). . . . Thus the "act" required for criminal liability by a particular crime—the physical movement or omission by the defendant—must be distinguished from the *actus reus* of that crime. The "act" is part of, but often not the complete, *actus reus* of the offense.

GEORGE E. DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW; CASES AND MATERIALS* 154 3d ed. (1987).

agreement could undermine confidence in the conclusion that the defendant is guilty. Assume a male defendant charged with burglary under a statute that requires proof that the defendant entered without authority the dwelling of another and "with the intent to commit a felony" inside. The evidence suggests that the defendant was climbing in through the victim's open, second-story window in the evening clad only in under-shorts. The victim was in her bed nearby, and when she awoke and screamed, the defendant fled. At the end of the trial, jurors are told of the elements not only of burglary but of rape, grand larceny and robbery. After deliberating, the jurors all agree that the defendant is guilty of burglary. Nonetheless, they cannot agree on what felony the defendant intended to commit upon entering the dwelling.¹⁴⁷ Half the jurors are convinced that the defendant only intended to commit a rape. The other jurors are convinced the defendant only intended to commit grand larceny or robbery. The inability of a substantial majority of the jury to concur in a particular view of the defendant's intent on these facts raises doubt that the defendant possessed any intent to commit a felony in the apartment.¹⁴⁸ What the defendant intended to do may only have amounted to a misdemeanor or to no crime additional to the unlawful entry. Hence, although the defendant may be guilty of a lesser crime, there is serious doubt that he committed a burglary. Nonetheless, none of the standards of materiality that we have seen would identify a potential nonconcurrence problem. A guilty verdict would not require the pooling of votes based on distinct crimes, distinct incidents or distinct acts.¹⁴⁹ The verdict would involve only the pooling of conceptually severable mental states that satisfy the mental-state requirement in the statute.¹⁵⁰

Some courts have emphasized the need to ask whether the evidence suggests conceptually severable acts or mental states satisfying the act or mental state requirements for an offense.¹⁵¹ We could call this the "distinct-

147. *Cf. People v. Failla*, 414 P.2d 39 (Cal. 1966) (similar facts involved in one of defendant's burglary cases).

148. Regarding why this difference is material, see *infra* notes 160-67 and accompanying text.

149. *Cf. Failla*, 414 P.2d at 144-45 (using the distinct-crimes test to hold that jurors need not be instructed that to convict a defendant of burglary they must agree on the particular felony or felonies the defendant intended to commit at the time he entered the dwelling, since, in any event, there is only one burglary).

150. This kind of problem could arise in two paradigm situations. First, it could occur if the prosecution alleges alternative mental states under a statute that prohibits an act committed with one of several mental states specified in the statute. Second, it could arise, as in this hypothetical, where the evidence suggests two different ways the defendant may have satisfied a single mental-state requirement stated in the statute. These two situations are not really different. Which of them will describe a particular case may only depend on whether the legislature has described the applicable mental state in general terms (if any at all) or through a series of more specific characterizations.

151. *See, e.g., United States v. Duncan*, 850 F.2d 1104, 1111 (6th Cir. 1988) (noting that non-concurrence issues can arise when there are "alternative acts or intents each of which would satisfy the *actus reus* or *mens rea* required"); *see also State v. Franco*, 639 P.2d 1320, 1329 (Wash. 1982) (Utter, J., dissenting) (noting that the jury must agree on the factual basis

conduct" test since the term "conduct" traditionally has been used to describe the combined physical and mental state requirements embodied in the definition of crime.¹⁵² This standard is superior to the distinct-acts test. Yet, even this standard is not quite right because jurors could disagree, for example, on the essential factual basis for some additional circumstance or result required to be established to make out an offense.

As an example of how divergence might arise under a nonconduct element, assume a defendant is charged with selling stolen goods.¹⁵³ A police officer testifies that, while working in plain clothes, she purchased from the defendant a portable color television, still in its original carton, for one hundred dollars. The defendant claimed that he had purchased the set from a neighbor for seventy-five dollars and also testifies at trial to this version of events. However, the neighbor testifies for the prosecution that he did not sell a television to the defendant. A former friend of the defendant also testifies that the defendant had told him about a month before the defendant's arrest that he had purchased six new televisions for thirty dollars apiece from a man driving an out-of-state van. After hearing this evidence, six jurors conclude that the defendant purchased the set from the neighbor for seventy-five dollars but that the price was low enough to indicate that the neighbor had stolen it. Six other jurors do not believe that a seventy-five dollar purchase price offered by a neighbor would indicate that the set was stolen. However, those six jurors conclude that the defendant purchased the set for thirty dollars from the man in the van, and that this low purchase price was strong evidence that the set was stolen.

In this situation, the factual divergence reflects serious doubt that the television was stolen. Many jurors believe that the defendant purchased the set from a neighbor for seventy-five dollars, a transaction which many jurors also believe does not indicate that the property was stolen. At the same time, many jurors disbelieve the former friend's testimony regarding the purchase from the man in the out-of-state van. To convict the defendant, a substantial majority of jurors should be required to concur on one theory or the other for concluding that the television was stolen.

Hence, courts should ask whether the evidence presented to the jury reveals conceptually severable factual scenarios that would each constitute the offense. The concern of the factual concurrence mandate is not accurately served by standards that focus only on the existence of distinct crimes, distinct incidents, distinct acts or even distinct conduct. Courts must focus on the potential for disagreement on any of the facts that are necessary to prove that the defendant engaged in conduct and in a context that the criminal law

underlying both the physical and the mental elements of the offense).

152. See, e.g., MODEL PENAL CODE § 1.13(5) (Proposed Official Draft 1962) ("conduct" means an action or omission and its accompanying state of mind"); LAFAVE & SCOTT, *supra* note 37, at 7 ("Conduct" . . . is used in a broad sense to cover two distinct matters: (1) the act, or the omission to act where there is a duty to act; and (2) the state of mind which accompanies the act or omission.").

153. The situation presented in the *Franco* case discussed earlier could also arguably be viewed as reflecting disagreement on an element that defines a circumstance rather than the defendant's conduct. See *supra* text accompanying notes 116-20.

prohibits.¹⁵⁴ When a substantial majority of jurors cannot agree on all of the material facts necessary to prove a crime, there is reasonable doubt that the defendant is guilty.¹⁵⁵

*b. The Distinction Between Material and Trivial Facts:
"Where Do You Draw the Line?"¹⁵⁶*

There remains the question of just what level of specificity jurors must reach in finding facts that warrant liability. Inconsistencies and uncertainties in the evidence as to how a particular element could be met frequently arise. The vast majority of these ambiguities appropriately are viewed as immaterial to whether an element was satisfied. However, it is difficult to state a precise rule for distinguishing important facts from immaterial facts. The solution boils down to a judgment about whether the inability to resolve the ambiguity undermines the conclusion that the defendant engaged in conduct under circumstances that the applicable statute proscribes.

As we already have seen, it is sometimes obvious that disagreement among jurors over how the elements of a criminal statute were satisfied casts serious doubt on any conclusion that a crime occurred.¹⁵⁷ Hence, factual nonconcurrence problems that undermine confidence in the defendant's guilt frequently are quite obvious.

As already indicated,¹⁵⁸ not all inconsistencies revealed by the evidence require resolution by the jury because the inability to resolve them simply

154. As for any affirmative defense on which a state has properly placed the burden of persuasion on the defendant, for example insanity, *see* *Leland v. Oregon*, 343 U.S. 790 (1952), the factual concurrence mandate would appear not to apply to a disparity as to why it was not established. *See generally* W.J. Dunn, Annotation, *Requirement of Unanimity of Verdict in Proceedings to Determine Sanity of One Accused of Crime*, 42 A.L.R. 2d (1955 & 1992 Supp.); *see also* *Martin v. Ohio*, 480 U.S. 228 (1987) (state may properly cast as affirmative defense a claim of self-defense).

155. One could argue the need to proscribe some disagreements occurring not only at the level of material "facts," but at the level of the evidentiary basis for the "facts." For example, assume the prosecution's case against a defendant for the robbery-murder of a drug dealer depends entirely on two witnesses. One is an informant who, in return for leniency in his own cases, testifies that he saw the defendant shoot the decedent and take the decedent's money. The second is also an informant who, in return for leniency in his cases, testifies that the defendant confessed to him at the jail to having shot the decedent while robbing him. All jurors might conclude that the defendant killed the decedent while robbing him, but disagree as to the credibility of the two prosecution witnesses. In this situation, one could plausibly argue the propriety of an instruction to jurors on the need to avoid dividing between the two witnesses before returning a guilty verdict. Yet, a serious difficulty exists in trying to determine and explain in instructions the extent to which jurors may have doubts about a particular piece of evidence yet still appropriately find some support from it for reaching a particular factual conclusion. If the line is drawn at the level of factual conclusions, this problem is avoided.

156. *Cf. Irwin v. Gavit*, 268 U.S. 161, 168 (1925) (Holmes, C.J.) ("[W]here to draw the line . . . is the question in pretty much everything worth arguing in the law.")

157. *See supra* text accompanying notes 34-35, 116-20, 132-33.

158. *See supra* text accompanying notes 98-99 (discussing the Barnes hypothetical).

does not undermine the conclusion that the defendant engaged in proscribed conduct under circumstances specified by the statute. Even when the defendant is guilty, inconsistencies will occur because of inevitable deficiencies in witness perception, sincerity, memory and recitation. Moreover, a court can often conclude that the failure to resolve an evidentiary conflict would not undermine a guilty verdict.¹⁵⁹

Multiple reasons explain why factual inconsistencies or uncertainties should be deemed immaterial. First, the factual dispute or uncertainty may simply occur at a level so specific that the dispute over it does not undermine the conclusion that the relevant fact was established. For example, in the Barnes hypothetical presented earlier,¹⁶⁰ the jurors' inability to resolve a dispute over whether the defendant struck the complainant with a dark colored pistol or a black jack does not itself raise a reasonable doubt about whether the defendant struck him.¹⁶¹ Likewise, if the defendant is charged with burglary, a disparity in the evidence over whether the defendant pried open a window with a screwdriver or a crowbar does not cast doubt on whether he entered the premises.¹⁶²

Second, an inconsistency or uncertainty as to a particular fact may be deemed immaterial if there is other evidence that convincingly establishes that fact. This basis for a finding of immateriality would apply even if the inability of jurors to agree as between two factual scenarios might otherwise cast doubt on the truth of either scenario. For example, in a burglary case, if an inconsistency appears in the testimony of eyewitnesses about whether the defendant entered the front door or climbed in through a skylight, the dispute surely becomes immaterial to whether he entered if he is a stranger to the home and his fingerprints are found in the kitchen. Likewise, in a case where the defendant is charged with receiving a stolen car in interstate commerce, and witnesses disagree about whether he received the car in Mobile or Birmingham, the inconsistency becomes immaterial if there is convincing evidence that the defendant's hair samples were found in the vehicle and his handwriting appears on an application to register it.

Third, an inconsistency as to a particular fact may be deemed immaterial if doubt as to one basis for guilt appears only to suggest that an alternative

159. There is room for dispute about the standard to be applied by courts in reaching this decision. One can easily conclude that if a reasonable juror could not find the defendant guilty without resolving the factual inconsistency or uncertainty, the disparity should be characterized as material to guilt or innocence. For an example, see *supra* text accompanying notes 34-35. Nonetheless, this should not be the dispositive test. To follow that standard would mean that simply because a reasonable juror could find the defendant guilty without resolving the dispute, the inconsistency or uncertainty would be classified as immaterial. Yet, a court can sometimes conclude that a reasonable juror probably would not find the defendant guilty without resolving the disputed or uncertain evidentiary point even if doing so could not be called irrational. When a court reaches that conclusion, it is appropriate to view the factual point as material and to require its resolution by the jury as a precondition to conviction. This approach is appropriate in light of the commitment to protecting the innocent accused from conviction.

160. See *supra* text accompanying notes 98-99.

161. See *supra* text accompanying note 98-99.

162. See *Schad v. Arizona*, 111 S. Ct. 2491, 2510 (1991) (White, J., dissenting).

basis for guilt is true. This reason for a finding of immateriality would also apply even if the lack of strong support among jurors for either scenario might otherwise cast doubt on the truth of either one of them. For example, assume that there is evidence that a defendant charged with murder beat the victim and then threw him over a cliff. Assume that some jurors conclude that the first act caused the victim's death, some jurors conclude that the second act caused it, and some jurors can't decide which act was the cause. There is little dispute that one or the other, if not both acts, caused the death and that the defendant committed both acts. The disagreement here is immaterial, and jurors need not resolve it. Doubt about one scenario supporting guilt tends only to confirm another factual scenario supporting guilt.¹⁶³ The lack of concurrence does not undermine confidence in the conclusion that the defendant caused the victim's death.¹⁶⁴

Fourth, in connection with the previous point, when the language in a statute covers a range of events or conditions and leaves few gaps, courts will often more easily find a factual divergence concerning that language immaterial. If the defendant is charged with carrying a concealed weapon and if courts have interpreted the word "weapon" to cover a wide variety of objects capable of inflicting harm and carried for that purpose, it may be immaterial that two witnesses disagree on whether the defendant suddenly pulled out a black jack or a dark colored gun. The dispute simply may not undermine confidence in the conclusion that the defendant carried an object prohibited by the statute even if it was not a black jack or a gun. On the other hand, if the statute proscribes only the carrying of a few specific items, like guns, black jacks and knives, there is more reason for concern about the divergence in the accounts. The inability of jurors to agree on the nature of the weapon, to the extent that it raises doubt that the object was either a black jack or a gun, would also raise doubt that it was a weapon prohibited by the statute.¹⁶⁵

163. By contrast, consider a premeditated murder case in which some jurors conclude that the defendant intentionally beat the victim to death and then threw his body over a cliff intending merely to hide it, while other jurors conclude that he beat the victim intending merely to knock him unconscious and then threw him over the cliff intending that he subsequently die. The jurors do not agree at which point the defendant had the intent to kill the victim. The question is whether the dispute raises doubt that the defendant had the intent to kill the victim at the time of one of the two assaultive acts. Unless there was other strong evidence of an intent to kill, this dispute would raise doubt about whether the defendant possessed the requisite premeditated intent to kill. The dispute suggests that the defendant could have intended at the time of the beating to harm, but not to kill the victim, and then could have thrown his body over the cliff only to hide it. Of course, the defendant would still be guilty under this scenario of a lesser grade of murder. Further, if there is other strong evidence of an intent to kill, a court could conclude that the dispute is immaterial under the standard set forth *supra* in the text following note 162.

164. It is for this reason, in part, that Federal Rule of Criminal Procedure 7(c)(1), appropriately provides that "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." FED. R. CRIM. P. 7(c)(1). In addition, see *supra* note 135 (discussing duplicity doctrine).

