Subject: SCHAD v. ARIZONA, Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U. S. 321, 337. SUPREME COURT OF THE UNITED STATES

Syllabus

SCHAD v. ARIZONA

certiorari to the supreme court of arizona

No. 90-5551. Argued February 27, 1991 -- Decided June 21, 1991

After he was found with a murder victim's vehicle and other belongings, petitioner Schad was indicted for first-degree murder. At trial, the prosecutor advanced both premeditated and felony murder theories, against which Schad claimed that the circumstantial evidence proved at most that he was a thief, not a murderer. The court refused Schad's request for an instruction on theft as a lesser included offense, but charged the jury on second-degree murder. The jury convicted him of first-degree murder, and he was sentenced to death. The State Supreme Court affirmed, rejecting Schad's contention that the trial court erred in not requiring the jury to agree on a single theory of first-degree murder. The court also rejected Schad's argument that Beck v. Alabama, 447 U. S. 625, required an instruction on the lesser included offense of robbery.

Held: The judgment is affirmed.

163 Ariz. 411, 788 P. 2d 1162, affirmed.

Justice Souter delivered the opinion of the Court with respect to Part III, concluding that Beck v. Alabama, 447 U. S. 625 -- which held unconstitutional a state statute prohibiting lesser included offense instructions in capital cases -- did not entitle Schad to a jury instruction on robbery. Beck was based on the concern that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital offense might nonetheless vote for a capital conviction if the only alternative was to set him free with no punishment at all. See id., at 629, 630, 632, 634, 637, 642-643, and n.19. This concern simply is not implicated here, since the jury was given the "third option" of finding Schad guilty of a lesser included noncapital offense, second-degree murder. It would be irrational to assume that the jury chose capital murder rather than second-degree murder as its means of keeping a robber off the streets, and, thus, the trial court's choice of
instructions sufficed to ensure the verdict's reliability. Pp. 19-22.

Justice Souter, joined by The Chief Justice, Justice O'Connor, and Justice Kennedy, concluded in

Part II that Arizona's characterization of first-degree murder as a single crime as to which a jury need not agree on one of the alternative statutory theories of premeditated or felony murder is not unconstitutional. Pp. 4-19.

(a) The relevant enquiry is not, as Schad argues, whether the Constitution requires a unanimous jury in state capital cases. Rather, the real question here is whether it was constitutionally acceptable to permit the jury to reach one verdict based on any combination of the alternative findings. Pp. 4-5.

(b) The long-established rule that a jury need not agree on which overt act, among several, was the means by which a crime was committed, provides a useful analogy. Nevertheless, the Due Process Clause does place limits on a State's capacity to define different states of mind as merely alternative means of committing a single offense; there is a point at which differences between those means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating between what the Constitution requires to be treated as separate offenses subject to separate jury findings. Pp. 5-11.

(c) It is impossible to lay down any single test for determining when two means are so disparate as to exemplify two inherently separate offenses. Instead, the concept of due process, with its demands for fundamental fairness and for the rationality that is an essential component of that fairness, must serve as the measurement of the level of definitional and verdict specificity permitted by the Constitution. P. 11.

(d) The relevant enquiry must be undertaken with a threshold presumption of legislative competence. Decisions about what facts are material and what are immaterial, or, in terms of In re Winship, 397 U. S. 358, 364, what "fact[s] [are] necessary to constitute the crime," and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court. There is support for such restraint in this Court's "burden-shifting" cases, which have made clear, in a slightly different context, that the States must be permitted a degree of flexibility in determining what facts are necessary to constitute a particular offense within the meaning of Winship. See, e. g., Patterson v. New York, 432 U. S. 197, 201-202, 210. Pp. 11-13.

(e) In translating the due process demands for fairness and rationality into concrete judgments about the adequacy of legislative determinations, courts should look both to history and widely shared state practice as guides to fundamental values. See, e. g., id., at 202. Thus it is significant here that Arizona's equation of the mental states of premeditated and felony murder as a species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes. See, e. g., People v. Sullivan, 173 N. Y. 122, 127, 65 N. E. 989, 989-990; State v. Buckman, 237 Neb. 936, --- N. W. 2d ---. Pp. 13-17.

