# AGGREGATING IS AGGRAVATING: UNITARY OFFENSES AND THEIR EFFECTS ON DEFENDANT RIGHTS

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*This Note examines how unitary offenses affect defendants' rights in the state of Arizona. In Arizona, first-degree murder, along with several other felony crimes, has been designated a unitary offense—a single offense that can be committed in multiple ways (e.g., premeditation or felony murder). For unitary offenses, a jury must unanimously agree that the offense happened, but it does not have to agree on the exact way in which it happened. This conflicts with a defendant's right to a unanimous jury verdict and proof beyond a reasonable doubt. Unitary offenses also present issues pertaining to a defendant's right to notice of the charges against him. If a defendant is charged with a nonunitary offense and the statute has multiple subsections, the particular subsection that the defendant is being charged under must be listed in the indictment; otherwise, the defendant was not provided sufficient notice. However, unitary offenses do not require the same specificity, calling into question whether a defendant can adequately prepare a defense to the charges brought against him. To examine how unitary offenses affect defendants' rights, this Note analyzes specific Arizona case law, other state and federal case law, and U.S. Supreme Court decisions addressing the issue. In an attempt to preserve the wise and fair administration of justice, this Note also proposes its own theories for addressing some of the negative implications of unitary offenses.*

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## INTRODUCTION

Imagine that you are one of twelve jurors in an Arizona first-degree murder trial. The prosecution has offered evidence that supports both premeditated- and felonious-murder convictions. You and five other jurors are convinced that the defendant is guilty of killing the victim during the commission of a felony. The six remaining jurors disagree with that consensus and, instead, are convinced that the defendant is guilty of a premeditated killing of the victim. Although there is disagreement as to whether the murder was premeditated or felonious, you and your fellow jurors have come to a consensus that the defendant committed first-degree murder. This will be sufficient to meet the jury unanimity requirement of the Sixth and Fourteenth Amendments of the U.S. Constitution[1]—which is also set forth in Article II, section 23 of the Arizona Constitution.[2]

In Arizona, first-degree murder, along with several other felony crimes,[3] has been designated as a unitary offense—a single crime that can be committed in

1. U.S. CONST. amend. VI (jury trials for crimes, and procedural rights for criminal prosecutions); U.S. CONST. amend. XIV, § 1 (providing that no state shall "deprive any person of life, liberty, or property, without due process of law").

2. ARIZ. CONST. art. II, § 23 ("In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict."); State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982) (holding that unanimity of first-degree murder does not require jurors to agree on premeditated or felony murder so long as they agree that the defendant is guilty of one or the other).

3. State v. Schad, 788 P.2d 1162, 1168 (Ariz. 1989), *aff'd sub nom*. Schad v. Arizona, 501 U.S. 624 (1991) (first-degree murder); State v. Valentini, 299 P.3d 751, 754

multiple ways.[4] This means that, if the jury unanimously agrees that the crime was committed, that is enough to render a guilty verdict—even if there is disagreement as to *how* the crime was committed.[5]

When a statute designates a crime as a unitary offense, the different modes of commission may be listed out in separate subsections,[6] or a single section may list the multiple modes of commission.[7] Arizona courts have interpreted that these statutes do not require jurors to unanimously agree upon the mode that was used, so long as they agree that the offense was committed by means of one of the statute's enumerated modes.[8]

The Due Process Clause of the U.S. Constitution establishes that a defendant cannot be convicted of a particular crime unless the prosecution proves that the defendant is guilty beyond a reasonable doubt.[9] In order for the prosecution to meet this burden of proof, it must convince the fact finder beyond a reasonable doubt that the defendant committed *each* element of the crime.[10] Additionally, the Sixth Amendment and many state constitutions stipulate that a jury's guilty verdict must be unanimous.[11] That said, if a jury can render a guilty verdict notwithstanding its inability to agree upon the mode by which an offense is committed, this most certainly undermines a primary objective of the Due Process Clause: to ensure that a defendant is not convicted of a crime without sufficient proof of the defendant's guilt. If the jury cannot agree on how a defendant committed a particular crime, it is not clear that the state has met its burden of proving beyond a reasonable doubt that the defendant actually committed the crime. This court-made caveat most certainly creates issues with regard to the requirement of jury unanimity as set forth in the Sixth Amendment and many state constitutions.

Not only do unitary offenses present issues pertaining to jury unanimity and guilt beyond a reasonable doubt, but they are problematic with regard to a

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(Ariz. Ct. App. 2013) (second-degree murder); State v. Winter, 706 P.2d 1228, 1231 (Ariz. Ct. App. 1985), *abrogated by* State v. Kamai, 911 P.2d 626 (Ariz. Ct. App. 1995) (theft); State v. Bruni, 630 P.2d 1044, 1049 (Ariz. Ct. App. 1981) (kidnapping).

4. First-degree murder is either committed during the commission of a felony or through premeditation. State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982).

5. *Id*.

6. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1802 (2014).

7. *E.g.*, *id.* § 13-3623.

8. *Encinas*, 647 P.2d at 627.

9. Jackson v. Virginia, 443 U.S. 307, 315 (1979) (citing *In re* Winship, 397 U.S. 358 (1970)).

10. *See In re Winship*, 397 U.S. at 363 ("No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them is sufficient to show beyond a reasonable doubt that the existence of every fact necessary to constitute the crime charged.").

11. In the federal system and in most states—including Arizona—juries are usually comprised of 12 people who must unanimously agree upon guilt in criminal cases. ARIZ. CONST. art. II, § 23. However, states are constitutionally permitted to have juries as small as six in number. Williams v. Florida, 399 U.S. 78, 86 (1970). Furthermore, states are constitutionally permitted to allow nonunanimous jury verdicts by 12-person juries, so long as a "substantial majority" of the jurors vote to convict. Johnson v. Louisiana, 406 U.S. 356, 362 (1972) (upholding a 9-3 guilty verdict).

defendant's right to notice of the charges against him, as set out in the Fifth and Fourteenth Amendments of the U.S. Constitution. Rule 13.2 of the Arizona Rules of Criminal Procedure upholds the Fourteenth Amendment's right to notice[12] by requiring an indictment to disclose the specific statute that the defendant allegedly violated.[13] Accordingly, when an offense is nonunitary and a statute has multiple subsections, Rule 13.2 requires an indictment to disclose the particular subsection that the defendant is being charged under—a citation to the general offense alone is insufficient.[14] However, if the offense is unitary, the prosecutor can indict a defendant under the general statute without specifying any particular subsection.[15] Further, the indictment does not need to allege the specific modes of commission that the prosecutor will attempt to prove during trial.[16]

These procedures give rise to important questions. Given the broad nature of an indictment that references only the general statute, is there another process that can more adequately put a defendant on notice of the charges against him? If so, would that process provide adequate notice to a defendant without limiting the prosecution to presenting only one mode of commission where there is evidence that alternative modes were employed? When a defendant is indicted under the general statute without reference to a particular subsection or mode of commission, does this lack of specificity violate the defendant's right to prepare an adequate defense?[17] And finally, on a more procedural level, if a court has not designated an offense as unitary or nonunitary, when does an indictment under a general statute provide sufficient notice?

In this Note, I will discuss the questions posed above. Although this is a nationwide issue, my analysis is limited to how unitary offenses negatively impact a defendant's Fourteenth Amendment rights to notice, jury unanimity, and proof beyond a reasonable doubt in Arizona.[18] In light of the constitutional issues associated with unitary offenses, I propose a three-part solution.

First, state legislatures should revise criminal statutes to indicate whether proscribed offenses are unitary or nonunitary; this would resolve the problems associated with judicial interpretation, and would provide defendants with proper notice.

Second, state courts should adopt a new rule of criminal procedure focusing solely on unitary offenses. This rule would limit the prosecution's modes-of-

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12. *See* ARIZ. R. CRIM. P. 13.2(a) (requiring that the indictment be "sufficiently definite to inform the defendant of the offense charged").

13. ARIZ. R. CRIM. P. 13.2(b) (requiring that the indictment "state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated").

14. State v. Sanders, 68 P.3d 434, 444 (Ariz. Ct. App. 2003).

15. State v. Winter, 706 P.2d 1228, 1231–32 (Ariz. Ct. App. 1985), *abrogated by* State v. Kamai, 911 P.2d 626 (Ariz. Ct. App. 1995).

16. *Id*.

17. A defendant is entitled to notice so that he may prepare an adequate defense. State v. Maxwell, 445 P.2d 837, 839 (Ariz. 1968) (holding that an indictment "must be sufficiently definite to apprise the defendant so that he can prepare his defense to the charge").

18. However, my proposed solutions would be effective in all jurisdictions that recognize unitary offenses.

commission theories presented at trial to those presented during grand jury proceedings with sufficient evidence. This would provide the defendant with a narrower, more focused indictment that would more accurately put him on notice and allow him to prepare a defense. Moreover, this would ensure that verdicts will be based solely upon modes of commission that are adequately supported by the evidence.

Third, state courts should adopt another rule of criminal procedure requiring that judges give jurors a particular jury instruction before deliberating on whether a defendant is guilty of a unitary offense. If evidence of more than one mode of commission is presented to the jury, the jury should be instructed that they must agree on whether they believe that the defendant employed one, all, or either mode of commission. Meaning, if the jurors cannot unanimously agree on which mode of commission that the defendant employed, then they must agree that the defendant either employed all of the proposed modes of commission or, if he did not employ one mode, then he must have employed the others.