165. The preceding discussion might cause some to object that this approach to determining

This discussion implies that materiality questions are not resolved simply by looking to whether the language of the relevant statute draws distinctions in the manner by which a violation may occur. It is not dispositive that an "element" of a crime is articulated in one broad phrase or in a similarly-expansive series of more specific events or conditions.¹⁶⁶ The analysis has revealed that a factual disparity may be material although the alternative scenarios are covered by a single broad phrase in the statute.¹⁶⁷ The point here is that a factual disagreement may be deemed immaterial even though the two scenarios respectively converge with different statutory descriptions of how a violation may occur. Of course, the ability of the legislature to describe different factual scenarios in different terms underscores that the scenarios are conceptually severable to jurors too. Nonetheless, the presence of conceptually severable bases of liability does not alone indicate that a dispute between them is important.

For example, assume that one statute states that the carrying of a concealed "weapon" on one's person is proscribed (allowing the courts to decide what objects are included), while another, otherwise identical statute provides a list of particular weapons with a final, more expansive definition. That some jurors conclude that the defendant carried a black jack and that some think it was a dark-colored pistol may or may not be a material difference under either statute. Resolving the materiality question depends on more particular factors like those already mentioned: How many objects are included as weapons by the statutes and what are the gaps in coverage? Further, apart from the conflicting testimony, what evidence suggests that the defendant, for example, struck someone during the pertinent time frame with some object? Under either statute, the ultimate question should be whether the inability of a substantial majority of jurors to agree on the kind of weapon the defendant allegedly carried undermines confidence that the defendant possessed an object that was covered by the statute. That the statute uses a general term or a series of more particular terms to describe the relevant events or conditions is not dispositive.

To underscore that factual differences revealed in statutory language are not dispositive, consider the principal-versus-accessory distinction. Assume that one statute defines murder as if the violator were a principal and that another statute defines what it is to be an accessory to a crime and states that it carries the same punishment as that applicable to a principal. Courts repeatedly have articulated a bright-line rule that jurors need not agree on

materiality provides courts with too much room to impose their own evaluations of credibility to deny the existence of legitimate claims of factual nonconcurrency. Yet, this approach surely would not be as overly restrictive in recognizing valid claims as the prevailing, distinct-crimes standard. Furthermore, there is no better alternative.

166. What constitutes a separate "element" and, thus, what constitutes single versus multiple crimes can be viewed as a question of state law, as the plurality in *Schad* contended. See *infra* notes 262-72 and accompanying text. Nonetheless, for resolving what due process requires regarding factual concurrence, the question is not whether there are multiple elements and thus multiple crimes.

167. See *supra* text accompanying notes 110-14.

whether a defendant acted as a principal or only an accessory.¹⁶⁸ Yet, while it is certainly correct that a divergence among jurors on this kind of question is not always material, it is wrong to contend that it is never material. For example, if the dispute is simply over which of several guilty roles the defendant played among several co-defendants on the scene of a robbery-killing, the inability to resolve it might not undermine the conclusion that the defendant engaged in conduct prohibited by one of the statutes. Even if jurors do not agree on precisely what the defendant did, doubt about whether one scenario consistent with guilt occurred might only suggest occurrence of the other scenario consistent with guilt. At the same time, if some evidence suggested that the defendant participated in the planning of a robbery a week before it occurred and other evidence suggested that the defendant was present at the scene of the robbery-killing, the division among jurors is cause for concern. Here, doubt about the occurrence of one factual scenario consistent with guilt does not suggest merely that another factual scenario consistent with guilt occurred. In the absence of other convincing evidence that the defendant played a guilty role in the robbery, the inability of a substantial majority of jurors to embrace either version casts doubt on whether the defendant engaged in any prohibited conduct.

Distinguishing between material and trivial factual differences requires a multi-faceted and complex inquiry. It certainly is wrong to suggest that jurors must agree on "just what the defendant did" to warrant liability,¹⁶⁹ just as it is wrong to suggest that they must only agree on "the bottom line" of guilt.¹⁷⁰ Moreover, it is impossible to articulate a bright-line rule that defines a level of appropriate factual specificity for all circumstances. The same factual divergence that could be left unresolved in one case might demand resolution in another. Identifying a material factual dispute requires a careful analysis of the evidentiary context in each case. The trial court's determination warrants some deference. The ultimate question in each instance is whether the inability to resolve the dispute raises doubt that the defendant committed an act under conditions or causing a result that the criminal statute prohibits.

The complex nature of materiality questions, however, is not a reason to retreat to restrictive bright-line rules. Factual materiality questions are no more difficult than many other due process problems that courts frequently must address.¹⁷¹ For example, the questions whether due process requires the suppression of an identification or a confession or the granting of a motion for judgment of acquittal demand the same kind of careful evidentiary analysis under similarly general standards.¹⁷² Moreover, the belief that precedent

168. See authorities cited *supra* note 121.

169. *Gipson*, 553 F.2d at 457.

170. See authorities cited *supra* notes 18, 29.

171. It is also doubtful that they are much more frequently confronted. As with other claims of constitutional error, factual nonconcurrence claims are typically waived unless raised by the defendant. See *infra* text accompanying notes 214-17.

172. See *Jackson v. Virginia*, 443 U.S. 307, 317 (1979) (holding that criminal conviction is sustainable only if "there was sufficient evidence to justify a "rational trier of the facts to find

cannot adequately control courts and other decision-makers in the resolution of a problem of constitutional dimensions augurs for bright-line rules that provide an extra margin of error in favor of the constitutional value rather than a margin of error in the opposite direction.¹⁷³

This brings us back to a question raised earlier:¹⁷⁴ Can the restrictive rule on factual materiality that courts typically have adopted find support in a slippery slope argument? It seems that the only contention left that might justify the distinct-crimes test is that to go further inevitably will propel courts toward finding that even trivial factual differences require jury resolution as a predicate to conviction.

The slippery slope assertion, however, is fallacious. The burden rests with its proponents to explain the basis for such systematic skewing of the risk of erroneous decisionmaking in favor of criminal defendants.¹⁷⁵ Yet, no explanation has been offered. Further, empirical evidence points to the contrary. While several courts have approached the kind of analysis advocated here to identify nonconcurrence problems, they have not demanded concurrence on unimportant details.¹⁷⁶ Hence, there is no valid reason to assume that a slippery slope operates once courts depart from the separate-crimes standard.

guilt beyond a reasonable doubt."); *Mincey v. Arizona*, 437 U.S. 385, 117 (1978) (applying "voluntariness" test to determine admissibility under Due Process Clause of arrestee's statements for impeachment purposes); *Manson v. Brathwaite*, 432 U.S. 98, 401-02 (1977) (articulating multi-faceted, due-process test for analyzing the admissibility of pre-trial identification evidence in criminal cases).

173. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (creating bright-line rule that confession obtained from a suspect through custodial interrogation is inadmissible against the suspect in a criminal trial unless the suspect was warned of certain rights and waived them); *Edwards v. Arizona*, 451 U.S. 477 (1981) (creating bright-line rule that a suspect subjected to custodial interrogation who asserts the right to counsel cannot subsequently waive *Miranda* rights without counsel present unless the suspect initiates further communication, exchanges or conversations about the investigation with the police); see also *Gideon v. Wainwright*, 372 U.S. 335 (1963) (creating bright-line rule that an indigent's need for counsel in a felony prosecution is conclusively presumed regardless of his education, intelligence, background or the complexity of the case). For a summary of various views concerning the validity of this approach to constitutional adjudication, see the authorities excerpted in YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASE, COMMENTS AND QUESTIONS* 543-59 (7th ed. 1990).

174. See *supra* notes 94-104 and accompanying text.

175. See Schauer, *supra* note 94, at 376.

176. See, e.g., the federal decisions cited *supra* note 17. The District of Columbia Court of Appeals has been among the courts most active in addressing factual nonconcurrence claims in published opinions since the Fifth Circuit decision in *Gipson*. See, e.g., authorities cited *supra* notes 141-43. While that court also has gone well beyond the distinct-crimes test in identifying factual non-concurrence problems, it has not reversed a conviction based on a factual inconsistency or uncertainty that ignores the limits articulated here. For some samples of its more recent decisions overturning convictions based on the potential for factual nonconcurrence, see *Bourn v. United States*, 567 A.2d 1312 (D.C. 1989); *Smith v. United States*, 549 A.2d 1119 (D.C. 1988); *Brown v. United States*, 542 A.2d 1231 (D.C. 1988); *Horton v. United States*, 541 A.2d 604 (D.C. 1988).

IV. DEFINING THE CONSTITUTIONAL RIGHT AND THE STANDARD FOR REMEDIAL ACTION

One general issue remains to be resolved to cover the problems that courts must confront in addressing factual nonconcurrence claims: To obtain relief, what burden does the defendant bear to establish a possible juror division between materially different bases for liability? The answer depends on whether one focuses on the trial or the post-conviction stages. Relief at the trial stage should only hinge on the existence of materially divergent bases for liability. However, reversal of a conviction demands deeper inquiry into the risk of division among jurors.

A. Relief At Trial

The different showings that should be required to gain relief at trial and on appeal stem from the differences in the remedies involved at these different stages. At trial, relief is easily provided. The court need only direct jurors' attention to the evidentiary inconsistency and instruct them that the requisite number of jurors must agree¹⁷⁷ on a theory before finding the defendant guilty.¹⁷⁸ Where the defendant requests it, the court should also employ a special verdict form to attempt to ensure that jurors have followed the

177. As for the number of jurors that would have to agree, see *supra* notes 76-91 and accompanying text.

An objection might be leveled against an instruction that something less than unanimity is required on grounds that it is too confusing. This argument is not very persuasive given the complicated instructions jurors often receive on other matters. In any event, such an objection would not justify failing to enforce the constitutional mandate. It could justify, however, simply requiring that jurors agree unanimously on the resolution of the factual divergence problem. Nothing prevents courts from requiring more protection for criminal defendants than the constitutional minimum.

178. As earlier discussion implied, there is no general unanimity instruction that could be given that would accurately advise jurors of the level of specificity at which they should agree. See *supra* text accompanying notes 157-71. It surely is incorrect, for example, to tell jurors that as a prerequisite to conviction the requisite number of jurors must concur on "just what the defendant did." *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir. 1977). Such an instruction could be taken by jurors to mean they could not return a guilty verdict if they were substantially divided over insignificant details. Because of the inability to fashion a general instruction regarding jurors' obligation to coalesce on the factual basis for a guilty verdict, the trial court should focus on the particular evidentiary conflict that presents a potential problem.

instruction.¹⁷⁹ In contrast, at post-conviction stages the remedy is more costly—a reversal of the conviction typically followed by a new trial.

A trial court should take remedial action with the accused's consent whenever the evidence reveals any potential for disagreement among convicting jurors on a material fact issue. It is commendable at trial to attempt to forestall even the possibility of factual divergence. Factual concurrence instructions and special verdict questions accomplish that goal. These remedies pose no unfair prejudice to the prosecution or serious burden on the court. Properly defined, they also are not likely to confuse the jury.¹⁸⁰ Hence, a trial court should decide whether to grant relief on a factual nonconcurrence claim simply by asking whether the evidence indeed reveals materially different bases for a guilty verdict.

B. Post-Conviction Relief

Because relief on appeal, unlike at trial, is corrective rather than preventive, the need to determine how reviewing courts should address factual divergence claims requires clarification about precisely when a constitutional right to concurrence instructions arises. An appellate court is unlikely to reverse a conviction and remand for a new trial unless that course is required.¹⁸¹ Hence, one must resolve how much risk of jury division

179. Though not necessarily violative of due process, special verdict forms are generally disallowed in criminal cases, but only because they are thought improperly to compel the jury toward conviction. *See, e.g.,* *Heald v. Mullaney*, 505 F.2d 1241, 1244-45 (1st Cir. 1974), *cert. denied*, 420 U.S. 955 (1975) (noting that special verdicts are generally disallowed as infringing the valued authority of the criminal jury to acquit despite overwhelming evidence of guilt; but holding the use of special verdict form in case at hand not to violate due process). One court has described the reason for opposition to special verdicts as follows:

We are [concerned] . . . with the subtle, and perhaps open, direct effect that answering special questions may have upon the jury's ultimate conclusion. There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. A juror, wishing to acquit, may be formally catechized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted.

United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969). This rationale is not persuasive where the defendant requests the use of special questions and agrees with their wording. *See id.* at 182-83; *see generally* Note, *supra* note 8, at 503 n.31.

If *unanimity* as to the factual basis for the guilty verdict is not required, *see supra* notes 76-91, the verdict form could be tailored not only to differentiate the factual bases for liability, but to call for revelation of the number of jurors who found each basis to exist.

180. *See supra* note 177.

181. Federal courts at times have asserted a power to mandate procedures in federal criminal cases based on an inherent supervisory authority over the administration of criminal justice in the federal courts, although such power has not been asserted by federal courts over criminal justice in state courts. *See, e.g.,* *Mallory v. United States*, 354 U.S. 449 (1957) (using supervisory power to suppress confession obtained from suspect detained in violation of federal rule mandating that he be presented promptly before magistrate after arrest). The "supervisory

between materially different alternatives must exist to demand relief on appeal under the Constitution and what kind of evidence the convicted defendant can offer to establish that risk.

Supreme Court opinions suggest two approaches for defining the constitutional right and the standard for relief. First, the right could arise whenever any, or some low possibility of, division among jurors exists between materially divergent bases for guilt. At the same time, appellate courts would be authorized to deny relief for the violation under *Chapman v. California*¹⁸² if convinced beyond a reasonable doubt that the error did not affect the verdict.¹⁸³ The alternative approach would require the defendant to establish a fairly substantial risk of prejudice as a precondition even to identifying a constitutional violation. The violation would then warrant reversal without further inquiry into prejudice.¹⁸⁴

The functional difference between these two approaches could be significant. The first approach, incorporating the stringent *Chapman* standard on harmless error, would underscore that trial courts generally ought to provide relief whenever materially divergent bases for liability arise. However, the strength of that message would depend on the showing of prejudice required to make out the constitutional error. The second approach would not encourage close attention to factual nonconcurrence problems by trial courts and would require appellate courts to deny even the existence of error in the many cases in which it was possible, but simply unknown, that a convicting jury divided between two materially different bases of liability. The extent of this effect would also depend on the showing of prejudice required to make out a constitutional violation.

power" theory has not been employed, however, as the basis for rule-making regarding factual nonconcurrence problems, and the discussion simply assumes that it would not be so employed. The propriety of its use is beyond the scope of this Article.

For a thorough and incisive critique of the "supervisory power" theory as a basis for reversing convictions not otherwise grounded in a constitution or statute, see Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

182. 386 U.S. 18 (1967).