(f) Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found. See Tison v. Arizona, 481 U. S. 137, 157-158. This is enough to rule out the argument that a moral disparity bars treating the two mental states as alternative means to satisfy the mental element of a single offense. Pp. 17-18.

(g) Although the foregoing considerations may not exhaust the universe of those potentially relevant, they are sufficiently persuasive that the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality. P. 19.

Justice Scalia would reach the same result as the plurality with respect to Schad's verdict-specificity claim, but for a different reason. It has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission. As the plurality observes, one can conceive of novel "umbrella" crimes that could not, consistent with due process, be submitted to a jury on disparate theories. But first-degree murder, which has in its basic form existed in our legal system for centuries, does not fall into that category. Such a traditional crime, and a traditional mode of submitting it to the jury, do not need to pass this Court's "fundamental fairness" analysis; and the plurality provides no persuasive justification other than history in any event. Pp. 1-5.

Souter, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, in which Rehnquist, C. J., and O'Connor, Scalia, and Kennedy, JJ., joined, and an opinion with respect to Parts I and II, in which Rehnquist, C. J., and O'Connor and Kennedy, JJ., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment. White, J., filed a dissenting opinion, in which Marshall, Blackmun, and Stevens, JJ., joined.

EDWARD HAROLD SCHAD, Jr., PETITIONER
v. ARIZONA

on writ of certiorari to the supreme court of arizona

[June 21, 1991]

Justice Souter announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, and an opinion with respect to Parts I and II in which The Chief Justice, Justice O'Connor, and Justice Kennedy join.

/* This is a certainly arguable case. The split between the Justices so indicates. It is also interesting as one of the relatively few cases of criminal law going to the US Supreme Court from state courts in which the lower court found for the state. Generally, the US Supreme Court has been taking cases found in favor of defendants and reversing. */

This case presents two questions: whether a first-degree murder conviction under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional; and whether the principle recognized in Beck v. Alabama, 447 U. S. 625 (1980), entitles a defendant to instructions on all offenses that are lesser than and included within a capital offense as charged. We answer no to each.

I

On August 9, 1978, a highway worker discovered the badly decomposed body of 74-year-old Lorimer Grove in the underbrush off U. S. Highway 89, about nine miles south of Prescott, Arizona. There was a rope around his neck, and a coroner determined that he had been strangled to death. The victim had left his home in Bisbee, Arizona, eight days earlier, driving his new Cadillac and towing a camper.

On September 3, 1978, petitioner, driving Grove's Cadillac, was stopped for speeding by the New York State Police. He told the officers that he was transporting the car for an elderly friend named Larry Grove. Later that month, petitioner was arrested in Salt Lake City, Utah, for a parole violation and possession of a stolen vehicle. A search of the Cadillac, which petitioner was still driving, revealed personal belongings of Grove's, and petitioner's wallet contained two of Grove's credit cards, which petitioner had begun using on August 2, 1978. Other items belonging to Grove were discovered in a rental car which had been found abandoned off Highway 89 on August 3, 1978; petitioner had rented the car the previous December and never returned it. While in custody in Salt Lake City, petitioner told a visitor that he would " `deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona.' " 163 Ariz. 411, 414, 788 P. 2d 1162, 1164 (1989).

A Yavapai County, Arizona, grand jury indicted petitioner on one count of first-degree murder, and petitioner was extradited to stand trial. The Arizona statute applicable to petitioner's case defined first-degree murder as "murder which is . . . wilful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery." Ariz. Rev. Stat. Ann. MDRV 13-452 (Supp. 1973). {1} Petitioner was convicted and sentenced to death, but his conviction was set aside on collateral review. 142 Ariz. 619, 691 P. 2d 710 (1984).