Take, for example, the first-degree murder case above. My suggested rule of criminal procedure would allow the jury to convict the defendant so long as each individual juror's verdict does not contradict another juror's verdict. This means that a defendant charged with the unitary offense of first-degree murder could still be convicted if some jurors, for example, believe that the defendant committed premeditated murder, but not felony murder so long as the remaining jurors either believe that the defendant committed both premeditated and felony murder or if the defendant didn't commit felony murder, he must have committed premeditated murder. A conviction based on such individual jury verdicts is fair because all of the jurors agree that, one way or another, the defendant committed premeditated murder. In contrast, if some jurors agreed that the defendant committed premeditated murder, but not felony murder, and other jurors believed that the defendant committed felony murder, but not premeditated murder, conviction would be improper because the individual jury verdicts would be in direct contradiction.

I do not contend that my suggested reforms are required under current federal or state constitutional law. Rather, state legislatures and courts should implement these reforms because such reforms are reinforced by constitutional text and values, such as: the right to jury unanimity, proof beyond a reasonable doubt, and the right to notice. Ultimately, I make a policy argument about the wise and fair administration of justice and respect for the role of the legislature in defining crime—not an argument that well-established constitutional law must be reversed.

Part I of this Note discusses the concept of unitary offenses in Arizona: what they are and how the determination is made that an offense is unitary. Part II discusses duplicitous indictments—documents that charge a defendant with a single count, but introduce multiple criminal acts as proof—and why they are prohibited. I will then compare duplicitous indictments to unitary offenses and examine the procedures that are allowed when prosecuting a unitary offense, but disallowed when prosecuting a nonunitary offense. Part III will explain how the procedures allowed in prosecuting unitary offenses negatively impact a defendant. These negative impacts are strikingly similar to the ways that a duplicitous indictment negatively impacts a defendant's right to notice and jury unanimity. Part IV will

explore different federal and state court methods employed when dealing with unitary offenses. Part V discusses the U.S. Supreme Court's attempts at addressing the issue. Finally, Part VI proposes solutions to resolve the issues that occur in states as a result of the procedures employed in cases involving unitary offenses—namely, the right to notice, jury unanimity, and proof beyond a reasonable doubt.

## I. WHAT MAKES AN OFFENSE UNITARY IN ARIZONA?

A unitary offense is a single, statutorily defined crime that lists multiple ways in which the crime can be committed.[19] When a crime has been designated a unitary offense, the crime's statute may list the different modes of commission in distinct subsections,[20] or a single section of the statute will list the multiple modes of commission.[21] Using statutory interpretation, courts consider four factors to determine whether a crime is a unitary offense: (1) the section's or subsection's title; (2) whether the criminal acts set forth are perceivably connected; (3) whether the criminal acts "are consistent and not repugnant to each other"; and (4) whether the criminal acts "may inhere in the same transaction."[22]

To better understand this four-factor analysis, take, for example, Arizona's theft statute:

> **§13-1802. Theft; classification; definitions**
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> A. A person commits theft if, without lawful authority, the person knowingly:
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> 1. Controls property of another with the intent to deprive the other person of such property; or
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> 2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or
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> 3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or
>
> 4. Comes into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner and appropriates such property to the person's own or another's use without reasonable efforts to notify the true owner; or
>
> 5. Controls property of another knowing or having reason to know that the property was stolen; or
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> 6. Obtains services known to the defendant to be available only for compensation without paying or an agreement to

19. Schad v. Arizona, 501 U.S. 624, 631 (1991).
20. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1802 (2014).
21. *E.g.*, *id.* § 13-3623.
22. State v. Forrester, 657 P.2d 432, 435 (Ariz. Ct. App. 1982) (citing State v. Dixon, 622 P.2d 501, 508 (Ariz. Ct. App. 1980)).

> pay the compensation or diverts another's services to the person's own or another's benefit without authority to do so; or
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> 7. Controls the ferrous metal or nonferrous metal of another with the intent to deprive the other person of the metal; or
>
> 8. Controls the ferrous metal or nonferrous metal of another knowing or having reason to know that the metal was stolen; or
>
> 9. Purchases within the scope of the ordinary course of business the ferrous metal or nonferrous metal of another person knowing that the metal was stolen.[23]

The court in both *State v. Dixon* and *State v. Forrester* examined Arizona's theft statute using the four-factor analysis.[24] First, the statute is entitled "Theft, classification"[25]—the name indicates that it contains content dealing with a single offense.[26] Second, there is a readily perceivable connection between the various acts set forth within the statute—a jury cannot find that a defendant violated one subsection without necessarily finding that the elements of another subsection were violated.[27] For instance, subsection (A)(1) requires control of the property of another, whereas subsection (A)(2) requires the conversion of the property of another for an unauthorized term or use.[28] "Conversion of the property of another" cannot be achieved without an individual first having "control of the property."[29] Therefore, there is a readily perceivable connection between the subsections.[30] Third, because proof of one subsection does not disprove another, the subsections are not repugnant to each other.[31] Proof that the defendant controlled another person's property with the intent to deprive that person[32] is "not inconsistent with keeping property for an unauthorized time or using it for an unauthorized purpose."[33] Fourth and finally, the modes of commission in each particular subsection of the theft statute adhere to the same act—the "act" being to deprive an individual of his or her property.[34]

Statutes containing unitary offenses list courses of conduct (the *actus reus* component) or states of mind (the *mens rea* component) that are alternative means of committing a single offense.[35] The *actus reus* or the *mens rea* may change, but ultimately the social harm—the harm to the victim—remains the same. For instance,

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23. ARIZ. REV. STAT. ANN. § 13-1802.
24. State v. Dixon, 622 P.2d 501 (Ariz. Ct. App. 1980); State v. Forrester, 657 P.2d 432 (Ariz. Ct. App. 1982).
25. ARIZ. REV. STAT. ANN. § 13-1802.
26. *Dixon*, 622 P.2d at 508.
27. *Id*.
28. ARIZ. REV. STAT. ANN. § 13-1802.
29. *Forrester*, 657 P.2d at 436.
30. *Id*.
31. *Id*.
32. ARIZ. REV. STAT. ANN. § 13-1802(A)(1).
33. *Forrester*, 657 P.2d at 436 (referring to ARIZ. REV. STAT. § 13-1802(A)(2)).
34. *Id*.
35. Schad v. Arizona, 501 U.S. 624, 632 (1991).

in Arizona, first-degree murder, second-degree murder, kidnapping, and theft are all unitary offenses.[36] Arizona's first-degree murder statute consists of one social harm: death;[37] however, the statute includes two different forms of *mens rea*: intentional and knowing; and different *actus reus*: premeditation and during the commission of a felony.[38]

Arizona's second-degree murder statute consists of the same social harm: death;[39] however, the statute includes three different forms of *mens rea*: intentional, knowing, and reckless.[40]

Arizona's kidnapping statute consists of one social harm: the restraint of another person; but the statute has several forms of specific intent: for ransom, for involuntary servitude, to inflict harm, etc.[41]

Finally, Arizona's theft statute also consists of a single social harm: depriving an individual of their property or services; however, there are two forms of *mens rea*: intentional and knowingly; and several forms of *actus reus*: through control, conversion, material misrepresentation, etc.[42]

As illustrated above, state courts determine whether or not an offense is unitary or nonunitary by ascertaining the legislature's intent through statutory interpretation. As a result, offenses are not designated unitary or nonunitary unless the issue is brought to the court's attention. For example, in Arizona, only a handful of offenses have been deemed unitary or nonunitary—for all of Arizona's other statutory offenses, it is unclear whether they are unitary or nonunitary. As I discuss later,[43] this is problematic because it creates procedural issues for the defendant who has been charged with one of these uncategorized offenses. For a better understanding of unitary offenses, it is useful to examine—as I do in Part II—the concept of duplicitous indictments and the reasons duplicitous indictments are proscribed.

## II. DUPLICITOUS INDICTMENTS VERSUS UNITARY OFFENSES

When addressing the issues related to unitary offenses, it is helpful to compare the procedures for duplicitous indictments with unitary offenses.[44] Duplicitous indictments and unitary offenses are closely related in the sense that arguments can be made that unitary offenses create issues similar to those created

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36. *See generally id*. (holding that first-degree murder is a unitary offense); State v. Valentini, 299 P.3d 751 (Ariz. Ct. App. 2013) (holding that second-degree murder is a unitary offense); State v. Herrera, 850 P.2d 100 (Ariz. 1993) (holding that kidnapping is a unitary offense); State v. Winter, 706 P.2d 1228, 1231–32 (Ariz. Ct. App. 1985), *abrogated by* State v. Kamai, 911 P.2d 626 (Ariz. Ct. App. 1995) (holding that theft is a unitary offense).

37. ARIZ. REV. STAT. ANN. § 13-1105 (2014).

38. *Id*.

39. *Id.* § 13-1104.

40. *Id*.

41. *Id*.

42. *Id.* § 13-1802.

43. *See infra* Part III.

44. The rationale behind these procedures is also a helpful tool in understanding the issues pertaining to unitary offenses.

by duplicitous indictments. In this Part, I will discuss duplicitous indictments and why they are prohibited. I will also discuss unitary offenses, and how and why they are less restricted than nonunitary offenses.