183. There is no serious dispute that harmless-error doctrine rather than an automatic-reversal rule would govern this kind of error. The Supreme Court first announced in *Chapman*, 386 U.S. at 24, that a harmless-error test based on a beyond-a-reasonable-doubt standard could be applied to some federal constitutional errors, although it had first suggested that possibility in *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963). Furthermore, since *Chapman*, the Court has clarified that most federal constitutional errors are subject to the harmless-error rule. The Court recently declared that a "strong presumption" exists that as long as the defendant had counsel and an impartial judge and jury, "any other errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579 (1986) (finding harmless a burden-shifting jury instruction that violated due process). There appear no compelling reasons not to apply the harmless-error doctrine to factual nonconcurrence claims. See generally Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 91-92 (1988).

184. For an example of the use of this approach, see *Darden v. Wainwright*, 477 U.S. 168, 184 & n.15 (1986).

The Court's opinions do not suggest either of these approaches as more appropriate than the other in addressing factual nonconurrence problems. The Court has vacillated between these two different methods of defining constitutional rights and standards for relief.¹⁸⁵ For example, the Court has used the first approach to define the defendant's constitutional right to cross-examine the government's witnesses on bias¹⁸⁶ or to present his own favorable witnesses.¹⁸⁷ Yet, it has held that even to establish violations of constitutional rights to a speedy trial¹⁸⁸ or to effective assistance of counsel,¹⁸⁹ the defendant must show a fairly strong likelihood that the exercise of those rights would result in a not-guilty verdict. The Court generally has failed to explain why it has pursued one approach over the other.¹⁹⁰

As for protections like the factual nonconurrence mandate, which implicate due process but not a more specific constitutional guarantee, the Court also has used both approaches. For example, it has held that a substantial degree of prejudice is required even to establish due process violations from the failure of the government to disclose favorable evidence to the accused,¹⁹¹ from a prosecutor's concededly improper arguments in closing summation,¹⁹² and from the failure to instruct the jury on the presumption of innocence.¹⁹³ At the same time, it has held that a due process violation occurs whenever a trial court gives an instruction that a reasonable juror could

185. See generally Stacy & Dayton, *supra* note 183, at 81, 117-22.

186. See *Delaware v. Van Arsdall*, 475 U.S. 673, 682 (1986).

187. See *Crane v. Kentucky*, 476 U.S. 683, 691 (1986).

188. See *United States v. MacDonald*, 435 U.S. 850, 858-59 (1978).

189. See *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984).

190. Professors Stacy and Dayton have described the ambiguity and the singular attempt by the Court to explain its choice between these approaches:

[T]he Court has not articulated a convincing rationale for distinguishing when courts ought to define a right to obtain or present evidence at trial in terms of a strict outcome-oriented prejudice test from when they ought to use a lesser prejudice test, subject to post-trial harmless error review. The Court has attempted to justify using a lesser prejudice test in only one case, *Delaware v. Van Arsdall*. The Court reasoned that the language of the confrontation clause forecloses use of an impact-on-the-outcome prejudice test to define a defendant's right to cross-examine a government's witness for bias. The Court stated: "[T]he focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." . . .

The broad rationale the Court has articulated . . . reads too much into the language of the confrontation and compulsory process clauses. It is true, as the Court has observed, that those clauses speak of witnesses "against" a defendant and "in his favor." The meaning of this language, though, is not self-evident.

Stacy & Dayton, *supra* note 183, at 119-20 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

191. See, e.g., *United States v. Bagley*, 473 U.S. 667, 684 (1985).

192. See *Darden v. Wainwright*, 477 U.S. 168, 184 & n.15 (1986).

193. See *Kentucky v. Whorton*, 441 U.S. 786, 789-90 (1979); *Taylor v. Kentucky*, 436 U.S. 478, 487-88, 490 (1978).

understand to shift the burden of persuasion on an element to the defense. In that case, the *Chapman* test defines the only appropriate inquiry into prejudice.¹⁹⁴ It surely would be fanciful to suggest that the basis for these choices can be derived from the language or purposes of the Due Process Clauses.

State and lower federal courts, focusing particularly on factual nonconurrence claims, also have not hewn a consistent path in defining the constitutional right. Some courts have followed the harmless error approach, defining the constitutional right to remedial instructions as one which arises whenever there are materially different bases for liability; the existence of the right either does not hinge on the risk that jurors will divide between the theories or else requires only a low threshold of risk.¹⁹⁵ Other courts have followed the alternative approach, requiring a fairly convincing showing of a risk of division as a precondition to the identification of any constitutional error.¹⁹⁶

Courts that have required the defendant to show a substantial risk of division among jurors to establish an error have not articulated a coherent approach for determining when too much risk arises. The opinion in *United States v. Ferris*,¹⁹⁷ is representative. There, the defendant was convicted of one count of possession with intent to distribute cocaine. The evidence presented suggested several incidents over two months, each of which provided a factual basis for this charge.¹⁹⁸ The trial court did not instruct

194. See, e.g., *Rose v. Clark*, 478 U.S. 570, 583 (1986) (holding that harmless error doctrine, rather than rule of automatic reversal applies where such an instruction is given); *Francis v. Franklin*, 471 U.S. 307, 316-17 (1985) (instruction which reasonable juror could interpret as requiring rebuttable presumption violates due process); *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979) (instruction that reasonable juror could understand to create mandatory presumption violates due process).

195. See, e.g., *United States v. Duncan*, 850 F.2d 1104, 1113-14 (6th Cir. 1988) (failure to instruct was error and not harmless); *United States v. Beros*, 833 F.2d 455, 463 (3d Cir. 1987) (same); *Brown v. United States*, 542 A.2d 1231, 1232 (D.C. 1988) (same); *Scarborough v. United States*, 522 A.2d 869, 870 (D.C. 1987) (error, but harmless); *Hack v. United States*, 445 A.2d 634, 641 (D.C. 1982) (error, but harmless).

196. As a prerequisite to the finding of error, the Second Circuit has most consistently required a convincing showing that a risk of division among jurors exists. See, e.g., *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986), cert. denied, 480 U.S. 945 (1987) (although government alleged under single charge three ways Schiff attempted to evade income tax, held no right to special instruction and court declaring such instructions unnecessary "except in cases where the complexity of the case or other factors create a genuine danger of jury confusion"); *United States v. Murray*, 618 F.2d 892, 903-04 (2d Cir. 1980) (although acknowledging that jurors must agree on factual basis for guilty verdict and that single charge alleged separate factual bases, presuming that general instruction on unanimity required as to verdict itself was sufficient to inform jurors as to the need for agreement on factual foundation); *United States v. Natelli*, 527 F.2d 311, 324-25 (2d Cir. 1975), (same, but reversing on other grounds), cert. denied, 425 U.S. 924 (1976).

197. 719 F.2d 1405 (9th Cir. 1983) (opinion of Kennedy, J.).

198. This evidence, covering events extending over two months, was presented to establish that Ferris was part of a conspiracy to distribute cocaine, an allegation embodied in a separate charge. *Id.* at 1406.

the jurors that they must coalesce behind one or more of the incidents as the basis for a guilty verdict. However, the Circuit Court of Appeals concluded that there was no error. The basis for this conclusion was that the case was "[not] particularly difficult or complex" and presented no other particular reason—such as "questions from the jury, some variance between the proof and the indictment, or ambiguous supplementary instructions from the court"—to think that jurors divided on the facts underlying the possession charge.¹⁹⁹

Ferris suggests a very limited group of situations in which factual nonconcurrence errors will arise. First, some of the suggested bases for finding factual nonconcurrence actually do not focus on considerations that affect whether the jury is likely to divide. Therefore, these bases will not likely lead a court to find a risk of division. For example, whether the evidence is simple or complicated is of no importance. Even when the evidence concerning separate bases for liability is exceedingly simple, jurors could divide over which basis was established.²⁰⁰ Likewise, a substantial variance between the proof and the indictment implicates concerns about proper notice to the defendant²⁰¹ and, in some jurisdictions, the basis for grand jury indictment;²⁰² however, it does not raise a concern about factual division among convicting jurors.²⁰³ Indeed, the only situation where the

199. *Id.* at 1407.

200. *See, e.g.*, examples discussed *supra* text accompanying notes 34-35, 132-33.

201. *See* *Kotteakos v. United States*, 328 U.S. 750, 776-77 (1946) (reversing conspiracy conviction where variance resulted in jury hearing of numerous conspiracies unrelated to defendant's individual liability); *see generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 830-34 (2d ed. 1992).

202. The Fifth Amendment right to indictment by a grand jury has not been applied against the states through due process, *see* *Hurtado v. California*, 110 U.S. 516, 538 (1884), but would limit the power of a federal prosecutor to introduce evidence establishing a different offense than that for which the grand jury indicted. *See, e.g.*, *Stirone v. United States*, 361 U.S. 212, 215-16 (1960) (reversing conviction); *United States v. Crocker*, 568 F.2d 1049 (3d Cir. 1977) (reversing conviction). Numerous states also require grand jury indictment in felony prosecutions, and in these jurisdictions, a variance between the indictment and the proof at trial could be deemed to violate this mandate in addition to the fair notice requirement. *See, e.g.*, *Commonwealth v. Dean*, 109 Mass. 349, 352 (1872). In *Dean*, the court declared in reversing assault convictions:

It is a rule of the common law, as well as a provision of the Constitution of this Commonwealth, that no one shall be held to answer, unless the crime with which it is intended to charge him is set forth in the indictment with precision and fullness; and this rule is not to be defeated by allowing the defendant to be convicted upon evidence of another offense of the same kind, committed on the same day, but not identical with it.

Id.

203. Where materially different bases for liability exist in the evidence, the potential for disagreement as to the basis for liability could plausibly be thought heightened if, during the trial, the prosecutor shifts between the two theories as the basis for liability. *See, e.g.*, *Davis v. United States*, 448 A.2d 242, 243-44 (D.C. 1982) (prosecutor shifted argument between opening and closing statement as to basis for liability, emphasizing in closing that concern of jury was to determine who possessed two envelopes of marijuana obtained at different places).

defendant could likely ever prove a potential division under *Ferris* would be where the jury sent back a note asking whether it could divide as to the factual basis for a guilty verdict. After *Ferris*, the other situation suggested—the provision of an erroneous special instruction on factual concurrence—is not likely to occur in the jurisdiction unless the jurors ask a court such a question.

The *Ferris* approach to defining a right to factual concurrence instructions lacks empirical justification. First, it is plain enough that convicting jurors are not always sure they must reach a shared vision of the crime when the opportunity for division over factual bases exists.²⁰⁴ It is easy to find cases in which a jury note indicates that jurors believe it possible to divide between materially different bases for liability.²⁰⁵ Thus, the important empirical question is whether jurors are likely to reveal their division by asking whether a patchwork guilty verdict is proper before they render it. If they usually would seek guidance, it might be appropriate to require a showing of prejudice by the defendant at trial as a prerequisite to the acknowledgment of the right itself. If jurors usually would not reveal their division, it is unapparent why the defendant should be required to adduce evidence that is unavailable. However, empirical studies regarding jury behavior do not resolve this question.²⁰⁶ Only one's intuitions serve as a guide. And intuition hardly favors the conclusion that jurors will typically ask permission before rendering a patchwork guilty verdict.

Given the uncertainty about how often convicting jurors will reveal a factual division among them, there are other good reasons for defining the right to a factual concurrence instruction as arising whenever the evidence reveals materially different bases for guilt.²⁰⁷ First, except for extreme cases

Nonetheless, the same concern may arise where the prosecutor consistently relies on separate bases as grounds for liability throughout the trial. Moreover, the existence of a variance between the evidence and the formal charge would not itself create the factual divergence problem.

204. Of course, if one believed that convicting juries always deliberated until reaching appropriate agreement on the facts, there would be no basis for recognizing a right to a factual concurrence instruction in any circumstances.

205. See, e.g., *United States v. Duncan*, 850 F.2d 1104, 1109-14 (6th Cir. 1988); *United States v. Gipson*, 553 F.2d 453, 455-59 (5th Cir. 1977); *Smith v. United States*, 549 A.2d 1119, 1121-22 (D.C. 1988).

Even those who believe that few factual divergence claims create constitutional problems implicitly have acknowledged the implausibility of any assumption that convicting jurors will know of the need to agree on the basis for the guilty verdict. See Trubitt, *supra* note 5, at 558 ("[p]atchwork verdicts are a little-noticed but perhaps pervasive phenomenon").

206. The problem does not appear to have been the focus of any significant study. For a representative sampling of the literature summarizing the empirical research on jury behavior, see generally JOHN GUINTEHER, *THE JURY IN AMERICA* (1988); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986); KALVEN & ZEISEL, *supra* note 59; NATIONAL JURY PROJECT, *JURYWORK: SYSTEMATIC TECHNIQUES* (Elissa Krauss & Beth Bonora eds., 1992); SAKS, *supra* note 86.

207. It is worth reiterating that, under the approach outlined here, trial courts already would have leeway to reject as involving immaterial differences claims of factual nonconcurrence on which a division could not reasonably be said to undermine confidence in the offender's guilt. See *supra* notes 160-71 and accompanying text.

that would fall within the harmless-error rule, courts would not have a good basis to determine when convicting jurors would divide between competing theories of liability. Courts could do no more than impose their own judgments on credibility in deciding how a jury might view the competing theories of guilt. Yet, to depart from the *Chapman* harmless-error test is to confer unnecessary latitude on courts to undermine the constitutional value of protecting the innocent. Second, the relief advocated here imposes no significant burdens on the prosecution or on the trial court. When the evidence reveals materially divergent bases for liability, there is no good reason why trial courts should not instruct the jury on concurrence requirements. Hence, for the same reasons that trial judges appropriately give the remedial instruction whenever materially different bases for liability appear,²⁰⁸ the constitutional right should be defined to arise at that point.²⁰⁹

Following the harmless-error approach would not mean, however, that the failure to provide an instruction where the evidence reveals materially divergent theories of liability would always undermine the conviction. Sometimes the failure to provide the instruction would indeed be harmless error. For example, in some cases the jury's verdict on a related charge indicates that the jurors concurred on the factual basis for the ambiguous charge.²¹⁰ Likewise, a harmless finding might rest on a determination that the evidence of one of the theories was extremely powerful, while the evidence of the other was extremely weak.²¹¹ Further, a court could find the

208. See *supra* text accompanying notes 179-80.

209. This method of analyzing which approach courts should follow coincides with the method suggested by others who have studied the general problem of defining constitutional rights in the criminal context. See *Stacy & Dayton, supra* note 183, at 126 ("[C]ourts should be required to balance the loss of finality resulting from the increased risk that an outcome-oriented prejudice test will be misapplied at trial against the strength of any governmental interest a more lenient prejudice test might impair"). Nonetheless, this method cannot explain the outcomes in the Court's cases. See *id.* at 120-25.

210. For example, assume one count charges a defendant with possessing marijuana, and the evidence suggests he possessed two different quantities of marijuana, one laced with phencyclidine and the other pure. A second count charges the defendant with possessing the phencyclidine mixed with the first portion of marijuana. Even if the trial court errs in failing to provide a factual concurrence instruction regarding the two portions of marijuana, a conviction on the phencyclidine charge warrants a conclusion of harmless error. See, e.g., *Hack v. United States*, 445 A.2d 634 (D.C. 1982); cf. *Jackson v. State*, 284 N.W.2d 685 (Wis. Ct. App. 1979) (while trial court erred in failing to instruct jurors on the need to agree as to alternative elements of crime of theft, error was harmless because the verdict's specification of value of property involved revealed a single form of crime which all jurors must have found to have occurred).