At petitioner's retrial, the prosecutor advanced theories of both premeditated murder and felony murder, against which petitioner claimed that the circumstantial evidence proved at most that he was a thief, not a murderer. The court instructed the jury that "[f]irst degree murder is murder which is the result of premeditation. . . . Murder which is committed in the attempt to commit robbery is also first degree murder." App. 26. The court also instructed that "[a]ll 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty." Id., at 27.

The defense requested a jury instruction on theft as a lesser included offense. The court refused, but did instruct the jurors on the offense of second-degree murder, and gave them three forms for reporting a verdict: guilty of first-degree murder; guilty of second-degree murder; and not guilty. The jury convicted petitioner of first-degree murder, and, after a further hearing, the judge sentenced petitioner to death.

The Arizona Supreme Court affirmed. 163 Ariz. 411, 788 P. 2d 1162 (1989). The court rejected petitioner's contention that the trial court erred in not requiring the jury to agree on a single theory of first-degree murder, explaining:

" `In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. Although a defendant is entitled to a unanimous jury

verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." Id., at 417; 788 P. 2d, at 1168 (quoting State v. Encinas, 132 Ariz. 493, 496, 647 P. 2d 624, 627 (1982)) (citations omitted).

The court also rejected petitioner's argument that Beck v. Alabama, 447 U.S. 625 (1980), required an instruction on the lesser included offense of robbery. 163 Ariz., at 416-417, 788 P. 2d, at 1167-1168.

We granted certiorari. 498 U. S. --- (1990).

II

Petitioner's first contention is that his conviction under instructions that did not require the jury to agree on one of the alternative theories of premeditated and felony murder is unconstitutional. {2} He urges us to decide this case by holding that the Sixth, Eighth, and Fourteenth Amendments require a unanimous jury in state capital cases, as distinct from those where lesser penalties are imposed. See Johnson v. Louisiana, 406 U. S. 356 (1972); Apodaca v. Oregon, 406 U. S. 404 (1972). We decline to do so, however, because the suggested reasoning would beg the question raised. Even assuming a requirement of jury unanimity arguendo, that assumption would fail to address the issue of what the jury must be unanimous about. Petitioner's jury was unanimous in deciding that the State had proved what, under state law, it had to prove: that petitioner murdered either with premeditation or in the course of committing a robbery. The question still remains whether it was constitutionally acceptable to permit the jurors to reach one verdict based on any combination of the alternative findings. If it was, then the jury was unanimous in reaching the verdict, and petitioner's proposed unanimity rule would not help him. If it was not, and the jurors may not combine findings of premeditated and felony murder, then petitioner's conviction will fall even without his proposed rule, because the instructions allowed for the forbidden combination.

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

A

A way of framing the issue is suggested by analogy. Our cases reflect a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed. In Andersen v. United States, 170 U. S. 481 (1898), for example, we sustained a murder conviction against the challenge that the indictment on which the verdict was returned was duplicitous in charging that death occurred through both shooting and drowning. In holding that "the Government was not required to make the charge in the alternative," id., at 504, we explained that it was immaterial whether death was caused by one

means or the other. Cf. Borum v. United States, 284 U. S. 596 (1932) (upholding the murder conviction of three codefendants under a count that failed to specify which of the three did the actual killing); St. Clair v. United States, 154 U. S. 134, 145 (1894). This fundamental proposition is embodied in Federal Rule of Criminal Procedure 7(c)(1), which provides that "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means."

We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." McKoy v. North Carolina, 494 U. S. 433, 449 (1990) (Blackmun, J., concurring) (footnotes omitted).

The alternatives in the cases cited went, of course, to possibilities for proving the requisite actus reus, while the present case involves a general verdict predicated on the possibility of combining findings of what can best be described as alternative mental states, the one being premeditation, the other the intent required for murder combined with the commission of an independently culpable felony. See State v. Serna, 69 Ariz. 181, 188, 211 P. 2d 455, 459 (1949) (in Arizona, the attempt to commit a robbery is "the legal equivalent of . . . deliberation, premeditation, and design"). {3} We see no reason, however, why the rule that the jury need not agree as to mere means of satisfying the actus reus element of an offense should not apply equally to alternative means of satisfying the element of mens rea.