### *A. Duplicitous Indictments: Issues and Procedures*

A defendant has the constitutional right to not have *multiple* criminal acts introduced at trial in order to secure a conviction of a *single* criminal offense.[45] The defendant also has the constitutional right to not be convicted unless there is a unanimous jury verdict with regard to that offense.[46] For these reasons, a duplicitous indictment—an indictment that introduces multiple criminal acts within a single count—must be amended or dismissed. This protects the defendant by ensuring that: he is not convicted without receiving adequate notice of the charges against him, he is not convicted on less than a unanimous jury verdict, and he is not exposed to the possibility of double jeopardy.

For example, in *Spencer v. Coconino County Superior Court, Division 3*, the defendant was charged with one count of child molestation and one count of incest; however, the facts that gave rise to the charges involved over 100 different incidents between the defendant and his daughter.[47] The Arizona Supreme Court dismissed the prosecution without prejudice stating that "each separate offense must be charged in a separate count."[48] Therefore, if the prosecutor wanted to introduce evidence of the 100 different incidents, he would have to charge the defendant with 100 separate counts of incest and/or child molestation. The court cited three reasons to support its holding. First, if the indictment lists several criminal acts under one count, the defendant cannot know for certain which of the several acts the prosecutor will try to prove in court. This can potentially inhibit the defendant from preparing a case in his defense. As a result, duplicitous indictments do not provide the defendant with adequate notice of the charges to be defended.[49]

Second, if evidence is presented to prove multiple criminal acts, but the jury is only instructed to determine guilt or innocence as to one count, it is possible that the jury will not unanimously decide which criminal act justified the guilty verdict.[50] Hypothetically, assume a defendant was charged with a single count of assault, and the prosecution presents evidence attempting to prove that the defendant punched the victim on Monday and kicked the victim on Tuesday. Some jurors may have reasonable doubt as to Monday's punching, but those same jurors may believe Tuesday's kicking occurred beyond reasonable doubt. The remaining jurors may believe Monday's punching occurred beyond a reasonable doubt, but not Tuesday's kicking. Because both criminal acts were tried as a single count, the defendant would receive a guilty verdict. However, if each criminal act were deliberated separately, the defendant would not be convicted of either crime; this is because there is reasonable doubt concerning each act and, thus, the jury could not unanimously

45. State v. Counterman, 448 P.2d 96, 101 (Ariz. Ct. App. 1968).
46. *Id*.; ARIZ. CONST. art. 2, § 23.
47. 667 P.2d 1323, 1324 (Ariz. 1983).
48. *Id*. at 1325 (citing State v. Axley, 646 P.2d 268 (Ariz. 1982)).
49. *See id*.
50. *See id*.

agree as to whether the defendant committed either assault. For this reason, duplicitous indictments are also improper because they are a hazard to the defendant's right to a unanimous jury verdict.[51]

Finally, duplicitous indictments can weaken a defendant's constitutional protection against double jeopardy.[52] A duplicitous indictment does not list the specific criminal act that constitutes the charge, and instead may list multiple acts. For that reason, "a precise pleading of prior jeopardy [becomes] impossible in the event of a later prosecution."[53] In such situations, the court would not know which criminal act the defendant was convicted or acquitted of. This makes protecting him against a second, more precise charge nearly impossible.[54]

### *B. Unitary Offenses: How are They Different from Duplicitous Indictments?*

Unitary offenses do not create duplicitous indictments.[55] A unitary offense is a single offense listing alternative *ways* in which to commit the same offense.[56] Subsequently, alternative ways of committing a single criminal act do not require being listed out in separate counts like alternate criminal acts.[57] For example, a defendant who is charged with a single count of theft may be indicted for allegedly: "(1) control[ling] property of another with the intent to deprive the other person of such property; (2) convert[ing] . . . property of another entrusted to the defendant . . . for a limited, authorized term or use; or (3) control[ling] property of another knowing or having reason to know that the property was stolen."[58] This indictment would be acceptable because theft is a unitary offense.[59]

Because a unitary offense does not create a duplicitous indictment, Arizona courts have made the determination that there is no issue concerning a defendant's right to notice of the charges.[60] A defendant can be charged under the general section of a unitary offense statute, and, according to Arizona courts, this provides the defendant with sufficient notice that he may be convicted under any of that statute's subsections.[61] An indictment does not need to "specify which overt act, among several named, was the *means* by which a crime was committed."[62] In fact, it may even be acceptable for a defendant to be indicted under one subsection only to later be convicted under an entirely different subsection.

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51. *See id.*
52. *See id.*
53. *Id.* at 1325 (citing Wong Tai v. United States, 273 U.S. 77 (1927); State v. O'Brien, 601 P.2d 341 (Ariz. Ct. App. 1979)).
54. I mention double jeopardy to give the reader a full understanding of the implications that might result from a duplicitous indictment. I will not argue that unitary offenses have those same double jeopardy implications.
55. *O'Brien*, 601 P.2d at 346.
56. *Id*.
57. *Id*.
58. ARIZ. REV. STAT. ANN. § 13-1802 (2014).
59. *See O'Brien*, 601 P.2d at 346.
60. *Id*.
61. State v. Winter, 706 P.2d 1228, 1231–32 (Ariz. Ct. App. 1985), *abrogated by* State v. Kamai, 911 P.2d 626 (Ariz. Ct. App. 1995).
62. Schad v. Arizona, 501 U.S. 624, 631 (1991) (emphasis added).

For example, in *State v. Winter*, the state charged the defendant with two counts of theft under subsection (A)(1) of the theft statute (controlling the property of another with intent to deprive the owners)[63] Later, the trial court instructed that it was permissible for the jury to return a guilty verdict under either subsection (A)(1) or subsection (A)(5): committed when a defendant knowingly "controls property of another knowing or having reason to know that the property was stolen."[64] While an amendment to charges at trial is only allowed "to correct mistakes of fact or remedy formal or technical defects,"[65] an indictment is automatically amended to conform to the evidence so long as the amendment does not change the nature of the underlying offense.[66] Because the defendant was originally charged with acting intentionally to deprive someone of their property under subsection (A)(1), this necessarily includes her having knowledge that the property belonged to someone else under subsection (A)(5).[67] The crime's *mens rea* component—"intentionally"—legally includes instances where a defendant acts "knowingly"; therefore, the nature of the underlying offense was not changed when the judge instructed the jury under both subsections (A)(1) and (A)(5), and the indictment was automatically amended to conform to the evidence.[68]

Conversely, nonunitary offenses (such as assault) are not given the same leeway.[69] Unlike the theft statute, a defendant is considered not to have received adequate notice if he is charged under the general section of the assault statute[70]—instead, the indictment must cite to a specific subsection so that it is clear to the defendant which subsection of assault he is being charged under.[71] Further, if an indictment cites to a specific subsection of the assault statute, but the jury is later instructed that they can convict under a different subsection, that would constitute a violation of Arizona Rule of Criminal Procedure 13.5(b).[72] This is because the types of assaults listed in the separate subsections are distinctly different crimes, meaning

63. 706 P.2d at 1230.
64. *Id*.
65. ARIZ. R. CRIM. P. 13.5(b).
66. *Winter*, 706 P.2d at 1230 (citing State v. Suarez, 670 P.2d 1192 (Ariz. Ct. App. 1983)).
67. *Id*. at 1233.
68. *Id*.
69. *See generally* State v. Freeney, 219 P.3d 1039 (Ariz. 2009) (holding that an amendment changing the subsection charged under the assault statute was a violation of Rule 13.5(b)); State v. Garcia, 560 P.2d 1224 (Ariz. 1977) (holding that it was error to sentence the defendant under subsection (B) of the assault statute when the indictment cited generally to the assault statute, but used language from both subsection (A) and (B)); State v. Sanders, 68 P.3d 434 (Ariz. Ct. App. 2003) (holding that changing the subsection charged under the assault statute altered the underlying nature of the originally charged offense); State v. Kelly, 595 P.2d 1040 (Ariz. Ct. App. 1979) (holding that an indictment citing generally to the assault statute, but using language from both subsection (A) and (B), was insufficient notice to the defendant of his charges).
70. *See Garcia*, 560 P.2d at 1226 (holding that Arizona's assault statute is a nonunitary offense).
71. *Id*.
72. *Freeney*, 219 P.3d at 1042.

that a midtrial amendment changes the nature of the originally charged offense, leaving the defendant with insufficient notice to prepare an adequate defense.[73]

Because a statute proscribing a unitary offense defines a single crime and lists multiple ways in which to commit the crime, Arizona courts have also determined that a defendant can be convicted of a unitary offense with less than a unanimous jury verdict, reasoning that this does not offend a defendant's right to jury unanimity.[74] According to Arizona courts, unitary offenses list different *actus reus* or *mens rea* that are alternate means of committing a single offense.[75] Like certain factual issues—a gun versus a knife being used during the commission of a crime—the statute does not require the jury to agree on a single means of commission.[76] Rather, a defendant has the right to a unanimous jury verdict concerning "whether the criminal act charged has been committed, . . . [not] on the precise manner in which the act was committed."[77]

It appears that Arizona courts grant defendants extra protection by only waiving the jury-unanimity requirement where there is sufficient evidence to support a finding for each mode of commission as a basis for guilt.[78] If it were reasonably possible for the jury to render a guilty verdict under any of the modes of commission set forth, then it would be proper to suggest those modes of commission, and jury unanimity as to the particular mode would not be required.[79] Courts reason

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73. *Id*.