211. See *Scarborough v. United States*, 522 A.2d 869 (D.C. 1987) (trial court's failure to give a concurrence instruction after defendant presented different defenses with regard to different items allegedly stolen at the same time found harmless because convicting jurors could have divided only through a tortured, though not irrational, route).

Some scholars have argued that courts should not evaluate the weight and credibility of evidence in reaching harmless-error determinations, see, e.g., *Stacy & Dayton, supra* note 183, at 132-33, but the Supreme Court's opinions imply the contrary. For example, in *Rose v. Clark*,

lack of an instruction harmless when two separate bases of liability are established by powerful evidence and the defense does not challenge their occurrence.²¹² Therefore, the harmless-error inquiry would not be a mere formality.²¹³

478 U.S. 570 (1986), the Court remanded a case for reconsideration as to harmless error regarding the giving of a burden-shifting instruction on malice. The defense argued at trial that the defendant had lacked malice, and it was allowed to introduce substantial evidence in support of that claim. The Court stated, "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Id.* at 579. It was obviously not possible under the circumstances in *Rose* to conclude that a rational jury would never find in the defendant's favor. Thus, the remand implied that the inquiry was indeed to focus on the weight and credibility of the state's case supporting malice as against the defendant's claim (and evidence) that it was lacking. It is in cases where a jury can be said to have made no finding at all regarding an "elemental fact" that a significant number of the Justices have concluded that this kind of harmless error inquiry is inappropriate. See *Carella v. California*, 491 U.S. 263, 267 (1989) (Scalia, J., concurring in judgment, joined by Brennan, Marshall, & Blackmun, JJ.) (arguing that such an inquiry is not proper where a mandatory conclusive presumption has been employed).

212. For example, assume the complainant testifies that the defendant, an acquaintance, while walking through a park, knocked her down and began raping her. As some passersby approached, he pulled her off the path and into the woods. When the passersby left, he sodomized her and then raped her again. Assume further that the defendant is charged with one count of rape and one count of sodomy. If the defendant presents an alibi defense and only challenges the complainant's account of the identity of the perpetrator, not what occurred during the incident, a court might find the failure to give an instruction on which alleged act constituted the rape harmless error. For a case that presents this basic scenario, but in which the defense also challenged the victim's story generally and the jury found the defendant not guilty of the intervening sodomy, see *Gray v. United States*, 544 A.2d 1255 (D.C. 1988). See also *United States v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989) (because prosecution presented overwhelming evidence involving possession of large quantities of marijuana by conspiracy members and defendant claimed merely that he was not part of conspiracy, failure to instruct that jurors must agree on factual basis for violation was harmless error); *State v. Encinas*, 647 P.2d 624 (Ariz. 1982) (evidence was overwhelming that appellant, convicted of first-degree murder under statute that encompassed both premeditation and felony-murder theories, was guilty, if at all, under both theories of first-degree murder).

213. Nonetheless, the theory justifying rules that disallow use of extrinsic evidence regarding juror deliberations to attack or support a conviction should prevent the prosecution from using such extrinsic evidence to demonstrate that jurors agreed on the factual basis for the verdict.

The theory behind this prohibition has been explained by the Supreme Court: But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Trial courts also cannot be expected to parse through the evidence for evidentiary inconsistencies on their own initiative. A defendant should forfeit his grounds to object to a trial court's failure to provide a factual concurrence instruction if she does not request the instruction from the trial court.²¹⁴ The only exception should be for errors falling within the narrow confines of the "plain error" doctrine followed in the jurisdiction.²¹⁵ That exception typically applies only to egregious violations that should have been apparent to the prosecutor or the trial court even without a defense motion.²¹⁶ The

McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

The best articulation of the prevailing rule in most jurisdictions on the use of extrinsic evidence to attack or support a jury verdict is contained in Federal Rule of Evidence 606(b), which states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

FED. R. EVID. 606(b).

214. In the federal courts, this principle is embodied in a formal rule: No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

FED. R. CRIM. P. 30.

215. While not constitutionally required, many jurisdictions provide for such an exception. In the federal system, the exception is embodied in Federal Rule of Criminal Procedure 52(b), which provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [trial] court." FED. R. CRIM. P. 52(b).

216. Because plain error doctrine is not constitutionally controlled, jurisdictions that employ it may differ in the standards by which "plain errors" are identified. The Supreme Court has described the standard applicable under Federal Rule of Criminal Procedure 52(b) as follows:

Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice. By its terms, recourse may be had to the Rule only on appeal from a trial infected with error so "plain" the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it. The Rule thus reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.

United States v. Frady, 456 U.S. 152, 164 (1982) (footnotes omitted).

"Plain error" doctrine also typically only applies at the direct appeal stage. Errors raised for the first time in a habeas corpus appeal may be analyzed under a standard that is more stringent toward the defendant. That is true in the federal courts. See, e.g., Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (federal habeas appeal by state prisoner); *Frady*, 456 U.S. at 165-66 (federal habeas appeal by federal prisoner). In federal court, that more stringent test is the "cause

general rule requiring that defendants raise factual nonconcurrence claims at trial or lose them would limit the number of claims that would result in reversals of convictions.²¹⁷

In sum, a due process right to relief in the form of special verdict questions and special instructions should arise whenever a criminal case presents materially different bases for liability. This formulation of the constitutional right means that a trial court, upon identifying materially divergent guilt scenarios, should honor a request for relief without further inquiry into the likelihood of juror division. It also means that reviewing courts should reverse a conviction based on a trial court's failure to grant requested relief in the face of materially different liability theories unless the error is deemed harmless beyond a reasonable doubt. The discussion here builds on the recognition that the difficulty of distinguishing material from immaterial inconsistencies itself warrants some deference to trial court judgments. Nonetheless, this formulation of the constitutional violation, without engendering significant side-effects, most effectively serves the goal of protecting the innocent.

This concludes an overview of the approach recommended for analyzing factual divergence claims in criminal cases under the Constitution. The analysis now turns to the question whether the Supreme Court followed this approach in addressing the factual divergence problem presented in *Schad v. Arizona*.²¹⁸

and prejudice" standard first enunciated in *Davis v. United States*, 411 U.S. 233, 242-45 (1973). For more on the showing required under this standard, see *Murray v. Carrier*, 477 U.S. 478 (1986).

217. For examples of cases in which factual nonconcurrence claims that warranted remedial action at the trial level have nonetheless been held not to amount to plain error, see *United States v. Peterson*, 768 F.2d 64 (2d Cir.), cert. denied, 474 U.S. 923 (1985); *Shivers v. United States*, 533 A.2d 258 (D.C. 1987).

218. 111 S. Ct. 2491 (1991).

V. THE SUPREME COURT'S EFFORT TO DEFINE THE CONSTITUTIONAL PROBLEM

The *Schad* decision represents the Supreme Court's only attempt during this century to address the constitutional implications of a factual nonconcurrency claim.²¹⁹ Unfortunately, the Court did not perform well. The Court divided five to four on *Schad*'s nonconcurrency contention and also produced no majority opinion. However, the more troubling aspect of the case is that none of the three opinions written revealed a sensible approach to analyzing factual nonconcurrency problems under the Due Process Clauses. In the end, five Justices correctly rejected *Schad*'s divergence claim, but not for the right reasons.

219. In the late 19th century, the Court decided two cases presenting very similar factual nonconcurrency claims. In *St. Clair v. United States*, 154 U.S. 134 (1894), and *Anderson v. United States*, 170 U.S. 481 (1898), the defendants were convicted of murder while working as mariners on ships on the high seas. In *St. Clair*, the defendant and two others allegedly had beaten the victim with a blunt instrument and then thrown him overboard. *St. Clair*, 154 U.S. at 135-36. In *Anderson*, the defendant was alleged to have shot and then thrown overboard the victim. *Anderson*, 170 U.S. at 482-84. In each case, the defendant sought to attack his conviction on grounds that the murder count in the indictment was duplicitous. Without addressing that claim in particular, the Supreme Court simply declared the indictment proper in the first case. *St. Clair*, 154 U.S. at 154. In *Anderson*, the Court also did not openly address the factual nonconcurrency aspect of the duplicity claim, but at least explicitly rejected the claim that the indictment was invalid: "The government was not required to make the charge in the alternative in separate counts. The mate was shot, and his body immediately thrown overboard; and there was no doubt that, if not then dead, the sea completed what the pistol had begun." *Anderson*, 170 U.S. at 500-01; cf. *Crain v. United States*, 162 U.S. 625, 636 (1896) (alternative modes of committing fraud against the United States, which were outlined in statute, could be alleged in single count).

In the 1930s, the Court also decided a case, *Borum v. United States*, 284 U.S. 596 (1932), that presented a claim closely related to the factual nonconcurrency problem. In *Borum*, three defendants were charged in a single indictment with the first degree murder of a single victim. The first count alleged that defendant Borum held the gun; in the second that defendant Logan held the gun; in the third that defendant Guy held the gun; and in the last count that the person who held the gun was unknown to the grand jury. At trial, the jury entered acquittals under the first three counts, but convicted all three defendants under the fourth count. On these facts, the appellate court certified a question to the United States Supreme Court about whether given the acquittals of each of the defendants under the first three counts, the convictions under the fourth count could stand. The Court simply answered the question "yes" and cited an earlier decision in which it had held that inconsistency between an acquittal and a conviction on separate counts presented to a jury does not warrant overturning the conviction. *Id. Borum* indicated that jurors could vote to convict when it was unknown exactly what role a defendant played in a killing. However, it did not indicate whether the same result should apply where jurors actually divided over the role played by a defendant.

A. *Schad's Factual Divergence Claim*

The problem in *Schad* concerned Arizona's statute specifying the several ways in which one could commit the capital crime of first-degree murder. "Murder" in Arizona was the unlawful killing of another human with either an intent to kill or a reckless disregard for human life.²²⁰ The relevant statute declared that three general categories of murder were of the first degree, while all others were of the second degree. First degree murder covered any murder that was (1) "wilful, deliberate or premeditated;" (2) "committed in avoiding or preventing a lawful arrest or in effecting an escape from legal custody;" or (3) committed in the perpetration or attempted perpetration of certain enumerated felonies, including robbery.²²¹ This statute exemplifies how American jurisdictions typically have divided the common law crime of murder into degrees.²²²

220. *State v. Schad*, 691 P.2d 710, 711 (Ariz. 1984). The trial court instructed the jury consistent with this view of "malice" in *Schad*. See Petition for Writ of Certiorari, Appendix C, at 6, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551).

221. The statute provided:

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

ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1973).

A revised but similar statute took effect on October 1, 1977, two months after the killing for which *Schad* was prosecuted. See 1977 Ariz. Sess. Laws, Ch. 142, § 60. Under the new statute, there are two general ways of committing first degree murder. First, a person is guilty if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation." ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (1989). Second, a person is guilty if "[a]cting either alone or with one or more other persons such person commits or attempts to commit [any of several specified felonies, including robbery], and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person." *Id.* § 13-1105(A)(2).

222. At common law, murder covered a wide variety of killings and was not divided into degrees. Murder was the unlawful killing of another human with "malice aforethought," which consisted of (1) an intent to kill; (2) an intent to grievously injure; (3) knowledge (and perhaps even imputed knowledge) that an act or omission will probably cause death or grievous injury to another; or (4) an intent to commit any felony. See LAFAVE & SCOTT, *supra* note 37, at 605-07, 611-42. "Malice aforethought" also required the absence of circumstances, particularly a heat of passion in the defendant caused by sudden provocation from the victim, that would reduce the crime to voluntary manslaughter. See PHILLIP E. JOHNSON, CRIMINAL LAW; CASES, MATERIALS AND TEXT 159 (4th ed. 1990). A mandatory penalty of death applied to all murders. See JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 464-65 (1883).

Because of discontent with the tendency of juries to acquit even those clearly guilty of murder, and perhaps for humanitarian reasons as well, a movement began in the United States to divide murders into degrees and to limit the mandatory death penalty to murders in the first degree. See *McGautha v. California*, 402 U.S. 183, 199-200 (1971), *vacated sub nom.* *Crampton*

Edward Schad was arrested for the killing on August 1, 1978, of a 74-year-old man named Lorimer Grove. The indictment charged Schad with first-degree murder.²²³ It did not specify which of the three situations described in the statute had occurred. However, the state's theory at trial was that Schad had killed Grove with premeditated intent and while robbing him.²²⁴

Although there was no doubt that Grove was murdered, the evidence that Schad murdered Grove was paltry. Testimony indicated that Grove was a resident of Bisbee, Arizona, a town located near the Mexican border. Grove was seen leaving his home in Bisbee on August 1, 1978, to visit his sister in Everett, Washington. He was driving a new Cadillac, pulling a camper-trailer. On August 9, 1978, a highway worker discovered Grove's body about nine miles south of Prescott, Arizona, which is approximately three hundred miles north of Bisbee. The body was discovered in the woods near a pull-off area in the Prescott National Forest. Neither the Cadillac nor the camper were nearby. A small rope hung around Grove's neck. Medical testimony indicat-

v. Ohio, 408 U.S. 941 (1972). The first state to enact such legislation was Pennsylvania, which adopted the following statute in 1794:

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

1794 Pa. Laws, ch. 1766, § 2, *quoted in Schad*, 111 S. Ct. at 2502 n.8. Similar legislation dividing murder into two and sometimes three degrees was followed in a majority of states, and that approach to defining the offense continues today. *See LAFAVE & SCOTT, supra* note 37, at 642. Virtually all American jurisdictions that divide murder into degrees define the same two murder situations defined as first-degree murder in the original Pennsylvania statute as first-degree murder under their current statutes. *See id.*

223. *Schad*, 111 S. Ct. at 2495. The document alleged:

The grand jurors of Yavapai County, Arizona, accuse Edward Harold Schad charging that in Prescott Precinct, Yavapai County, State of Arizona: On or about August 1, 1978, EDWARD HAROLD SCHAD murdered Lorimer Leroy Grove, all in violation of A.R.S. §§ 13-451, 13-452, as amended and 13-453 A, as amended.

Petition for Writ of Certiorari, Appendix F at 1, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551).

224. *Schad*, 111 S. Ct. 2495. After an earlier trial, Schad's conviction for first-degree murder and death sentence were reversed by the Arizona Supreme Court on a petition for post-conviction relief. *See State v. Schad*, 691 P.2d 710 (Ariz. 1984). That court originally had upheld the conviction and sentence on direct appeal. *See State v. Schad*, 633 P.2d 366 (Ariz. 1981), *cert. denied*, 455 U.S. 983 (1982).

At Schad's first trial, the State had proceeded on three theories of first-degree murder—premeditated murder, felony murder/robbery, and felony murder/kidnapping. The Arizona Supreme Court reversed the conviction and sentence because the trial court had failed to instruct the jury on the elements of either of the felonies alleged. *Schad*, 691 P.2d at 711. Because the jury's verdict had only indicated that the jury had found Schad guilty of first-degree murder, the appellate court could not sustain the conviction on the ground that the jury had found Schad guilty under the premeditation theory. *Id.* at 712.

ed that Groves had been dead about a week. The killer had strangled Grove to death apparently with the rope found around his neck.²²⁵

The evidence connecting Schad to the murder was circumstantial. Schad became a suspect in the crime when he was arrested in Salt Lake City, Utah, on September 8, 1978. The police had received a tip that Schad, on parole in Utah for a prior murder, was in town and was in possession of a stolen car. When arrested, Schad was driving Grove's car and had his credit cards. The police also found a speeding ticket issued to Schad in New York. Further, a man named John Duncan, who knew Schad through Schad's girlfriend in Salt Lake City, heard Schad make an incriminating statement in jail shortly after his arrest. Duncan had arranged with the police to relay any information Schad provided. According to Duncan, Schad said that he would deny being in Arizona, "particularly Tempe, Arizona[,] and Prescott, Arizona."²²⁶

After Schad's arrest, police in Arizona pieced together other information suggesting that he was connected with Grove's death. Evidence revealed that Schad repeatedly used Grove's credit cards to make purchases, beginning on August 2, 1978. Schad also apparently cashed a forged check made out to himself on Grove's account for "wages" in Des Moines, Iowa, on August 7, 1978.²²⁷ In addition, Schad was stopped in New York by a New York Highway Trooper on September 3, 1978, for speeding while driving Grove's Cadillac. Upon questioning as to why he did not have a registration for the car, Schad responded that he was delivering it to an elderly friend, named Larry Grove, who lived five or ten miles away.²²⁸

On August 3, 1978, an Arizona highway patrolman also found an abandoned Ford car about thirty miles north of Flagstaff, Arizona, and about 150 miles north of where Grove's body was discovered. Schad had rented the car from a dealership in Sandy, Utah, on December 31, 1977.²²⁹ Although rented for a weekend, the car had never been returned and, consequently, had been reported stolen. After the patrolman found the car, local authorities impounded it. Officers searched the car on September 12, 1978, after Schad became a suspect in the Grove killing. In the car they found a unique mirror contraption, like one Grove had constructed to aid him in hooking his camper-trailer to his car by himself.²³⁰

Schad's defense was that he merely had received some of the property stolen from Grove, but that he had not participated in the robbery or the

225. See *Schad*, 111 S. Ct. at 2495; *State v. Schad*, 788 P.2d 1162, 1164 (Ariz. 1989); *Schad*, 633 P.2d at 370; Brief for Petitioner, Joint Appendix at 21, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551).

226. *Schad*, 111 S. Ct. at 2495; Brief for Petitioner at 4, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551); *Schad*, 788 P.2d at 1164.

227. See Brief for Petitioner, Joint Appendix at 16, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551).

228. See *Schad*, 111 S. Ct. at 2495; *Schad*, 633 P.2d at 370-71.

229. *Schad*, 111 S. Ct. at 2495; *Schad*, 633 P.2d at 370; Brief for Petitioner, Joint Appendix at 17, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551).

230. See *Schad*, 788 P.2d at 1164; *Schad*, 633 P.2d at 370.

killing.²³¹ Schad's counsel argued that the evidence against Schad failed to show more than that he had received the stolen property.²³² He also pointed to other evidence that raised further doubts about Schad's involvement in the robbery or murder. For example, Grove was known to have regularly carried thousands of dollars in cash, and he had cashed a check for over \$2,000 the day before leaving Bisbee. Yet, if Schad had obtained a large sum of money from Grove, why would he quickly start using the credit cards? Likewise, what happened to the camper-trailer that Grove had been pulling? Its disappearance also suggested that someone else could have committed the robbery and murder, kept the camper and Grove's cash, and then sold or exchanged the other property. Likewise, it was doubtful that Schad would have committed the murder and robbery alone and subsequently entered the rented Ford. If he had accosted Grove or committed the murder near where the Ford was abandoned (as the government theorized), why would he have driven 150 miles south in one or the other of the cars with either Grove or Grove's dead body? This seemed particularly unlikely given that he would have to have driven through the center of Prescott and also because at the time there was a highly publicized manhunt going on throughout central Arizona for the famous "Tison gang." The gang had pulled off a successful prison break from the state penitentiary at Florence only three days earlier.²³³ But, if Schad had first encountered Grove near where the body was found, how had he arrived at that location and how had the mirror contraption subsequently ended up in the Ford 150 miles to the north? Schad could not have driven two cars at the same time, but why would he have been at the Prescott forest without the Ford? A basis for doubt existed that Schad had committed a robbery; an even stronger basis for doubt existed that he had perpetrated or aided in a premeditated killing.²³⁴

The prosecution contended, nonetheless, that Schad was guilty of both premeditated murder and felony murder and secured a jury charge on both

231. At his first trial, Schad actually had testified in support of that theory, but his account obviously had not convinced the jury. Schad had testified that he had exchanged the Ford for the Cadillac in Phoenix with a "French couple." See *Schad*, 633 P.2d at 379-80. Schad did not testify in the second trial. See Petition for Writ of Certiorari, Appendix C at 4, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551).

232. See *Schad*, 111 S. Ct. at 2495 ("petitioner claimed that the circumstantial evidence proved at most that he was a thief, not a murderer.").

233. See generally *Tison v. Arizona*, 481 U.S. 137 (1987) (affirming the murder convictions and death sentences of Ricky and Raymond Tison for a killing committed by their father during their flight after the prison break).

234. See Brief for Petitioner, Joint Appendix at 8-25, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551) (final summation of defense counsel). Defense counsel pointed to other evidence or lack of evidence that was consistent with this defense theory. For example, he noted that the police had failed to fingerprint the mirror device found in the Ford. *Id.* at 9. He noted that the clothing on the body also was destroyed by the examining pathologist before it could be examined for evidence of fibers, blood, hair or vegetation. *Id.* at 12, 13. He noted that there also were Belair cigarette cartons found in both the Cadillac and the Ford that were unconnected to Schad or his girlfriend. *Id.* at 14.

theories.²³⁵ The trial court instructed the jury that "[f]irst degree murder is murder which is the result of premeditation . . . Murder which is committed in the attempt to commit robbery is also first degree murder."²³⁶ The trial court did not instruct the jury that it must agree on one of the two theories as the basis for a guilty verdict. Consistent with Arizona law requiring unanimity as to the verdict in criminal cases, the judge merely instructed jurors that "[a]ll 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty."²³⁷ The jury convicted Schad of first-degree murder, and the trial judge imposed the death penalty.

Schad claimed on appeal that the trial judge should have made the jurors issue separate verdicts on the premeditation and felony-murder theories.²³⁸ The Arizona Supreme Court rejected the claim on the merits without noting that Schad had failed to request separate verdicts at trial. In rejecting the claim, the appellate court referred to its prior decision in *State v. Encinas*,²³⁹

235. The prosecutor argued:

Let's talk about the specifics of this case. If you look at the easel, members of the jury, I have drawn up the elements, or the components parts [sic], of first degree murder. There are two types of first degree murder, two ways for first degree murder to be committed. On the left is premeditated murder. There are three elements to that. One, that a killing take place, that the defendant caused someone's death. Secondly, that he do so with malice. And malice simply means that he intended to kill or that he was very reckless in disregarding the life of the person he killed.

And you will also be instructed that if the defendant used a deadly weapon, as he did in this case, the ligature, that you may find the intent to kill from the use of that deadly weapon.

And along with the killing and the malice, attached to that killing is a third element, that of premeditation, which simply means that the defendant contemplated that he would cause death, he reflected upon that.

The other type of first degree murder, members of the jury, is what we call felony murder. It only has two components parts [sic]. One, that a death be caused, and, two, that that death be caused in the course of a felony, in this case a . . . robbery. And so if you find that the defendant committed a robbery and killed in the process of that robbery, that also is first degree murder.

If you'll look at the easel toward the lower left-hand corner there, members of the jury, I have put the word second degree and then under that no premed.

All that means to say is the difference between premeditated first degree murder and second degree murder is that the first two elements, a killing with malice, do apply but if there's no premeditation then it's second degree murder.

You'll be given three forms of verdict in this case, guilty of first degree murder, guilty of second degree murder, or not guilty.

If you find either a premeditated murder of [sic] a felony murder, then you will find the defendant guilty of first degree murder.

In this case, both types of first degree murder apply.

Id. at 6-7.

236. *Schad*, 111 S. Ct. at 2495.

237. *Id.*

238. *See State v. Schad*, 788 P.2d 1162, 1165 (Ariz. 1989) (en banc).

239. 647 P.2d 624 (Ariz. 1982) (en banc).

in which it had declined to require an instruction to jurors in first-degree murder cases that they must agree as between premeditation and felony murder theories.²⁴⁰ While in a recent decision the court had "strongly urged" trial courts to use separate verdicts,²⁴¹ it reaffirmed in *Schad* that the failure to do so was "not error" because "first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder."²⁴²

In their briefs in the United States Supreme Court, the parties urged the Justices to draw bright-line rules to address *Schad*'s factual nonconcurrence claim. *Schad* contended that allowing jurors in a first-degree murder case to commingle guilty votes based on premeditation and felony-murder theories always violates the Constitution or, at least, always when the death-penalty applies. He based this contention principally on the Sixth Amendment right to jury trial and its concomitant unanimity requirement, which *Schad* argued applied to the states in capital cases.²⁴³ Nonetheless, he also relied on *In re Winship*'s²⁴⁴ declaration that due process demands that the state must prove beyond a reasonable doubt every fact necessary for conviction.²⁴⁵

The state urged that in Arizona convicting jurors in a first-degree murder case could always disagree as between premeditation and felony-murder theories. First, the state argued that the Constitution does not require that any minimum number of jurors agree on the factual basis for a guilty verdict in either capital or noncapital cases.²⁴⁶ Second, even if the Constitution embodied such a requirement, it was satisfied in Arizona in first-degree murder cases. The proper standard for determining the materiality of factual disparities, the prosecutors argued, is whether the state has determined that the disparate bases represent separate crimes or only different modes of committing a single crime. The Arizona Supreme Court had determined that premeditated murder and felony murder were merely two ways of committing a single crime. Hence, agreement among convicting jurors as between these two theories was unnecessary.²⁴⁷ Finally, while relying principally on the bright-line contention that agreement is never required between the theories of first-degree murder, the state also urged that even if it were wrong in that contention, the Court should find any error in *Schad*'s case harmless. The jurors could not have disagreed as between the two theories because the evidence that Grove's murderer acted with premeditated intent and during a

240. *Id.* at 627.

241. *See* State v. Smith, 774 P.2d 811, 817 (Ariz. 1989).

242. *Id.* (quoting *Encinas*, 647 P.2d at 627).

243. *See* Brief for Petitioner at 9-20, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (90-5551).

244. 397 U.S. 358 (1970).

245. *See* *Winship*, 397 U.S. at 363 (quoting *Davis v. United States*, 160 U.S. 469, 484, 493 (1895)); Brief for Petitioner at 10, 15, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (90-5551).

246. *See* Brief for Respondent at 11-15, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (90-5551).

247. *See id.* at 15-24.

robbery was "overwhelming" and had gone "uncontested" at trial. Hence, jurors must have agreed on the applicability of both theories.²⁴⁸

B. The Justices' Disparate Views

Although the Justices divided three ways on how Schad's claim should be analyzed, all three approaches built on bright-line rules. Five Justices concluded, as the state had urged, that the Constitution *never* requires jurors to agree as between premeditation and felony-murder theories embodied in a single statute as long as the state has declared them merely different modes of committing a single crime. Among these five, Justice Scalia declined to join Justice Souter's plurality opinion because he disagreed with its articulation of the limits on deference due to a state's definition of what constitutes a single crime. Writing for four dissenters, Justice White concluded, as Schad had urged, that the Constitution *always* requires jurors to agree as between premeditation and felony-murder theories as the basis for a guilty verdict of aggravated murder. Thus, while the Court was badly divided on how to treat Schad's claim, all of the opinions suggested that the problem could be resolved without an analysis of the particular evidence presented at Schad's trial.²⁴⁹

248. *See id.* at 24-25.

The state also argued that Schad's failure to raise the factual divergence claim at trial meant that the Supreme Court should not grant relief unless Schad could demonstrate "plain error." *See* Brief for Respondent at 8-10, 25, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (90-5551). However, this argument was only properly addressed to the Arizona Supreme Court. As Schad noted, *see* Reply Brief for Petitioner at 2, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551), because the Arizona Supreme reviewed his claim on the merits without mention of his failure to raise it at trial and without mention of the source of substantive law it was applying, there were no limitations on the authority of the United States Supreme Court to address Schad's claims. *See generally* *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (ruling that if "it fairly appears that the state court rested its decision primarily on federal law[,] the Supreme Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds.>"). The plurality in *Schad* rejected the prosecution's contention on these grounds. *See Schad*, 111 S. Ct. at 2496 n.2.

249. The Supreme Court also addressed Schad's claim that the trial court had violated due process by refusing his request for a lesser included offense instruction on robbery. *Schad*, 111 S. Ct. at 2504-05. The trial court had given an instruction on second-degree murder and had advised jurors that if they found that Schad was not guilty of first-degree murder, they should consider whether he was guilty of second-degree murder. *See id.* at 2491; Petition for Writ of Certiorari, Appendix C at 7, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551). Schad contended that he was entitled to an instruction on robbery. He alleged that some jurors might have thought he was only guilty of robbery, but, because they were not allowed to convict him of robbery, might have concluded the only plausible alternative was to find him guilty of first-degree murder. He contended that the denial of the instruction in those circumstances violated *Beck v. Alabama*, 447 U.S. 625 (1980). *See* Brief for Petitioner at 20-27, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551). The Supreme Court rejected this argument. *Schad*, 111 S. Ct. at 2504-05. The same four justices who dissented from the denial of relief on the nonconcur-

1. The Plurality Opinion

Justice Souter began his opinion for the plurality by clarifying that Schad's argument really contained two separate questions. First, what was the level of factual specificity at which convicting jurors were required to agree?²⁵⁰ Second, if agreement as to either the premeditation or felony-murder theories was required in Schad's case, did agreement mean a unanimity or only a substantial majority of jurors?²⁵¹ In his brief, Schad had focused largely on the second question.²⁵² Yet, Justice Souter noted that if agreement was not required as between the premeditation and felony-murder theories, the second question became irrelevant. Further, if agreement as between them was required, there really was no question but that, even if agreement meant only a majority of jurors, it could not be assumed to have occurred in Schad's case. Thus, the first question was actually dispositive.²⁵³

Based on the answer to that question, Justice Souter concluded that Schad should lose. First, he implied that a divergence among jurors would have been suspect if Arizona had characterized the premeditation and felony-murder theories as "separate crimes."²⁵⁴ However, he rejected a purported argument by Schad that premeditated murder and felony murder were separate crimes under Arizona law.²⁵⁵ The Arizona Supreme Court had declared repeatedly

rence claim dissented from the denial of relief on this claim. *See id.* at 2511-13 (White, J., dissenting). There was a majority opinion for the Court on this claim, however, because the remaining five justices agreed on the analysis. *See id.* at 2494, 2504-05.