74. Several other states have adopted this same approach. State v. Berndt, 672 P.2d 1311 (Ariz. 1983); s*ee* Ward v. State, 758 P.2d 87 (Alaska 1988); People v. Adcox, 763 P.2d 906 (Cal. 1988); People v. Wilson, 378 N.E.2d 378 (Ill. Ct. App. 1978); Rice v. State, 532 A.2d 1357 (Md. 1987); People v. Ferguson, 528 N.W.2d 825 (Mich. Ct. App. 1995); State v. Anderson, 511 N.W.2d 174 (Neb. Ct. App. 1993), *aff'd*, 512 N.W.2d 367 (Neb. 1994); State v. Brown, 651 A.2d 19 (N.J. 1994), *abrogated by* State v. Cooper, 700 A.2d 306 (N.J. 1997); State v. Pipkin, 316 P.3d 255, 260 (Or. 2013); State v. Goddard, 871 P.2d 540 (Utah 1994); State v. Hursh, 890 P.2d 1066 (Wash. App. Div. 1 1995), *abrogated by* State v. Roggenkamp, 106 P.3d 196 (Wash. 2005); State v. Simplot, 509 N.W.2d 338 (Wis. Ct. App. 1993). However, unlike Arizona, other state statutes are not referred to as unitary offenses. *Id*. Instead, they are simply described as single offenses with alternate modes of commission or "alternative element" crimes.

75. Schad v. Arizona, 501 U.S. 624, 632 (1991).

76. *Id*. at 631.

77. State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982).

78. *See* State v. Arnett, 760 P.2d 1064, 1069 (Ariz. 1988); State v. Dixon, 622 P.2d 501, 508 (Ariz. Ct. App. 1980); State v. Forrester, 657 P.2d 432, 435 (Ariz. Ct. App. 1982). Several other states have implemented this same approach. *See* State v. James, 698 P.2d 1161, 1161 (Alaska 1985); State v. Bratthauer, 354 N.W.2d 774, 776 (Iowa 1984); State v. Carr, 963 P.2d 421, 429 (Kan. 1998) *disapproved of on other grounds by* State v. Gunby, 144 P.3d 647 (Kan. 2006); Wells v. Com., 561 S.W.2d 85, 88 (Ky. 1978); People v. Embree, 246 N.W.2d 6, 8 (Mich. Ct. App. 1976); State v. Parker, 379 N.W.2d 259, 260 (Neb. 1986); People v. Sullivan, 65 N.E. 989, 995 (N.Y. 1903); Newsted v. State, 720 P.2d 734, 738 (Okla. Crim. App. 1986); State v. Flathers, 232 N.W. 51, 52 (S.D. 1930); Nevarez v. State, 847 S.W.2d 637, 643 (Tex. App. 1993); State v. Tillman, 750 P.2d 546, 566 (Utah 1987); State v. Arndt, 533 P.2d 1328, 1330 (Wash. 1976); Bloomquist v. State, 914 P.2d 812, 819 (Wyo. 1996).

79. *See Arnett*, 760 P.2d at 1069 (holding that the defendant was guilty of first-degree murder on any one of the three theories offered by the state—premeditated and

that if the state presents sufficient evidence as to each mode of commission set forth at trial, then requiring jury unanimity as to the specific mode would overcomplicate jury instructions, and would cause hung juries[80] even though the jurors unanimously agree that the defendant committed a crime.[81]

In sum, duplicitous indictments charge a defendant with multiple criminal acts under a single count whereas unitary offenses list a single criminal act with various means in which to commit that criminal act. Because unitary offenses do not create duplicitous indictments, certain procedures are allowed such as, general statutes as opposed to particular subsections being listed on indictments and less than unanimous jury decisions as to which mode of commission the defendant employed. Arguably, these procedures create similar issues—with regard to a defendant's right to notice and jury unanimity—that duplicitous indictments create.

## III. IMPLICATIONS OF UNITARY OFFENSES IN ARIZONA

There are several issues that result from the leeway provided for unitary offenses and their procedures. This Part argues that unitary offenses have the potential of creating similar issues concerning a defendant's right to notice and jury unanimity that duplicitous indictments create.

### *A. The Defendant's Right to Notice*

As discussed earlier,[82] both the Due Process Clause and Arizona Rules of Criminal Procedure require that a defendant be given notice of the charges brought against him.[83] In Arizona, this notice comes in the form of an indictment specifying the statute under which the defendant is charged.[84] If a defendant is charged with a nonunitary offense under a statute that has multiple subsections, the particular subsection that the defendant is being charged under must be listed in the indictment—otherwise, the defendant is not given sufficient notice.[85] However, unitary offenses do not require the same specificity. An indictment charging a defendant with a unitary offense may list the general statute or any of its subsections, and the prosecutor is later free to offer evidence of guilt as to any of the other subsections of the statute during trial.[86]

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deliberate, lying in wait, or during the course of a robbery—because there was sufficient evidence to support each theory).

80. Hung juries occur when a jury "cannot reach a verdict by the required voting margin." BLACK'S LAW DICTIONARY (9th ed. 2009).

81. State v. James, 698 P.2d 1161, 1165 (Alaska 1985).

82. *See supra* Introduction.

83. *See* ARIZ. R. CRIM. P. 13.2(a) (requiring that the indictment be "sufficiently definite to inform the defendant of the offense charged"); Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970) (holding that a fundamental requisite of due process of law is adequate notice).

84. ARIZ. R. CRIM. P. 13.2(b) (requiring that the indictment "state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated").

85. State v. Sanders, 68 P.3d 434, 444 (Ariz. Ct. App. 2003).

86. State v. Winter, 706 P.2d 1228, 1231–32 (Ariz. Ct. App. 1985), *abrogated by* State v. Kamai, 911 P.2d 626 (Ariz. Ct. App. 1995).

The primary argument courts use to condone such procedures is that unitary offenses are single offenses that simply list different modes of committing that single offense. Take, for example, the crime of burglary. When indicting a defendant for burglary, the prosecutor is not required to specify whether the defendant allegedly pried a door versus broke a window as means of committing the burglary.[87] Similarly, when indicting a defendant for assault, the prosecutor is not required to specify whether the defendant allegedly used a knife versus a gun as means of committing the assault.[88] On that basis, courts reason that they shouldn't require a first-degree murder indictment to specify whether the killing was allegedly premeditated or occurred during the commission of a felony.

However, this reasoning is problematic because the modes of commission associated with unitary offenses must actually be proven in order to convict the defendant. How can a defendant adequately marshal a defense against the "modes of commission" that, upon proof, will subject him to a guilty verdict if he does not know which "modes of commission" the prosecutor will attempt to prove? Continuing with the example of first-degree murder, the prosecutor is required to present evidence proving either that the defendant premeditated the murder, or that someone was killed while the defendant was committing a felony.

Unlike first-degree murder, the crime of assault does not require proof of the "modes of commission" in order to convict the defendant. In fact, the prosecutor need only prove that the defendant "intentionally plac[ed] another person in reasonable apprehension of imminent physical injury."[89] Accordingly, the prosecution can secure a conviction without proving beyond a reasonable doubt that the defendant used a gun or a knife when he placed the victim "in reasonable apprehension of imminent physical injury."[90] So then it makes sense that an indictment is not required to list something that is not a necessary element to a crime. Arguably, a defendant has more of an entitlement to know what "mode of commission" the prosecutor will attempt to prove during trial when proof beyond a reasonable doubt of that "mode of commission" will subject a defendant to a conviction. With such knowledge, the defendant can more adequately prepare a defense against those accusations that, if sufficiently proven, will result in the defendant's loss of freedom—or potentially his life.[91]

### *B. The Defendant's Right to a Unanimous Jury Verdict*

As discussed earlier,[92] because courts view unitary offenses as listing different modes of committing the same offense, jurors are not required to unanimously agree as to which mode the defendant employed as long as they agree

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87. *See* ARIZ. REV. STAT. ANN. § 13-1506 (2014) (excluding proof of such facts as a necessary element of the crime).

88. *See id.* § 13-1203 (excluding proof of such facts as a necessary element of the crime).

89. ARIZ. REV. STAT. ANN. § 13-1203(A)(2).

90. *Id*.

91. Thirty-two states still impose the death penalty. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 9, 2014).

92. *See supra* Introduction.

that the offense was committed.[93] However, according to the Due Process Clause, a prosecutor cannot secure a conviction unless he presents sufficient evidence that the defendant is guilty beyond a reasonable doubt of each element of the crime charged.[94] Furthermore, the Arizona Constitution requires that the finding of guilt is unanimous amongst the jurors.[95] By allowing for nonunanimous jury verdicts as to modes of committing a unitary offense, this bright-line rule has the potential to seriously undermine a defendant's due process rights and right to jury unanimity.

Courts' rationale behind not requiring jury unanimity for the multiple modes of commission of unitary offenses parallel the reasoning behind not requiring more specificity in the indictment: because we wouldn't require a jury to unanimously agree whether a knife versus a gun was used during the commission of an assault, we also won't require jury unanimity as to whether the killing was premeditated or occurred during the commission of a felony.[96] According to Arizona courts, so long as the jury unanimously agrees that either occurred, then first-degree murder has been proven beyond a reasonable doubt.[97]

If juries were required to unanimously agree upon a specific mode of commission in unitary offenses, convictions would be far more difficult to obtain.[98] For example, if jury unanimity were required, a conviction for first-degree murder would only occur in one of two situations: the jury unanimously agrees that the defendant is guilty of premeditated murder or the jury unanimously agrees that the defendant is guilty of felony murder.