250. *See* Schad, 111 S. Ct. at 2496.

251. *See id.*

252. *See supra* text accompanying notes 242-45.

253. *Schad*, 111 S. Ct. at 2496.

254. *See id.* at 2498.

255. Justice Souter portrayed Schad as arguing that premeditated murder and felony murder were separate crimes under state law. According to Justice Souter:

[P]etitioner's real challenge is to Arizona's characterization of first-degree murder as a single crime as to which a verdict need not be limited to any one statutory alternative, as against which *he argues that premeditated murder and felony murder are separate crimes* as to which the jury must return separate verdicts. The issue in this case, then, is one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions

Id. at 2496 (emphasis added).

Actually, Schad had emphasized that premeditated murder and felony murder involved distinct factual bases for guilt on which jurors should have to agree as a matter of due process. He had not claimed to know just how the factual materiality standard should be defined. *See, e.g.,* Brief for Petitioner at 10, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551) ("Because the prosecutor sought conviction on alternative factual theories of premeditated and felony murder, the jurors were allowed to concur in a verdict finding that petitioner committed 'first degree murder' without ever reaching unanimous agreement—or even majority consensus—on the underlying facts constituting the elements of the first-degree offense."); *id.* at 17-18 ("[T]he prosecutor was permitted to obtain a conviction by persuading half the jury of each of two independent, alternative factual scenarios."); *id.* at 19 ("The constitutional trouble

that they were not separate crimes,²⁵⁶ and the Arizona court was the proper authority to define the meaning of the Arizona statute.²⁵⁷ For the same reason, Justice Souter rejected the contention he perceived in Judge Wisdom's opinion in *United States v. Gipson*,²⁵⁸ that federal courts should decide what are separate crimes under state law according to what appeared to be distinct "conceptual groupings."²⁵⁹ He also rejected the contention he perceived in Justice White's dissent that federal courts should declare the meaning of state statutes as a matter of state law according to linguistic distinctions drawn in the statutes.²⁶⁰ Justice Souter concluded: "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law."²⁶¹

. . . is that under Arizona procedure the prosecutor needed to convince no more than six jurors of either of the two alternative factual propositions on which petitioner's conviction and death sentence depend.").

In two instances Schad suggested in his pleadings that these were separate crimes, but those statements could not fairly be read as other than an argument about how the two theories should be viewed for purposes of the concurrence problem under the Constitution. They also could not fairly be read as a concession that the standard for determining factual materiality for those purposes was whether the separately cognizable bases for liability constituted "separate crimes." In his opening brief, Schad at one point said:

[A]lthough Arizona purports to require the jury to unanimously agree on the verdict in capital cases, it includes two conceptually and factually different offenses, premeditated murder and felony murder, under the rubric of first degree murder. If a prosecutor seeks conviction based on *alternative factual theories*, Arizona procedure permits the jury to convict when no more than six jurors are convinced beyond a reasonable doubt as to what it was the petitioner did.

Id. at 8. In his reply brief, Schad also entitled one subsection as follows: "Premeditated Murder and Felony Murder are Two Distinct Offenses." Reply Brief for Petitioner at 4, Schad v. Arizona, 111 S. Ct. 2491 (1991) (No. 90-5551). Nonetheless, that Schad was basing his argument on the Constitution and that he also did not pin his position on a separate crimes standard of materiality is obvious from his heading to the section that encompassed that subargument: "Respondent's One Offense Rationale Is Irreconcilable With Due Process and Sixth Amendment Guarantees." *Id.* at 3.

256. See *supra* text accompanying notes 239-42.

257. See *Schad*, 111 S. Ct. at 2499.

258. 553 F.2d 453 (5th Cir. 1977), discussed *supra* notes 7-15 and accompanying text.

259. See *Schad*, 111 S. Ct. at 2498-99. However, Judge Wisdom did not claim to identify limits in state law, but rather in the Sixth Amendment right to a jury trial. See *supra* text accompanying notes 14-15, 127-30.

260. See *Schad*, 111 S. Ct. at 2499. However, Justice White grounded the limits, not in state law, but in the Fourteenth Amendment's Due Process Clause. See *infra* text accompanying notes 286-98.

261. *Schad*, 111 S. Ct. at 2499. It was not apparent that either Schad in his written pleadings, Judge Wisdom in his *Gipson* opinion, or Justice White in his dissenting opinion actually had argued that the United States Supreme Court should define the Arizona statute as a matter of state law. See *supra* notes 255, 259-60. In oral arguments before the Court, Schad's counsel

Justice Souter emphasized that the only genuine issue was whether failing to require convicting jurors to coalesce behind one form of murder or the other violated due process.²⁶² He also answered that question negatively.²⁶³ Justice Souter first claimed support from the Court's "burden-shifting" cases for deference to the propriety of Arizona's procedure. In those decisions, the Court addressed the validity of a state's definition of an offense so as to exclude a particular fact from those to be proved beyond a reasonable doubt, typically by placing the burden of persuasion on the defendant. For example, the Court upheld a state's ability to require the defendant to prove self-defense by a preponderance of the evidence in *Martin v. Ohio*.²⁶⁴ *Patterson v. New York*²⁶⁵ also authorized states to shift the burden to the defendant in a murder case to show by a preponderance that his crime was only manslaughter because of his extreme emotional disturbance.²⁶⁶ Of course, in *Mullaney v. Wilbur*,²⁶⁷ the Court declined to allow states to shift

did at times suggest that premeditated murder and felony murder were "separate crimes." Schad's counsel argued at one point, for example, that, "it's our position that these are two separate crimes regardless of what Arizona calls it." Recorded Arguments, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (on file with the author). Nonetheless, as even this quoted statement suggests, Schad meant that the two routes to a first-degree murder conviction ought to be viewed as separate crimes for purposes of analyzing the nonconcurrency problem as a matter of federal due process.

Justice Souter's discussion, moreover, actually was more muddled than the text here suggests. He discussed due process principles and limitations on a state's definition of crimes in reaching his conclusion that state courts are the arbiters of the meaning of state laws. See *Schad*, 111 S. Ct. at 2497-98. Consequently, he implied that he already had concluded that due process did not limit the Arizona courts from enforcing the statute consistently with its own interpretation of it.

262. Justice Souter stated:

The issue in this case therefore is not whether "the State must be held to its choice," for the Arizona Supreme Court has authoritatively determined that the State has chosen not to treat premeditation and the commission of a felony as independent elements of the crime, but rather whether Arizona's choice is unconstitutional.

Schad, 111 S. Ct. at 2500 (citation omitted).

The plurality also clarified that the constitutional question implicated only due process, not the Sixth Amendment right to a jury trial. See *id.*

263. Justice Souter had already noted that vagueness was a grounds for challenging a statute under the Due Process Clauses. See *id.* at 2497-98. Schad had not raised a vagueness challenge to the Arizona statute, however, and it was plain enough that a vagueness claim was not apt.

264. 480 U.S. 228, 236 (1987).

265. 432 U.S. 197 (1977).

266. *Id.* at 210. For another recent example, see *Medina v. California*, 112 S. Ct. 2572 (1992), in which the Court upheld a state statute providing that criminal defendants who claim mental incompetence must prove their incompetence by a preponderance of the evidence. *Id.* at 2577; see also *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) (holding that Pennsylvania could characterize the possession of a firearm during the commission of an offense as only an aggravating factor for sentencing purposes, rather than as an element of the offense, and, thereby, avoid bearing the stringent *Winship* standard of proof on that question).

267. 421 U.S. 684 (1975).

the burden to a murder defendant to prove that his heat of passion based on provocation reduced the crime to manslaughter.²⁶⁸ Further, in *Sandstrom v. Montana*²⁶⁹ the Court concluded that in prosecutions for deliberate homicide a state could not shift the burden of proving lack of intent to the defendant through an instruction creating a presumption that the defendant possessed an intent to kill.²⁷⁰ Indeed, Justice Souter admitted that the Court had encountered "difficulty" in deciding, "as an abstract matter, what elements an offense must comprise."²⁷¹ Yet, he did not claim that the burden-shifting decisions logically compelled the plurality's conclusion in *Schad*. He only claimed that they indicated the propriety of some deference to state courts in defining the "fact[s] necessary to constitute the crime."²⁷²

Justice Souter found more "concrete" support for his conclusion in history.²⁷³ States had begun defining premeditated murder and felony murder in their first-degree murder statutes two hundred years earlier, and in many states those statutes still existed. Also, most state court decisions addressing this issue, beginning with *People v. Sullivan*,²⁷⁴ had concluded that jurors need not coalesce behind either theory to find a defendant guilty of first-degree murder. Many states treated premeditation and the commission of a felony as "mere means of satisfying a *mens rea* element of high culpability."²⁷⁵ Though not dispositive, this long and continuing history was a strong indicator that fundamental fairness and rationality did not require what *Schad* requested.²⁷⁶

Beyond historical support for Arizona's practice, however, Justice Souter offered little explanation of what factors warranted the conclusion that Arizona's practice passed constitutional muster. He noted that distinct modes of conduct prohibited under a single offense and enforced as a single crime might, nonetheless, warrant treatment as separate crimes if the alternative modes appeared to involve different degrees of culpability. However, he declared that one could reasonably think that felony murder is as abhorrent as premeditated murder so they were not separate crimes on this rationale.²⁷⁷

268. *Id.* at 704.

269. 442 U.S. 510 (1979).

270. *Id.* at 524; accord *Francis v. Franklin*, 471 U.S. 307, 325 (1985); see also *Carella v. California*, 491 U.S. 263, 266 (1989) (holding violative of due process an instruction that the failure to return rented personal property within 20 days after owner has made written demand creates a conclusive presumption of an intent to commit fraud by theft).

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

272. *Id.*

273. *Id.* at 2501.

274. 65 N.E. 989 (N.Y. 1903).

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

276. *Id.* at 2501-03.

277. Justice Souter said:

Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental

Justice Souter said other factors might be relevant to the inquiry, but he did not explain them.²⁷⁸ He apparently decided that any other considerations were either irrelevant to Schad's case or relatively insignificant. The considerations already mentioned, he declared, "suffice to persuade us that the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality."²⁷⁹

2. Justice Scalia's Concurrence

Justice Scalia's disagreement with the plurality focused on the reasons why due process did not proscribe the Arizona procedure. Justice Scalia concluded that a long, broad and continuing history supporting a state practice immunizes the practice from due process attack. He contended that "[i]t is precisely the historical practices that *define* what is 'due.'"²⁸⁰ According to Justice Scalia, because there was strong historical support for the challenged Arizona practice, it unquestionably did not violate due process.²⁸¹ "Fundamental fairness' analysis may appropriately be applied to *departures* from traditional American conceptions of due process; but when judges test their individual notions of 'fairness' against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges."²⁸²

Justice Scalia underscored his argument by demonstrating that the plurality was unable to offer a satisfactory explanation for concluding that the Arizona procedure satisfied due process if the historical evidence was not dispositive. He noted that the plurality's only point was that felony murder and premeditated murder could be viewed as equally depraved. Yet, he contended that, if history was not dispositive, this could not constitute the only additional consideration. Otherwise, the Court might have to allow states to support a single count of assault with allegations that the defendant assaulted different victims on different days, although half the jury believed as to each incident that the defendant was not guilty.²⁸³ "Thus, the plurality approves the Arizona practice . . . because it meets *one* of the conditions for constitu-

element of a single offense.

Id. at 2503-04.

278. According to Justice Souter:

We would not warrant that these considerations exhaust the universe of those potentially relevant to judgments about the legitimacy of defining certain facts as mere means to the commission of one offense. But they do suffice to persuade us that the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality.

Id. at 2504.

279. *Id.*

280. *Id.* at 2507 (Scalia, J., concurring in part and concurring in judgment) (emphasis in original).

281. *Id.* at 2506-07.

282. *Id.*

283. *See id.*

tional validity. It does not say what the *other* conditions are, or why the Arizona practice meets them.²⁸⁴ However, in the end Justice Scalia concluded that even the plurality's moral equivalency contention derived merely from history.²⁸⁵

3. The Dissenting Opinion

Writing for the dissenters, Justice White concluded that the potential for disagreement among jurors between the premeditation and felony-murder theories required reversal of *Schad*'s conviction. Like the justices in the majority, Justice White viewed the question of what the jurors had to agree on as implicating only due process.²⁸⁶ He concluded that the controlling principle was *Winship*'s command that a conviction rest on "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged."²⁸⁷ Implicitly, he concluded that when half the jurors agree that the defendant committed premeditated murder but conclude that he is not guilty of felony murder while half believe just the reverse, a reasonable doubt exists that the defendant is guilty of either premeditated murder or felony murder. Justice White also contended that precisely this possibility for disagreement existed in *Schad*.²⁸⁸

Justice White seemed to adopt a "separate-crime" standard to determine what are materially different bases of liability²⁸⁹ and simply disagreed that premeditated murder and felony murder are not separate crimes. He built his argument on the contention that these alternative modes of first-degree murder involve "divergent routes possessing no elements in common except the fact of a murder."²⁹⁰ He noted that felony murder, unlike premeditated murder, does not require that the defendant committed the killing or intended to kill as long as he participated in the alleged felony. At the same time, unlike premeditated murder, felony murder requires that the defendant intended to commit and actually committed the alleged felony.²⁹¹ He pointed out that

284. *Id.*

285. *See id.*

286. *See id.* at 2508 (White, J., dissenting). Hence, the dissenters, like the majority justices, avoided the question whether the unanimity aspect of the Sixth-Amendment right to jury trial applied to the verdict in capital cases in state court. For more on this potential unanimity argument, see *supra* text accompanying notes 88-91.

287. *Schad*, 111 S. Ct. at 2508 (quoting *Winship*, 397 U.S. at 364).

288. *See id.* at 2509.

289. Justice White at one point suggested that a material divergence could not arise based on different factual theories revealed in the evidence as to how a particular "element" of a crime was satisfied. Evidence may reveal theories as to how a particular element was satisfied that would cast doubt on the defendant's guilt if the jury could not coalesce behind one or the other or both of them. *See supra* text accompanying 146-55. The failure of the rationale advanced by Justice White to acknowledge that point suggests that he was applying the distinct-crime standard.

290. *Schad*, 111 S. Ct. at 2508.