In contrast, first-degree murder as a unitary offense does not require jury unanimity, and allows for a conviction in five general situations:

(1) the jury unanimously agrees that the defendant is guilty of premeditated murder;

(2) the jury unanimously agrees that the defendant is guilty of felony murder;

(3) the jury unanimously agrees that the defendant committed both premeditated and felony murder;

(4) the jury unanimously agrees that the defendant either committed premeditated or felony murder (if he did not commit one, then he must have committed the other); and

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93. State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982).

94. *See In re* Winship, 397 U.S. 358, 363 (1970) ("No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them is sufficient to show beyond a reasonable doubt that the existence of every fact necessary to constitute the crime charged.").

95. ARIZ. CONST. art. II, § 23.

96. State v. Schad, 788 P.2d 1162, 1168 (Ariz. 1989).

97. *Id*.

98. Arguably, this would improve the accuracy of convictions by requiring a higher "proof beyond a reasonable doubt" standard and jury unanimity. However, that is not what this Note is advocating. Rather, this Note argues that the "proof beyond a reasonable doubt" standard and jury unanimity require that individual juror decisions are not mutually exclusive.

(5) some jurors think the defendant is guilty of premeditated murder while other jurors think that the defendant is guilty of felony murder.[99]

There are three distinct ways in which situation (5) can occur:

(5)(a) one set of jurors believes that the defendant either committed premeditated or felony murder (situation 4); the other set of jurors believes that the defendant committed premeditated murder or no murder;

(5)(b) one set of jurors believes that the defendant either committed premeditated or felony murder (situation 4); the other set of jurors believes that the defendant committed felony murder or no murder;

(5)(c) one set of jurors believes that the defendant committed premeditated murder or no murder; the other set of jurors believes that the defendant committed felony murder or no murder.[100]

As the above example illustrates, the jury is given far more leeway to convict a defendant of a unitary offense than a nonunitary offense. It is clear from situations (1)–(4) that the jury has reached a unanimous decision, and thus, that the state met its burden by proving guilt beyond a reasonable doubt.

Arguably, even situations (5)(a) and (5)(b) meet the proof-beyond-a-reasonable-doubt standard, because both sets of juror's decisions *can* coexist. The first set of jurors believe that the defendant is guilty of either premeditated or felony murder. Meaning, if he didn't commit felony murder, then he must have committed premeditated murder or, if he didn't commit premeditated murder, then he must have committed felony murder. Because the first set of jurors believe that one of the two things happened (if not one, then its alternate), the second set of jurors' belief that only one thing happened still allows for a uniform jury verdict. Even though their opinions are disparate, both sets of jurors have the potential to be right without the other set of jurors being wrong.

Now, compare situations (5)(a) and (5)(b) with situation (5)(c). It is my contention that situation (5)(c) does not meet the requisite burden of proof necessary for conviction. In situation (5)(c), some jurors are convinced beyond a reasonable doubt that the defendant is guilty of premeditated murder, but not that the defendant committed felonious murder; the remaining jurors are convinced beyond a reasonable doubt that the defendant committed felonious murder, but not that the

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99. For the sake of simplicity, I will reduce this concept to a set of variables. I will assign *x* to premeditated murder and *y* to felony murder. A semicolon is indicative of there being two groups of jurors with varying decisions:

*x*
*y*
*x* and *y*
*x* or *y*
*x* ; *y*

100. Same concept as footnote 99:

(5)(a) *x* or *y* ; *x*
(5)(b) *x* or *y* ; *y*
(5)(c) *x* not *y* ; *y* not *x*

defendant committed premeditated murder. Unlike situations (5)(a) and (5)(b), both sets of jurors decisions in (5)(c) *cannot* coexist. If one set of jurors is right, the other set of jurors must be wrong. Such an inconsistent jury verdict suggests that the prosecutor's burden of proof has not been met to support a conviction.

Although each individual juror is convinced beyond a reasonable doubt that the element of first-degree murder—premeditated or felony—has been committed, in situation (5)(c), some of the jurors believe that, if the defendant did not commit *premeditated* murder, then he is *not* guilty of first-degree murder and the remaining jurors believe that if the defendant did not commit *felony* murder then he is *not* guilty of first-degree murder. Both sets of jurors deny the truth of the factual finding on which the other set of jurors base their judgments. This creates major issues pertaining to the integrity of a jury's guilty verdict.

The integrity of a guilty verdict "is wholly a function of the accuracy of the factual judgment on which it rests: a defendant charged with violating a criminal statute is guilty in law only if he *in fact* did what the statute prohibits."[101] The integrity of jury verdicts does not only require that the *individual* judgments of jurors be left with no doubt as to whether or not the defendant violated the particular elements of a statute.[102] The judgments of the jurors in the *aggregate* must also leave no doubt as to whether or not the defendant violated the particular elements of a statute.[103] Although the reasonable doubt standard was satisfied by each juror individually, this does not alleviate the fact that, in the aggregate, there is reasonable doubt as to the defendant committing premeditated or felony murder. Because premeditated or felony murder is a necessary element to first-degree murder, if there is not proof beyond a reasonable doubt as to that element, then it should follow that there is insufficient evidence to convict a defendant of first-degree murder. Allowing a conviction to rest upon such disparate jury findings significantly undermines constitutional notions of jury unanimity and proof beyond a reasonable doubt.

In sum, the procedures allowed when prosecuting a unitary offense—much like duplicitous indictments—have the potential to significantly undermine a defendant's rights to notice, jury unanimity, and proof beyond a reasonable doubt. The next Part will address the procedures—different than those of Arizona—employed by other courts in an attempt to confront the jury unanimity and proof beyond a reasonable doubt issues that arise when a defendant is charged with a unitary offense.

## IV. OTHER APPROACHES IN ADDRESSING JURY UNANIMITY AND UNITARY OFFENSES

The concept of unitary offenses is one that is recognized by most states and federal courts. The rules that states employ in dealing with the jury-unanimity issue as it pertains to unitary offenses are inconsistent. There are four basic approaches

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101. Peter Westen & Eric Ow, *Reaching Agreement on When Jurors Must Agree*, 10 NEW CRIM. L. REV. 153, 187 (2007) (citing Lewis Kornhauser & Lawrence Sager, *The Many As One: Integrity and Group Choice in Paradoxical Cases*, 32 PHIL. & PUB. AFF. 249, 258–59 (2004)).

102. *Id*.

103. *Id*.

that federal and state courts have adopted in addressing jury unanimity in relation to unitary offenses: (1) jury unanimity is not required where the statute states a single offense and provides for various modes of commission;[104] (2) jury unanimity is not required where the statute states a single offense and provides for various modes of commission *and* sufficient evidence exists to support a finding of each mode;[105] (3) jury unanimity *is* required where the statute states a single offense and provides for various modes of commission, *but* the possible ways of violating a statute are conceptually distinguishable;[106] and (4) jury unanimity *is* required where the statute states a single offense and provides for various modes of commission, *but* the possible ways of violating a statute are conceptually distinguishable *and* the prosecution has presented evidence as to each way.[107] The first two approaches, as discussed earlier in this Note,[108] address when jury unanimity is not required for unitary offenses. In contrast, the last two approaches address when unitary offenses actually require jury unanimity, and will be the focus of this Part.

Connecticut, New Jersey, and Wisconsin, as well as the federal courts, have recognized that jury unanimity as to the particular mode of commission *is* required when the specified modes of commission are conceptually distinguishable.[109] Other states even provide an extra safeguard for the defendant by requiring jury unanimity when the specified modes of commission are conceptually distinguishable *and* when the prosecution presents sufficient evidence as to each mode of commission.[110] An example of conceptually distinguishable modes of commission can be seen in *United States v. Gipson*, a case involving a defendant charged with the sale or receipt of stolen vehicles.[111] The relevant state statute stated that an individual could be found guilty if he or she "receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft."[112] The court determined that these six prohibited acts could be separated into two distinct conceptual groupings: the first included receiving, concealing, and storing; and the second included bartering, selling, and disposing.[113] According to the court, "[w]ithin each grouping, the acts are sufficiently analogous

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104. 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, at § 3 (1989).

105. *Id*. § 4.

106. *Id*. § 6.

107. *Id*. § 7.

108. *See supra* Part II.B.

109. United States v. Gipson, 553 F.2d 453, 458 (5th Cir. 1977); State v. LoSacco, 525 A.2d 977, 982 (Conn. App. Ct. 1987) (holding that because the defendant was charged with committing disorderly conduct in three conceptually distinct ways, jury unanimity was required as to one of those three alternate modes of commission); State v. Bzura, 619 A.2d 647, 651–52 (N.J. Super. Ct. App. Div. 1993) (applying the *Gipson* rule); Jackson v. State, 284 N.W.2d 685, 689 (Wis. Ct. App. 1979) (adopting the *Gipson* rule).

110. State v. Suggs, 553 A.2d 1110, 1126 (Conn. 1989) (holding that unanimity as to a specific act is required only if two conditions are met: (1) the alternative acts are conceptually distinct from one another; and (2) the state has presented supporting evidence on each of the alternative acts); State v. Arceo, 928 P.2d 843, 882 (1996) (same).

111. 18 U.S.C.A. § 2313 (2006).

112. *Id.* § 2313(a).

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

to permit a jury finding of the actus reus element of the offense to be deemed 'unanimous' despite differences among the jurors as to which of the intragroup acts the defendant committed."[114] As long as jurors unanimously agree that the defendant committed an act within a single conceptual grouping, then the defendant's right to a unanimous jury verdict has been upheld.

Moreover, the court reasoned that the prohibited acts belonged in separate conceptual groupings for two reasons.[115] First, the prohibited acts within each grouping are conceptually similar.[116] For example, "the single act of keeping a vehicle in a certain place may constitute both concealing and storing; or the single act of marketing a vehicle may simultaneously constitute bartering, selling, and disposing."[117] Second, if the jurors had to distinguish between the acts within each grouping, this would present characterization and definition problems.[118] Some jurors may consider housing a stolen vehicle "receiving," whereas other jurors may consider such an act "concealing" or "storing."[119]

According to the court, differentiating between the first and second groupings does not create the conceptualization and characterization issues that exist when differentiating between acts within the same group; therefore, a guilty verdict would not be unanimous if some jurors believe the act of one grouping occurred and others believe the act of another grouping occurred.[120] Unanimity is only fulfilled if all of the jurors agree that one or another of the prohibited acts in a single conceptual grouping occurred.[121]

Conceptual-grouping approaches arguably offer more protection to the defendant than the first two approaches by breaking a unitary statute down into subparts and requires unanimity within those subparts. However, much like approaches one and two, the conceptual grouping approaches do not sufficiently address a situation where individual juror opinions directly contradict one another. Take, for example, the statute at issue in *Gipson*. One of the conceptual groupings consists of "barter[ing], sell[ing], and dispos[ing] of [a] motor vehicle or aircraft."[122] In a situation where conceptualization and characterization issues do not exist amongst the jurors, if six jurors believe that the defendant sold the vehicle, but not that he disposed of it, and the other six jurors believe that the defendant disposed of it, but not that he sold it, wouldn't this create reasonable doubt as to the defendant's guilt? So far this Note has addressed the many state and federal court attempts at providing guidance for unitary offenses, which has, ultimately, left attorneys and defendants confused. This next Part will discuss the U.S. Supreme Court's failed attempt at resolving the complex issue.

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114. *Id*.
115. *Id*.
116. *Id*.
117. *Id*.
118. *Id*.
119. *Id*.
120. *Id*.
121. *Id*.
122. *Id*.

## V. THE SUPREME COURT'S ATTEMPT AT ADDRESSING THE ISSUE

The most prominent issue that arises when addressing unitary offenses is: when, if ever, should jurors be required to unanimously agree on which of the alternate modes of commission the defendant used when violating the statute. The U.S. Supreme Court has addressed this issue on two occasions—first in *Schad v. Arizona*,[123] and then in *Richardson v. United States*.[124] Unfortunately, these decisions have done little to clarify the issue. According to *Schad* and *Richardson*, the Constitution requires jury unanimity as to the mode of committing the offense at times, and at other times it does not.[125] In an attempt to formulate a method in determining when jury unanimity is or is not required, the Court in *Schad* and *Richardson* developed four distinct constitutional tests. First, the *Schad* plurality established a moral-equivalence test, which requires determining the moral equivalence of the elements and the history of jury unanimity as it relates to the elements. Under the moral-equivalence test, the moral equivalence[126] is given more weight in the analysis than history.[127] Second, the *Schad* concurrence established a history test, which also requires determining the moral equivalence of the elements and history of jury unanimity as it relates to the elements; however, the history of the element is given more weight in the analysis.[128] Third, the *Schad* dissenters took a complete unanimity approach and expressed that jury unanimity as to each explicit element of an offense should be required.[129] Finally, the dissent in *Richardson* expressed that jury unanimity should only be required when it would be irrational to combine the elements in a single statute, it would be unfair to the defendants, or the illicit purpose of the statute is to avoid the constitutional requirement of jury unanimity.[130] The Court in *Schad* and *Richardson* was unable to agree on a single constitutional test that should be employed,[131] and instead constructed these several constitutional tests that have proven to be unworkable.

### *A. The* Schad *Plurality: Moral Equivalence*

First, the concurrence in *Schad* recognized that there cannot be a bright-line test for determining when alternate means of committing an offense are so disparate that jury unanimity must be required for the sake of fairness to the

123. 501 U.S. 624 (1991).

124. 526 U.S. 813 (1999).

125. Westen & Ow, *supra* note 101, at 156.

126. For example, when evaluating first-degree murder, one would ask if its elements (i.e., premeditation or felony murder) are morally equivalent to each other.

127. *See Schad*, 501 U.S. at 625–26; Westen & Ow, *supra* note 101, at 167.

128. *See Schad*, 501 U.S. at 650–52 (Scalia, J., concurring); Westen & Ow, *supra* note 101, at 177.

129. *See Schad*, 501 U.S. at 656–59; Westen & Ow (White, J., dissenting), *supra* note 101, at 178–79.

130. *See Richardson*, 526 U.S. at 837 (Kennedy, J., dissenting); Westen & Ow, *supra* note 101, at 179.

131. *See generally Schad*, 501 U.S. at 625 (Scalia, J., concurring) (ruling 5-4 for the prosecution without producing an opinion of the Court); *Richardson*, 526 U.S. at 813 (ruling 6-3 for the defense, but a majority unable to agree on a constitutional test).

defendant.[132] Regardless, the concurrence determined that "history and widely shared practice [are] concrete indicators of what fundamental fairness and rationality require."[133] When a number of courts consider a crime to be a unitary offense, and have done so for some time, it is unlikely that a defendant will be able to demonstrate that the elements of a crime are inherently separate offenses.[134]

Yet, while history and current practice tend to be indicative of what constitutes a unitary offense, neither is dispositive.[135] Current practice and history are useful in determining fundamentally fair and rational ways of defining criminal offenses; however, the moral disparity or equivalence of particular actions is equally determinative, and can even weigh greater in the analysis than history and current practice.[136] According to the *Schad* concurrence, if a statute lists two or more mental states that satisfy the *mens rea* element of a single crime, the degrees of culpability should be equivalent.[137] If the mental states reflect notions of blameworthiness or culpability that cannot be recognized as equivalent, this is indicative of the different mental states identifying distinct offenses as opposed to a unitary offense listing separate mens rea that satisfy a single crime.[138]

In regard to the unitary offense of first-degree murder, the plurality recognized that not all instances of felony murder are the moral equivalent of premeditated murder.[139] In fact, all instances of felony murder do not even share the same level of culpability.[140] For example, compare a defendant who intentionally shot a victim during the commission of a robbery with a defendant whose victim inadvertently slipped, fell, and died while attempting to flee from the defendant.[141] One death was intentional while the other was not, and accordingly the two clearly have different levels of culpability.[142] However, the Court reasoned that the test "is not whether premeditated murder is necessarily the moral equivalent of felony murder in all possible instances of the latter."[143] Rather, the question is whether felony murder can ever be considered the moral equivalent of premeditated

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132. *Schad*, 501 U.S. at 643 (Scalia, J., concurring).
133. *Id*. at 640 (Scalia, J., concurring).
134. *Id*.
135. *Id*. at 642.
136. *Id*. at 643.
137. *Id.*
138. *Id*.
139. *Id*.
140. *Id*.
141. Felony murder does not require intent to kill. ARIZ. REV. STAT. ANN. § 13-1105 (2014).
142. Some states have deemed the levels of culpability between felony murder and premeditated murder so different that they do not include felony murder in their first-degree murder statutes or they have eliminated the felony-murder rule all together. *See, e.g*., HAW. REV. STAT. § 707-701 (West 2014) (eliminating felony-murder rule); KY. REV. STAT. ANN. § 507.020 (West 2014) (same); People v. Aaron, 299 N.W.2d 304, 324–26 (Mich. 1980) (eliminating felony-murder doctrine by reinterpreting malice as not including the commission of a felony). England, where the doctrine originated, abolished the felony-murder rule in 1957. The Homicide Act, 1957, 5 & 6 Eliz. 2 c. 11, § 1.
143. *Schad*, 501 U.S. at 643 (Scalia, J., concurring).

murder.[144] So long as, theoretically, situations could arise where a defendant charged with felony murder is just as culpable as a defendant charged with premeditated murder, then courts should not be barred from treating them as alternative means of committing a single offense.[145]

There are two dilemmas with the plurality's moral-equivalence standard. First, it is unworkable in the sense that one is expected to somehow measure and assess different levels of culpability.[146] The standard requires that a determination be made about the moral culpability of the different means and yet the plurality does not provide a method in which to assess culpability. Lower courts are given very little from their state statutes to guide them in applying the standard. Accordingly, the functionality of such a standard is non-existent and the application would most certainly require frequent appellate court review so as to designate statutes as unitary or nonunitary offenses.

Second, the moral-equivalence standard is underinclusive.[147] Specifically, it only requires jury unanimity when modes of commission are explicitly prohibited, and not when modes of commission are implicitly prohibited.[148] For example, if a state statute defines assault as "smacking, punching, kicking, stabbing, or shooting" an individual, the moral-equivalence standard may require jury unanimity as to these different modes of commission if the different modes are deemed to be morally unequal merely because they were explicitly mentioned in the statute. In contrast, an assault statute that does not define the crime by listing "smacking, punching, kicking, stabbing, or shooting" as different modes of commission would not require jury unanimity, even if the modes are morally distinct and implicitly prohibited, simply because the statute does not explicitly prohibit them. In both instances, it must be proven beyond a reasonable doubt that the defendant engaged in one or the other kind of conduct, but in the latter jury unanimity is not required whereas in the former it is.[149] This is a significant disparity in how the two situations are addressed when the situations themselves are normatively indistinguishable. Such disparity has the potential to create unjust and inconsistent convictions by making it easier to convict a defendant who was charged under a statute with implicit versus explicit prohibitions.