291. *Id.*

the prosecutor's own summation to the jury emphasized these different factual requirements.²⁹² Hence, the plurality was patently wrong in suggesting that these two theories of murder merely include different *mens reas*.²⁹³ More importantly, because each of them involve what are "elements" of state of mind and action that the other does not, they are different crimes for juror agreement purposes as a matter of due process, despite any characterization attached to them or to the factual showing required to establish them by the Arizona Supreme Court.²⁹⁴

Justice White emphasized that the issue was not one of deference to states in their capacity to define criminal conduct. Arizona was free to describe both premeditated murder and felony murder in a single statute. It was likewise free to call both offenses first-degree murder. Arizona simply was not free to allow jurors to find an offender guilty of first-degree murder without agreeing on a premeditation or felony-murder theory given that those theories involved different elements.²⁹⁵

Justice White also argued that the Court's burden-shifting cases supported his position, not that of the plurality justices; however, he couched his argument again on grounds that premeditated murder and felony murder embodied sets of elements that differed from each other.²⁹⁶ Justice White conceded that the Court had granted states some authority to declare certain facts to be other than "elements," which eliminated the requirement that the state bear *Winship*'s high burden of proof concerning them. Nonetheless, the Court had refused to allow states to shift the burden on what the Court had found to be an element.²⁹⁷ Moreover, Justice White emphasized that the disparity in elements between premeditated murder and felony murder was obvious from the statute despite any different characterization of the two alternatives by the Arizona Supreme Court: "To allow the State to avoid the consequences of its legislative choices through judicial interpretation would permit the State to escape federal constitutional scrutiny even when its actions violate rudimentary due process."²⁹⁸

292. See *id.* For the prosecutor's statements to the jury on this score, see *supra* note 235.

293. See *Schad*, 111 S. Ct. at 2509.

294. See *id.* at 2508-09.

295. See *id.* at 2509 ("While a State is free to construct a statute in this way, it violates due process for a State to invoke more than one statutory alternative, each with different specified elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt.").

296. See *id.* at 2510.

297. See *supra* text accompanying notes 267-72.

298. *Schad*, 111 S. Ct. at 2511. Justice White also noted that the trial court at sentencing had taken the jury's verdict as a finding that *Schad* was guilty of both premeditated murder and felony murder. He pointed out that it was impossible to know whether the jury had found that the murder was premeditated because it had only rendered a general verdict. Consequently, he concluded that, when the death penalty applies, the use of a general verdict that allows a finding of guilt based on either a premeditation or felony-murder theory violates the Constitution for a separate reason. He concluded that it "creates an intolerable risk that a sentencing judge may subsequently impose a death sentence based on findings that contradict those made by the jury during the guilt phase, but not revealed by their general verdict." *Id.*

C. A Critical Appraisal

None of the opinions in *Schad* embrace the approach advocated in this Article for evaluating factual nonconcurrency claims. Justice Souter, for the plurality, concluded that agreement is *never* required between the premeditation and felony-murder theories in the Arizona statute because they were characterized and enforced as a single crime under state law, there was historical precedent for that approach, and the culpability associated with each kind of murder was reasonably viewed as comparable. Justice Scalia, concurring, concluded that agreement is *never* required simply because historically agreement as between these two modes of murder was not required under identical or similar statutes. Justice White, for the dissenters, concluded that agreement is *always* required because premeditated murder and felony murder really were separate crimes for juror agreement purposes, regardless of what the Arizona Supreme Court said about them. While these three approaches all differ from each other, they share a common feature that distinguishes them from the approach advocated here: they all assume that factual nonconcurrency claims can be analyzed without reference to the evidence presented. Further, all three approaches fail to articulate the explanation this Article offers as to why due process sometimes requires agreement among convicting jurors as between divergent bases for liability: the conviction of those who have not violated any criminal prohibition should be avoided.

Factual nonconcurrency claims involving allegations of premeditated murder and felony murder under first-degree murder statutes present no special difficulty. First, because premeditated murder and felony murder potentially involve different courses of conduct, they present conceptually severable bases of liability. That is clear enough. A court must then determine whether the failure to agree between these alternatives represents a material divergence. However, that question cannot be resolved in the abstract. The answer depends on the evidence in the case. The general inquiry is whether a failure to agree on one or both bases of liability would raise doubt that the offender engaged in any conduct that amounted to first-degree murder. If so, the failure of the trial court to take remedial action should be viewed as error. Nonetheless, a court still must ask on appeal if there is a likelihood that jurors disagreed between the two theories as the basis for liability. If there is no reasonable likelihood of disagreement, any error was harmless.

Resolving *Schad's* claim under this analysis is easy. It is unnecessary to determine whether a failure by *Schad's* jury to agree on a premeditation or felony-murder theory would undermine confidence in his guilt. Any error in failing to take remedial action at *Schad's* trial was appropriately viewed as harmless; reasonable jurors could not have disagreed between the two theories. A juror perhaps could have doubted that *Schad* perpetrated a premeditated murder of Grove but still concluded that he participated in a robbery during which Grove was murdered. However, no reasonable juror could have concluded that *Schad* was guilty of premeditated murder, but not guilty of felony murder. The evidence did not support such a view. Indeed, *Schad's* lawyers in the Supreme Court did not suggest how a juror reasonably could

have found Schad guilty under the premeditation theory but not guilty under the felony-murder alternative.²⁹⁹ Harmless-error analysis need not account for the possibility that some jurors could adopt a particular view of liability through conjecture or tortured reasoning.³⁰⁰

The failure to consider the harmless question is the most obvious basis for criticizing Justice White's dissent. Justice White concluded that the failure of the trial court to require agreement on a theory of first-degree murder was error. In his view, this failure warranted "reversal of [Schad's] conviction" ³⁰¹ Yet, his opinion contains no clue as to why any error

299. The only possibilities suggested in Schad's Supreme Court briefs for how a juror could have doubted that Schad committed felony murder but, nonetheless, killed Grove would have rendered Schad guilty merely of second-degree murder. Even these suggested alternatives were speculative and were never presented to the jury, as Schad's initial brief underscored:

"In this case," the prosecutor argued, "both types of first-degree murder apply."

. . . . The argument for premeditated murder was based exclusively on a discrete factual proposition: that Mr. Grove was strangled with a thin rope and "strangling the . . . life out of someone with a rope is probably one of the best examples we can think of of premeditation." . . . The argument for felony murder was based exclusively on a different factual proposition: that petitioner's connection with the murder was proved by his possession of Mr. Grove's personal effects—car, credit cards, etc; *ergo* Mr. Grove "was the victim of a robbery." . . . Alternative possible factual scenarios, such as an accidental killing by strangulation in the course of a medically recognized form of deviant sex play (which would be second degree murder in Arizona) or a malicious, but undeliberated, murder followed by the formation and action upon an intent to steal the victim's personal effects (also second degree murder) were ignored . . .

Brief for Petitioner at 18-19, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551). Furthermore, the jury presumably did not believe that the theories suggested in Schad's brief were consistent with what had occurred. The trial court gave an instruction on second-degree murder and instructed jurors that if they found that Schad was not guilty of first-degree murder, they should consider whether he was guilty of second-degree murder. *See* Petition for Writ of Certiorari, Appendix C at 7, *Schad v. Arizona*, 111 S. Ct. at 2491 (1991) (No. 90-5551). However, the jury found Schad guilty of first-degree murder, despite its option to convict him only of the second-degree offense.

There also was no discussion at the oral argument before the Supreme Court about how a juror rationally could have found Schad guilty under a premeditation theory without concluding that he was guilty under the felony-murder theory. *See* Recorded Arguments, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (on file with the author).

300. *See, e.g.,* Scarborough v. United States, 522 A.2d 869, 874 (D.C. 1987) (en banc) ("[W]e are not permitted to find reversible error when the only basis for perceiving the jury's verdict was not unanimous would be that the jury acted irrationally."); *see generally* Stacy & Dayton, *supra* note 183, at 126-42.

The Supreme Court often remands to the lower appellate court for an inquiry into harmless question rather than devoting the resources necessary to resolve the question. *See, e.g.,* Rose v. Clark, 478 U.S. 570, 584-85 (1986). The dissenters in *Schad* perhaps could have advocated that course. Nonetheless, where the respondent has argued harmless question and the petitioner cannot offer a plausible rebuttal, such a remand would not appear warranted. The Supreme Court itself could appropriately declare any error harmless.

301. *Schad*, 111 S. Ct. at 2508.

would not be harmless, although the prosecutors presented a harmlessness argument in their pleadings.³⁰² Schad's conviction would more plausibly have merited reversal because of the dearth of evidence demonstrating that he was guilty of murdering Grove under any theory³⁰³ rather than because the jurors reasonably could have divided between the premeditation and felony-murder alternatives.³⁰⁴

The dissent justifiably criticized the plurality's approach to identifying errors based on factual nonconcurrence. However, here as well Justice White missed the mark. Justice White concentrated on establishing that premeditated murder and felony murder involve separate elements and, thus, are separate crimes, to show that error occurred in the failure to ensure agreement at Schad's trial.³⁰⁵ There are two problems with this approach. First, no established standard exists for determining what are separate crimes in the context of a factual divergence problem; certainly no natural standard exists by which to determine when alternative methods for violating a statute should be viewed as different crimes. Therefore, Justice White could never convincingly demonstrate that the Arizona court erred in concluding that premeditated murder and felony murder are simply alternative methods of committing first-degree murder. More fundamentally, it is simply wrong to assume that disparate bases for liability must amount to separate crimes for a factual divergence problem to arise. We have seen that multiple factual scenarios that each support what is indisputably a single element of a crime may be so divergent in the context of a particular case that juror disagreement between them casts doubt on whether any prohibited conduct occurred.³⁰⁶ This same conclusion applies where the divergence is between scenarios that constitute premeditated murder and felony murder under a first-degree-murder statute like that addressed in *Schad*.³⁰⁷

302. See *supra* text accompanying note 248.

303. The constitutional standard to be applied by an appellate court in addressing an insufficiency claim derives from the requirement of *In re Winship*, 397 U.S. 358, 361-62 (1970), that the state require its factfinders in criminal cases to apply the standard of proof beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307 (1979).

304. The insufficiency issue was not raised, however. Schad's counsel lamented in his petition seeking review in the Supreme Court that the issue had not been presented on direct appeal. See Petition For Writ of Certiorari at 3 n.4, *Schad v. Arizona*, 111 S. Ct. 2491 (1991) (No. 90-5551).

305. See *supra* notes 298-94 and accompanying text.

306. See *supra* text accompanying notes 146-55.

307. The central problem with Justice White's approach was revealed in his effort to establish that the Court's "burden-shifting" cases supported his position rather than that of the plurality. Justice White concluded that the "burden-shifting" decisions taught that the state could not shift the burden on "elements." He then reiterated his conclusion that premeditated murder and felony murder involve separate elements rather than different ways of satisfying a broader element of first-degree murder. See *supra* text accompanying notes 297-98. The principal flaw with the argument was its assumption that it was necessary to establish that each of the two forms of murder embodied *separate* elements. *Schad* was distinguishable for a different reason from the cases in which the Court had allowed states to shift the burden of proof on a factual point to the defense. Whether or not they represented *separate* elements, even the state was

For example, consider a case under the Arizona statute in which the problem is more starkly posed than in *Schad*. Assume a defendant is charged with first-degree murder for shooting to death a drug dealer during a hold-up on a street corner. The government's evidence consists partially of an oral statement, purportedly given by the defendant to a police officer, that the defendant killed the victim for revenge because the victim had shot the defendant's brother. The prosecution also calls an informant, who testifies in exchange for leniency in his own prosecution on multiple larcenies. This witness testifies that the defendant told him he had helped two others plan a robbery of the victim the day before it had happened but that he had stayed in the get-away car parked two blocks from the scene when the murder had occurred. The defendant allegedly said that one of the other assailants had shot the victim only when the victim had tried to pull a gun on them. There is no other evidence implicating the defendant in the killing. Further, the defendant testifies that he had no involvement in the incident although he was arrested too long after it occurred to remember where he was on the night of the shooting. He claims that the police officer distorted his statement; he had only said that he would liked to have been the one who killed the victim because the victim had shot his brother. He also testifies that the informant is falsely implicating him, presumably to gain leniency in his own prosecutions.

This scenario presents a legitimate factual nonconcurrence problem regardless whether Arizona has declared premeditated murder and felony murder only different modes of committing a single crime. It is plausible that convicting jurors here could hold different views about what prohibited act the defendant committed. Some jurors might believe that the defendant personally killed the victim for revenge and that either he lied to the informant about his role as a driver in a robbery or that the informant lied in his testimony. These jurors could find the defendant guilty only under a premeditated-murder theory. Other jurors might believe that the defendant was absent from the scene of the killing, but that he nonetheless had participated in the robbery as the get-away driver. These jurors could find the defendant guilty only under a felony-murder theory. Without remedial instructions, moreover, the jury could find the defendant guilty of first-degree murder despite the disagreement over the facts. However, the disagreement between the two theories in this situation would undermine confidence in the guilty verdict. If half the jurors disbelieve that this defendant committed a premeditated murder and the other half disbelieve that he committed a felony-murder, there is reasonable doubt that he engaged in any conduct that amounted to first-degree murder. In this context, there is a dearth of evidence, other than that revealing the divergent scenarios, to establish either that the defendant killed or assisted in the killing

bound to concede that one or the other or both courses of conduct described as premeditated murder or felony murder had to be established for first-degree-murder to have occurred. Yet, when jurors in a first-degree murder case cannot agree on whether a defendant committed premeditated murder or felony murder, the disagreement can cast doubt on whether the defendant engaged in either course of conduct. Hence, a state's characterization of the two alternatives as a single crime does not mean that juror disagreements between them are always immaterial.

or that the killing involved either a premeditated intent to kill or the *mens rea* associated with the commission of the robbery.

Contrary to the dissenters' view, however, a division among jurors over whether a defendant was guilty under a premeditation theory or a felony-murder theory would not always be material. For example, assume that the prosecution presents the same evidence as in the hypothetical just mentioned. Assume also that the defendant was stopped for reckless driving in a car with two passengers, five minutes after the murder and only a few blocks from the scene of the killing. Police officers testify that a gun, which ballistics evidence reveals to be the murder weapon, was found under the driver's seat. Officers also testify that the defendant had gunpowder residue on his hand and fresh blood on his shirt, which turns out to match the blood of the victim. A priest walking his dog also testifies that he saw the defendant approach the victim with a gun drawn, shoot him, and then quickly drag him out of view. In addition, assume that the defendant presents no witnesses and no plausible defense through cross-examination. In these circumstances, jurors should not necessarily have to resolve which theory of first-degree murder applies to find the defendant guilty. A court could find that the evidence revealed no feasible basis to see the killing as other than one of the two forms of first-degree murder. A court could also find convincing evidence, apart from the evidence warranting disagreement over which form of first-degree murder it was, indicating that the defendant was the killer. In that case, a court should conclude that division among jurors over whether the killing was a premeditated murder or a felony-murder would not create a reasonable doubt that the defendant committed first-degree murder. Therefore, agreement on that issue among jurors is not essential.³⁰⁸

The inability of both the plurality and the dissent in *Schad* to suggest how to decide what are appropriately viewed under due process as "single" and "separate" crimes underscores the disconnection between that standard and the actual explanation for demanding factual concurrence among jurors.³⁰⁹ Other than history, which the plurality conceded was not dispositive, the plurality indicated that courts should ask whether two scenarios could be

308. One can posit harder cases; factual nonconcurrence questions are not always easily decided. The point is simply that there are some first-degree murder cases in which a divergence among jurors between premeditation and felony-murder theories definitely undermines confidence in the defendant's guilt and others in which it definitely does not. That conclusion goes far towards establishing the impropriety of either never requiring convicting jurors to resolve such potential divergences or always requiring them to resolve them.