### *B. Justice Scalia's* Schad *Concurrence: History*

In his concurrence in *Schad*, Justice Scalia takes the position that, no matter how morally unequal the elements may be, if history demonstrates that jury unanimity is not required, then history is controlling, and jury unanimity should not be required.[150] He goes on to explain he is an advocate for such an approach because

144. *Id*. at 644.

145. *Id*.

146. Westen & Ow, *supra* note 101, at 170 (arguing that in order for such a standard to be workable, one must "possess a metric for assessing culpability").

147. *Id*. at 171.

148. *Id*.

149. *Id*.

150. *See Schad*, 501 U.S. at 650 (Scalia, J., concurring) ("It is precisely the historical practices that *define* what is 'due.'").

he can imagine a situation where, although elements are morally identical, jury unanimity should be required.[151]

This approach is problematic because it is both normatively questionable and incomplete.[152] It is normatively questionable because it denies relief to defendants simply because jury unanimity has not been required in the past.[153] Such an approach does not allow for the enhancement of the integrity of a guilty verdict.[154] Further, the approach is incomplete because, while the test explains when and why relief should be denied to a defendant—when jury unanimity has not been required in the past—it fails to explain when and why a defendant should be granted relief.[155] Rather, the approach only instructs that an indictment should not charge that the defendant assaulted either X on Tuesday or Y on Wednesday; clearly more guidance is needed considering the complexity of the issue.

### *C. The* Schad *Dissenters: Unanimity on Every Explicit Element of an Offense*

The dissenters in *Schad* took the position that jury unanimity is required in situations when a defendant is charged in the alternative with having violated two or more modes of commission that are listed as distinct statutory elements.[156] The dissent argued that jurors must be unanimous as to which mode of commission the defendant employed regardless of whether the modes of commission are morally equivalent or what history shows.[157] For example, this approach would require jury unanimity as to either felony murder or premeditated murder when a defendant is charged with first-degree murder.[158] This approach requires jury unanimity, not because felony and premeditated murder are morally dissimilar or because history has required jury unanimity as to one or the other, but simply because the statute lists two distinct requirements: premeditated or felony murder.[159]

This approach is normatively inadequate for two reasons. First, it would require jury unanimity as to one statutory element or another, even in instances where jury unanimity does not enhance the integrity of the guilty verdict.[160] In fact, jury unanimity would actually compromise the integrity of a verdict in a situation

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151. *See id*. at 651 ("We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts.").

152. Westen & Ow, *supra* note 101, at 178.

153. *Id*.

154. *Id*.

155. *Id*.

156. *See Schad*, 501 U.S. at 656 (Scalia, J., concurring) ("The problem is that the Arizona statute, under a single heading, criminalizes several alternative patterns of conduct. While a state is free to construct a statute in this way, it violates due process for a State to invoke more than one statutory alternative, each with different specified elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt.").

157. *Id*. at 656–57.

158. *Id*. at 656.

159. *Id*.

160. Westen & Ow, *supra* note 101, at 178–79.

where jurors believe that, if the defendant didn't commit one of the statutory elements, he must have committed the other.

For example, a defendant who is charged with theft in Arizona can be found guilty if the state can prove that he: stole the property, or found the property and did not return it to the owner when such an opportunity existed.[161] Under this approach, some jurors could be convinced that the defendant is guilty of stealing the property beyond a reasonable doubt; further, these same jurors could maintain that, even if he did not steal the property, at the very least he is guilty of finding the property and not returning it. Conversely, the remaining jurors may believe that the defendant found the property and did not return it, but that, if this wasn't the case, then the defendant must have stolen the property. The defendant would avoid conviction because the jurors are unable to reach a consensus as to which of the statutory elements the defendant is guilty of, despite the fact that the jurors unanimously agree that *one* of the statutory elements was committed by the defendant.

Second, this approach only accounts for those modes of commission that are listed in a statute.[162] As discussed in the moral-equivalence constitutional test, some statutes explicitly prohibit alternative conduct—e.g., Arizona's theft statute[163]—whereas other statutes implicitly prohibit alternative conduct—e.g., Arizona's burglary statutes prohibit entering a structure unlawfully which implicitly prohibits conduct that would fulfill this element like opening an unlocked door or breaking a window.[164] Like the first constitutional test, this approach is flawed for the same reason: both situations—explicit and implicit prohibition of conduct—are normatively indistinguishable, and yet explicit prohibition requires jury unanimity when implicit prohibition does not. Accordingly, it is unjust to require jury unanimity in one situation and not in the other.

### *D. Justice Kennedy's Dissent in* Richardson*: Arbitrary, Unfair, or Invidiously Motivated Statutes*

In the *Richardson* dissent, Justice Kennedy proposed that jury unanimity should be required as to alternative statutory elements if:

> (1) combining the elements in a single statute is 'irrational' (e.g., a statute making it a crime either to commit 'robbery or fail to file a tax return'); (2) not requiring jurors to concur is 'fundamental[ly] . . . unfair' to defendants; or (3) the statute aggregates elements for the 'illicit' purpose of 'avoid[ing] the constitutional requirement of jury unanimity.'[165]

There are fundamental issues with each element of Justice Kennedy's three-part test.[166] First, according to Kennedy's approach, a statute is "irrational" if

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161. ARIZ. REV. STAT. ANN. § 13-1802 (2014).
162. Westen & Ow, *supra* note 101, at 179.
163. ARIZ. REV. STAT. ANN. § 13-1802 (2014).
164. *Id.* § 13-1507.
165. Westen & Ow, *supra* note 101, at 180 (quoting Richardson v. United States, 526 U.S. 813, 837 (1999) (Kennedy, J., dissenting)).
166. *Id*.

it does not serve a legitimate purpose.[167] The hypothetical, irrational statute Justice Kennedy uses to support his approach makes it a crime to commit robbery or fail to file a tax return. Yet, such an aggregate offense fails to serve any legitimate purpose; it is comprised of two transgressions that do not "generate overlapping forms of proof," and do not "involve comparable culpability or require comparable punishments."[168] As a result, the statute is irrational and therefore could not be considered a unitary offense. The problem, however, is that irrational statutes that fail to serve any legitimate purpose, such as Justice Kennedy's hypothetical statute, do not exist because legislatures simply do not compile dissimilar offenses into a single statute.[169] Accordingly, this is hardly helpful to the analysis of when jury unanimity is required or not.

Next, Justice Kennedy proposes that jury unanimity is required where not requiring it would be fundamentally unfair.[170] However, this has already been established and adds nothing to the analysis. The constitutional purpose of jury unanimity is to promote fairness. The real question is *how* do we determine that it is fundamentally unfair not to require jury unanimity? Yet, in the *Richardson* dissent, Justice Kennedy fails to even attempt to answer this question.[171]

Finally, Justice Kennedy asserts that jury unanimity should be required when the "illicit" purpose of aggregating a statute is to "avoid the constitutional requirement of jury unanimity"[172]—this is yet another conclusory assertion by Justice Kennedy.[173] The real question is *when* is there a "constitutional requirement" for jury unanimity in situations where there are multiple means by which a defendant can commit a crime. A judge cannot determine that the legislature's intent is to avoid this constitutional requirement if it has yet to be determined when the constitutional requirement must be employed.[174] Thus, without knowing what the Constitution requires with regard to jury unanimity, this element of Justice Kennedy's approach is functionally useless.

Although *Schad* and *Richardson* both dealt with the concept of unitary offenses, neither shed much light on when jury unanimity is required or not. The majority of the Justices were unable to agree, and as a result lower courts are not bound to employ any of the Court's proposed tests. Nevertheless, each of the constitutional tests is inadequate. The next Part sets forth a more realistic and functional solution to unitary offenses and the implications the concept has on a defendant's right to notice and jury unanimity.

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167. *Id*. at 181.
168. *Id*.
169. *Id*.
170. *Richardson*, 526 U.S. at 837 (Kennedy, J., dissenting).
171. *See* Westen & Ow, *supra* note 101, at 181 ("To call for 'fairness,' as Kennedy does, does not solve the problem. It merely restates it.").
172. *Richardson*, 526 U.S. at 837 (Kennedy, J., dissenting).
173. *See* Westen & Ow, *supra* note 101, at 182 ("Before a court can ascertain whether a legislature's purpose is 'illicit,' the court must be able to do what Kennedy's test fails to do, namely, to identify when jurors are, indeed, required to concur on the means by which defendants commit alleged crimes.").
174. *Id*.

## VI. REMEDY BY LEGISLATIVE REVISIONS, EVIDENTIARY-SUPPORTED INDICTMENT, AND JURY INSTRUCTION

There have been numerous approaches constructed by state and federal courts that attempt to answer the complex question of when jury unanimity is and is not required in cases involving unitary offenses.[175] And, as illustrated above, there are fundamental problems with the approaches that have been posited. For example, due to the complexity, the standards are nearly impossible for a layman, or even an attorney, to apply in a predictable manner. Moreover, they do not address all of the concerns associated with unitary offenses. I propose that a more uniform, predictable approach be adopted that will promote judicial economy, and will better preserve a defendant's rights to notice, jury unanimity, and proof beyond a reasonable doubt. First, legislatures should draft revisions to already existing statutes designating the proscribed offense as unitary or nonunitary. This will prevent the necessity for judicial interpretation and respect the role of the legislature in defining crimes. Next, indictments should be limited to the evidence presented during the grand jury proceeding and, finally, the trial judge should be required to give a particular jury instruction before deliberations. This proposed framework will significantly reduce the many issues regarding unitary offenses.

### *A. Indictment Limited to Evidence Presented at Grand Jury*

In order to preserve a defendant's due process rights, state courts should adopt rules of criminal procedure requiring that an indictment (or other charging document) be limited to evidence presented during the grand jury proceeding. During the grand jury proceeding, the state must convince jurors that there is sufficient evidence to charge a defendant with a particular crime. This is an opportune time for the state to determine what its theory of the case is likely going to be.

For example, Arizona's theft statute defines theft using nine different subsections.[176] Say the prosecutor calls the victim as a witness in the grand jury proceeding and the victim testifies that he loaned the defendant his lawn mower and that when he went to retrieve the mower, the defendant refused to return the victim's property. This evidence makes clear that the state's theory of the case is going to predicate around two subsections: subsection (A)(1) [177] or potentially even subsection (A)(2).[178] Because there was no evidence presented supporting a theory on any of the other subsections,[179] and because it is unlikely—given the established evidence—that evidence of any of the other subsections will come out before trial,

175. *See supra* Parts IV & V.

176. *See* ARIZ. REV. STAT. ANN. § 13-1802 (2014).

177. *See id*. (a person commits theft if he/she knowingly "controls property of another with the intent to deprive the other person of such property").

178. *See id*. (a person commits theft if he/she knowingly "converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use").

179. For example, clearly, §§ (A)(7), (A)(8), & (A)(9) would not apply considering these subsections pertain to ferrous and nonferrous metal and a lawn mower is neither of these. *See id*.

the indictment formally charging the defendant should be limited to those two subsections.

Limiting the indictment charges to the two subsections would not only limit the jury to convict on modes of commission for which there is sufficient evidence to support, but would also provide the defendant with more adequate notice as to the charges brought against him than if, simply, the general section was listed. In the latter scenario, the defendant would have nine disparate subsections to consider, which would inhibit the defendant in preparing a defense. This would not be an issue if the defendant was guilty of the charged offense. The defendant would likely remember borrowing and not returning the victim's lawn mower and an indictment listing the victim's name and the general theft statute would be sufficient notice as to what sort of evidence the state would be presenting against him during trial. However, our judicial system is based off of the notion that a defendant is "innocent until proven guilty," so such a general indictment must be viewed in a light that upholds this value. If the defendant was innocent and received such a broad indictment, it is unlikely that he would have any idea of where to begin preparing his defense. Limiting the indictment to the evidence presented during the grand jury proceeding will ensure that a defendant's right to notice is preserved.

### *B. Jury Instructions*

In order to better preserve the defendant's right to jury unanimity and proof of guilt beyond a reasonable doubt, a uniform jury instruction should be given before deliberation in cases involving unitary offenses. If evidence of more than one mode of commission is presented to the jury, the jury should be instructed that they must agree on whether they believe that the defendant employed one, all, or either mode of commission. Peter Westen and Eric Ow have suggested such a uniform jury instruction. The instruction requires the jury to determine if they believe the defendant committed the offense by one or another, or all, of multiple means. Moreover, the instruction indicates that the defendant can only properly be convicted in three situations. First, the defendant can be convicted if the jurors are convinced beyond a reasonable doubt that the defendant committed the offense by *all* of the alleged means. Second, the defendant can be convicted if the jurors are convinced beyond a reasonable doubt that the defendant committed the offense by one or another of the alleged means *and* all of the jurors agree as to which means. Third, the defendant can be convicted if the jurors do not all agree on the particular means employed by the defendant, but are convinced beyond a reasonable doubt that, if the means they believe the defendant employed to commit the crime did not occur, then the means the other jurors believe the defendant employed to commit the crime must have occurred. [180]

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180. The jury instruction reads:

> The defendant is charged with having committed the offense of _____ by one or another, or all, of multiple means, namely, by means _____, and/or means _____ [and/or means _____].

This means that in the hypothetical scenario given above[181]—the defendant charged with theft under subsections (A)(1) and (A)(2)—jurors would need to unanimously agree to one of three things before a conviction would be permissible. First, the jurors could either unanimously agree that the defendant committed subsection (A)(1) of the theft statute or unanimously agree that the defendant committed subsection (A)(2) of the theft statute.[182] Second, the jurors could unanimously agree that the defendant is guilty of committing both subsections (A)(1) and (A)(2).[183] Finally, some jurors could agree that the defendant committed theft by means of subsection (A)(1) while others believe that the defendant committed theft by means of subsection (A)(2); but this would require that they also agree that if the defendant did not commit theft by means of their chosen subsection, then the defendant must have committed theft by means of the alternate subsection.[184] This means that those jurors who believe that the defendant committed theft by means of subsection (A)(1) must also believe that, if the defendant did not commit theft by means of subsection (A)(1), then he must have committed theft by means of subsection (A)(2). Alternatively, those jurors who believe the defendant committed theft by means of subsection (A)(2) must also believe that, if the defendant didn't commit theft by means of subsection (A)(2), then he must have committed theft by means of subsection (A)(1).

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> In order to convict the defendant, each of you must be persuaded beyond a reasonable doubt that the defendant is guilty of the offense.
>
> There are three grounds on which you may convict the defendant. First, you may convict the defendant if each of you is persuaded beyond a reasonable doubt that the defendant committed the offense by *all* of the alleged means.
>
> Second, in the event that you do not all find that the defendant committed the offense by all of the alleged means, you may nevertheless convict him if (1) each of you is persuaded beyond a reasonable doubt that the defendant committed the offense by one or another of the alleged means, *and* (2) all of you further agree upon which particular means he used.
>
> Third, in the event that you do not all agree upon which particular means the defendant used, you may nevertheless convict him if (1) each of you is persuaded beyond a reasonable doubt that the defendant committed the offense by one or another of the alleged means; *and* (2) some or all of you[180] further believe beyond a reasonable doubt that if the defendant did not commit the offense by one of the alleged means in particular, he must have committed the offense by another of the alleged means; *and* (3) as among the various alleged means, one particular means exists that each of you believes beyond a reasonable doubt is either the very means the defendant used or the means (or among the means) he must have used if he did not use any of the other alleged means.[180]
>
> Otherwise, you shall acquit the defendant of committing the offense.

Westen & Ow, *supra* note 101, at 192–93.

181. *See supra* Part VI.A.
182. *Id*.
183. *Id*.
184. *Id*.

A jury instruction such as this prevents a patchwork jury verdict that calls into question the guilty verdict's integrity. When some jurors believe that one mode of commission occurred and no other while the remaining jurors believe that another mode of commission occurred and no other, then convicting the defendant diminishes his due process rights. This is because the juror's opinions as to how the crime was committed are in direct contradiction. In the aggregate, there is reasonable doubt as to whether the defendant committed the offense charged. By implementing the suggested jury instruction into state rules of criminal procedure, the defendant's due process rights are enhanced. The jury instruction ensures that jurors' beliefs as to how the crime was committed are not in direct contradiction with each other. Furthermore, unlike the approaches adopted and suggested by states and the U.S. Supreme Court, this approach does not require a constitutional question to be answered by courts; it is uniform and applies to all unitary offenses. Although its guise is simple, application of such an approach could have profound effects on a defendant's due process rights.

In sum, my proposed remedy for the implications unitary offenses have on a defendant's right to notice, jury unanimity, and proof beyond a reasonable doubt is a three-part solution: (1) legislatures should draft revisions to already existing statutes designating the proscribed offense as unitary or nonunitary; (2) state courts should adopt new rules of criminal procedure requiring the prosecution to limit the theories on modes of commission presented during trial to those presented during the grand jury proceeding with sufficient evidence; and (3) state courts should adopt new rules of criminal procedure compelling judges to give jury instructions that require jurors to agree on whether they believe that the defendant employed one, all, or either mode of commission. These steps promote the respect for the role of the legislature in defining crimes, the wise and fair administration of justice by preventing the judiciary from having to interpret the legislature's intent, and preserve a defendant's right to notice, jury unanimity, and proof beyond a reasonable doubt.

## CONCLUSION

Unitary offenses have the potential to significantly undermine a defendant's rights to notice, jury unanimity, and proof beyond a reasonable doubt. Unitary offenses allow prosecutors to indict defendants by listing only the general section of the offense's statute. Because some statutes have numerous subsections, a defendant is often left to guess what sort of evidence the prosecutor will present during trial. Such a procedure significantly undermines a defendant's right to notice. Furthermore, in deliberating whether a defendant charged with a unitary offense is guilty or innocent, jurors are given the leeway to convict a defendant even if their opinions on the mode of commission employed directly contradict one another. One set of jurors may believe one mode was employed, as opposed to the others, and the other set may believe another mode was employed, as opposed to the others. Such a patchwork jury verdict diminishes a defendant's rights to both jury unanimity and proof beyond a reasonable doubt. As illustrated by the approaches employed by states, and the recommendations made by the Supreme Court in *Schad* and *Richardson*, prior attempts to address unitary offenses have been largely inadequate. Resolution will need to come from state legislatures and courts in the form of

drafting revisions to statutes and adopting new rules of criminal procedure. In doing so, the wise and fair administration of justice and respect for the role of the legislature in defining crimes will be preserved.