309. The plurality's discussion of the vagueness decisions, *see Schad*, 111 S. Ct. at 2497-98, discussed *supra* note 263, also distracted from the real point. Vagueness doctrine could be seen as supporting *Schad*'s position in that it underscores our belief that criminal jurors must agree on the existence of a prohibited act at a fairly specific factual level to find a criminal defendant guilty. However, that *Schad*'s claim did not fit under existing vagueness doctrine suggested nothing about the validity of his claim. For example, where two incidents of specific conduct are alleged as a single violation of a highly specific criminal prohibition, there is no vagueness claim. Nonetheless, there may still be a claim that the jury's inability to agree on the basis for liability between the two incidents would cast doubt on whether the defendant engaged in any prohibited conduct. Justice Souter conceded this point in a footnote. *See id.* at 2498 n.4.

viewed as involving equally culpable conduct. Of course, as Justice Scalia noted, the moral equivalence of the conduct embodied in the two theories does not respond to the central argument in a factual nonconurrence claim: There is doubt that either scenario is true. Yet, the plurality offered no other suggestion about how to distinguish a single crime from multiple crimes. Hence, while the plurality confirmed that due process is "always open to critical examination,"³¹⁰ it failed to suggest a principled approach by which to conduct such an evaluation.

The dissent's approach was equally flawed. Justice White seemed to say that where a state legislature creates a statute depicting separate paths to conviction through separate elements, "the State must be held to its choice."³¹¹ However, this surely cannot mean that merely because a legislature in a single statute describes multiple factual scenarios, each justifying criminal liability, that the distinctions must be viewed as separate elements and, thus, separate crimes. As demonstrated above, a statute could prohibit the carrying of a long list of prohibited weapons. The inability of jurors to agree on what weapon the defendant carried would not always undermine confidence in the conclusion that the defendant carried a weapon covered by the statute.³¹² Likewise, we have seen that a nonconurrence problem can arise where no distinction is articulated in the statute.³¹³ Hence, it remains essential under Justice White's view to explain how a court should decide when distinctions connote different "elements" as opposed to mere alternative "modes" for satisfying a more broadly characterized "element." Yet, the dissenters offered no more guidance on how to resolve this problem than the plurality.

Justice Scalia avoided the problem by applying a standard that, while controversial, is at least sometimes clear. Whenever a state practice is widely followed and has been followed for a long time, Justice Scalia concluded, it cannot violate due process.³¹⁴ Therefore, history alone is sometimes dispositive for Justice Scalia, and that is true in *Schad*.³¹⁵ As long as "the trial is had according to the settled course of judicial proceedings," a practice alleged to risk conviction of the innocent is, nonetheless, immune from evaluation.³¹⁶ If Justice Scalia's conception of due process were correct, of course, my contentions would fail. Even more plainly than with the ap-

310. *Id.* at 2503.

311. *Id.* at 2510.

312. See *supra* text accompanying note 165.

313. See *supra* text accompanying notes 167-68.

314. See *Schad*, 111 S. Ct. at 2507 (Scalia, J., concurring in part and concurring in judgment). This view, which Justice Scalia has espoused elsewhere, has been called the "historicist model" of due process. See Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 542 (1992).

315. Justice Scalia does not suggest by what standards courts should judge practices that do not bear the support of history, although he concedes that they may be upheld. He also does not explain why history should be dispositive on one account but not on the other.

316. *Schad*, 111 S. Ct. at 2507 (Scalia, J., concurring in part and concurring in judgment) (quoting *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875)).

proaches of the other Justices, this view conflicts with the notion that the basis for a factual concurrence mandate is to protect the innocent from conviction. Yet, if history is important in interpreting the Due Process Clauses, it is worth noting that Scalia's rigid view conflicts with the basic notion of due process embodied in Supreme Court opinions over the last seventy-five years.³¹⁷

317. On numerous occasions in the 1800s, the Court concluded that due process imposed little more than a requirement that there exist proper jurisdiction in the lower court over the proceedings. For example, in *Kennard v. Louisiana ex. rel. Morgan*, 92 U.S. 480 (1875), in which the claim concerned whether the deprivation of a judicial post was effected in accordance with due process, the Court declared, "Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all." *Id.* at 481; *see also* *Caldwell v. Texas*, 137 U.S. 692, 698 (1891) (dismissing due process claim to insufficiency of criminal indictment because this was only an allegation of error "in the disposition of a subject within [the state court's] jurisdiction"); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (declaring in a civil case that due process required only "a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit"); *Ex parte Watkins*, 28 U.S. 193, 203 (1830) ("[a]n imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court [issuing it] has general jurisdiction of the subject, although it should be erroneous"). In 1915, in the famous case of *Frank v. Magnum*, 237 U.S. 309 (1915), involving Leo Frank's conviction and death sentence for murder in Georgia, the Supreme Court actually carried this notion farther. It rejected Frank's due process claim that his trial had been mob dominated on grounds that any due process error at trial had been effectively cured because the state *appellate* proceedings in the case had been conducted by a court with proper jurisdiction. *Id.* at 327-28; *see generally* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 644-46 (1982).

In the criminal-procedure context, the decisive shift began with *Moore v. Dempsey*, 261 U.S. 86 (1923). There, the Court concluded that petitioner's allegation that his trial had been mob dominated stated a cognizable claim under the Due Process Clause despite the normalcy of state appellate review and the prior "tradition" reflected in *Frank*. *Id.* at 90-91. The notion that due process proscribes practices despite the historical support for them also underlies much of modern constitutional criminal procedure. *See, e.g.,* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-63 (1972) (declaring vagrancy ordinance derived from early English law too vague to satisfy due process); *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972) (declaring the death penalty a violation of the Eighth and Fourteenth Amendments when administered according to standardless sentencing schemes despite the longstanding use of such schemes); *In re Winship*, 397 U.S. 358, 368 (1970) (declaring the reasonable doubt standard applicable to all criminal cases and holding that it applied in juvenile delinquency proceedings as well, though no such tradition existed regarding delinquency proceedings); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding applicable to the states as part of the fundamental fairness required by due process the Sixth Amendment right to counsel in criminal trials despite a contrary tradition); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding exclusionary rule for Fourth Amendment violations applicable to the states as part of due process despite long and broad history of opposition within the state courts to exclusionary sanction for such violations); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (finding due process right of indigent to transcript on appeal despite existence of historical practice of not providing such transcripts); *see also* *Medina v. California*, 112 S. Ct. 2572, 2582 (1992) (O'Connor, J., concurring) ("[W]e have required States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution."); *see generally* L'FAVE & ISRAEL, *supra* note 203, at 56-73 (discussing Court's historical approach

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The plurality and Justice Scalia also assumed that the relevant history was that to be gleaned from state practices concerning the narrow problem presented by first-degree murder statutes incorporating premeditation and felony-murder theories. However, if the historical inquiry had focused on the treatment of factual divergence problems in general, it would have been difficult to claim a stable consensus concerning when a right to factual concurrence instructions should arise.³¹⁸ It would surely have been difficult to claim such a consensus if the inquiry had focused on the historical practice identified in *Winship* of enforcing the reasonable doubt standard regarding all facts necessary to establish a crime.³¹⁹

Indeed, the plurality justices and Justice Scalia would have done well to openly address the conflicting histories implicated by Schad's claim. Why was a state's practice of always allowing patchwork guilty verdicts between premeditation and felony-murder theories in first-degree murder cases to be valued more than the requirement that the prosecution prove all the facts necessary for a criminal conviction beyond a reasonable doubt? This is the important question that the majority justices failed to address and for which there is no persuasive answer.

VI. CONCLUSION

A factual concurrence mandate follows from the conclusion that due process incorporates a legality ideal. That conclusion is supported by many Supreme Court's decisions.³²⁰ It surely is most clearly revealed in the decision in *In re Winship*.³²¹ The *Winship* holding embodied an innocence-weighted legality ideal: A conviction must rest on proof beyond a reasonable doubt of all the facts necessary to establish a crime.³²² A factual divergence

to due process adjudication); Dripps, *supra* note 40, at 1706-08 (discussing instances in which the Court has "subordinated formal historical concerns to effective enforcement of the substantive constitutional values"); Nowak, *supra* note 72, at 400-01 (discussing Court's historical approach to due process adjudication); cf. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) (opinion of Souter, O'Connor, & Kennedy, JJ., joined by Blackmun, & Stevens, JJ.) (declaring it an "inescapable fact" that judges determining what due process means for the current age must arrive at an answer through "reasoned judgment" rather than mere deference to history); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that Due Process Clause in Fifth Amendment prohibited racial discrimination in school system of the District of Columbia despite a history of school segregation in that city).

318. See, e.g., authorities cited *supra* notes 17, 36.

319. For an illustration of the point, one need only reconsider the Court's decision in *Winship*. There, of course, the court required that the prosecution in criminal cases prove all the facts necessary to establish a crime beyond a reasonable doubt. See *Winship*, 397 U.S. at 364. Nonetheless, *Winship* actually involved the question what standard of proof should apply in juvenile delinquency proceedings. While a historical tradition existed of applying the reasonable doubt standard in adult criminal cases, no such tradition existed regarding delinquency prosecutions. See *id.* at 365-68.

320. See *supra* notes 40-52 and accompanying text.

321. 397 U.S. 358 (1970).

322. *Id.* at 364.

restriction follows from the legality principle because the restriction simply recognizes that sometimes a disagreement among jurors over the factual basis for a guilty verdict undermines confidence that the defendant engaged in prohibited conduct.³²³ When the potential for this kind of disagreement arises, jurors ought to be required to agree upon at least one of the factual alternatives before finding the defendant guilty.³²⁴

The central difficulties in defining factual concurrence doctrine lie in determining when a split among jurors over the factual basis for liability raises doubt about the defendant's guilt and how much potential for disagreement must exist to establish a constitutional error. Not every evidentiary conflict or uncertainty requires resolution among jurors as a prerequisite to a guilty verdict. The question is whether the jurors' inability to agree on a factual issue casts doubt on the conclusion that the defendant engaged in conduct under circumstances that the criminal law prohibits. It is impossible to articulate a bright-line rule that defines an appropriate level of factual specificity at which jurors must agree in all circumstances. Identifying material factual disputes requires a careful analysis of the evidentiary context in which the dispute arises.³²⁵ A constitutional right to remedial action exists when the potential for such a disagreement does arise, but the failure of the trial court to act sometimes is appropriately viewed as harmless error. Determining when a trial court's failure to act amounts to harmless error also requires a thorough analysis of the evidentiary context.³²⁶

Before *Schad v. Arizona*, courts typically misdiagnosed the underlying interests implicated by factual nonconcurrence claims. Some courts failed to acknowledge the constitutional basis for sometimes requiring concurrence among convicting jurors on disputed guilt scenarios. While recognizing the constitutional problem, other courts apparently overestimated the dangers of rule ambiguity involved in attempting to enforce a factual concurrence command. Consequently, they followed a bright-line rule that agreement was not required on alternative guilt scenarios unless they amounted to "separate crimes."³²⁷ An unfounded tendency also existed to assume that jurors reach a shared vision of the criminal act before condemning a criminal defendant.³²⁸ Nonetheless, before *Schad*, an increasing number of courts were recognizing the need for careful analysis of factual nonconcurrence claims to determine when relief was warranted.³²⁹

The *Schad* decision may retard the development of the kind of factual divergence analysis advocated here. It will certainly chill further analysis of problems posed under typical first-degree murder statutes encompassing multiple bases for liability. It may also inhibit the development of analysis of other claims brought in state courts in which the diverging scenarios alleged

323. See *supra* notes 34-35 and accompanying text.

324. See *supra* notes 36-75 and accompanying text.

325. See *supra* notes 105-76 and accompanying text.

326. See *supra* text accompanying notes 210-13.

327. See *supra* notes 105-23 and accompanying text.

328. See *supra* notes 197-209 and accompanying text.

329. See, e.g., authorities cited *supra* note 17.

under a single charge parallel different bases for liability set forth in a single statute. Recognizing that the need for analysis will largely end upon a declaration that the alternatives comprise merely different modes of committing a "single" crime rather than "separate" crimes, courts may simply pursue the "single" crime characterization.

The decision may also inhibit more profoundly the development of factual divergence doctrine. Factual nonconcurrence problems warranting relief can arise even under statutes that only specify a single, general prohibition.³³⁰ Convicting jurors may disagree as to how one or more elements of such a crime were satisfied. Sometimes this disagreement will undermine confidence that the defendant engaged in any proscribed conduct. Yet, none of the *Schad* opinions suggest a basis for concluding that this type of divergence warrants relief. In these kinds of cases, the defendant is often chargeable with only one violation of the statute, and both views as to how the statute was violated reflect the same kind of crime. A court may easily characterize the competing guilt scenarios as only alternative modes of committing a "single" offense. Consequently, these nonconcurrence claims may be even more likely than before to meet rejection.

The Court's decision in *Schad* is cause for concern if one believes that due process demands innocence-weighted decisional standards for determining the existence of elements of crime.³³¹ It is part of our legal tradition that an erroneous conviction is more abhorrent than the failure to convict a guilty person.³³² The Supreme Court also has given substance to this view, particularly in its decision in *Winship*.³³³ Perhaps a majority of the current Court has concluded that due process does not embody an innocence-weighted conception of accuracy in the criminal process. If these Justices believe that due process aims only to reduce the overall number of errors in criminal cases without regard to their allocation,³³⁴ surely less reason exists for concern about many factual nonconcurrence problems. However, if this is the true explanation for the *Schad* decision, we should wonder why the plurality Justices did not reveal it.

330. See *supra* text accompanying notes 165-68.

331. For a more optimistic interpretation of the *Schad* opinions, see LAFAVE & ISRAEL, *supra* note 201, at 1052-54.

332. See *supra* note 59 and accompanying text.

333. See *supra* notes 60-65 and accompanying text.

334. For an argument that several of the Court's pronouncements on constitutional criminal procedure find explanation on this rationale and that the view is not so clearly faithless to the Constitution, see generally Stacy, *supra* note 32, at 1405-35.