That is not to say, however, that the Due Process Clause places no limits on a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred. The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning, see Lanzetta v. New Jersey, 306 U. S. 451, 453 (1939) (citing Connally v. General Construction Co., 269 U. S. 385, 391 (1926)), carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him. Thus it is an assumption of our system of criminal justice " `so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " Speiser v. Randall, 357 U. S. 513, 523 (1958) (quoting Snyder v. Massachusetts, 291 U. S. 97, 105 (1934)), that no person may be punished criminally save upon proof of some specific illegal conduct. Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses, see United States v. UCO Oil Co., 546 F. 2d 833 (CA9 1976), cert. denied, 430 U. S. 966 (1977), nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction. {4}

To say, however, that there are limits on a State's authority to decide what facts are indispensable to proof of a given offense, is simply to raise the problem of describing the point at which differences between means become so important that they may not reasonably be viewed as

alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses. See generally Note, 91 Harv. L. Rev. 499, 501-502 (1977). Although we have never before attempted to define what constitutes an immaterial difference as to mere means and what constitutes a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings, there is a body of law in the federal circuits, deriving primarily from the decision of the Fifth Circuit in United States v. Gipson, 553 F. 2d 453 (1977) (Wisdom, J.), that addresses this problem. The defendant in Gipson was charged with violating 18 U. S. C. MDRV
2313, which prohibited knowingly "receiv[ing], conceal[ing], stor[ing], barter[ing], sell[ing] or dispos[ing] of" any stolen vehicle or aircraft moving in interstate commerce, and was convicted after the trial judge charged the jury that it need not agree on which of the enumerated acts the defendant had committed. The Fifth Circuit reversed, reasoning that the defendant's right to "jury consensus as to [his] course of action" {5} was violated by the joinder in a single count of "two distinct conceptual groupings," receiving, concealing, and storing forming the first grouping (referred to by the court as "housing"), and bartering, selling, and disposing ("marketing") constituting the second. Id., at 456-459. In that court's view, the acts within a conceptual grouping are sufficiently similar to obviate the need for jurors to agree about which of them was committed, whereas the acts in distinct conceptual groupings are so unrelated that the jury must decide separately as to each grouping. A number of lower courts have adopted the standard of "distinct conceptual groupings" as the appropriate test. E. g., United States v. Peterson, 768 F.2d 64 (CA2) (Friendly, J.), cert. denied, 474 U. S. 923 (1985); United States v. Duncan, 850 F. 2d 1104, 1113 (CA6 1988), cert. denied sub nom. Downing v. United States, 498 U. S. --- (1990); State v. Baldwin, 101 Wis. 2d 441, 449-450, 304 N. W. 2d 742, 747-749 (1981).

We are not persuaded that the Gipson approach really answers the question, however. Although the classification of alternatives into "distinct conceptual groupings" is a way to express a judgment about the limits of permissible alter natives, the notion is too indeterminate to provide concrete guidance to courts faced with verdict specificity questions. See, e. g., Rice v. State, 311 Md. 116, 133, 532 A. 2d 1357, 1365 (1987) (criticizing Gipson criteria as "not entirely clear" and as "provid[ing] little guidance"); Trubitt, Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues, 36 Okla. L. Rev. 473, 548-549 (1983) (same). This is so because conceptual groupings may be identified at various levels of generality, and we have no a priori standard to determine what level of generality is appropriate. Indeed, as one judge has noted, even on the facts of Gipson itself, "[o]ther conceptual groupings of the six acts are possible. [One might] put all six acts into one conceptual group, namely trafficking in stolen vehicles." Manson v. State, 101 Wis. 2d 413, 438, 304 N. W. 2d 729, 741 (1981) (Abrahamson, J., concurring); accord Trubitt, supra, at 548-549 ("[I]t is difficult to see how a court could determine that `housing' and `marketing' are ultimate acts in some metaphysical or constitutional sense, and thus prohibit the legislature from including them in the single offense of trafficking"). In short, the notion of "distinct conceptual groupings" is simply too conclusory to serve as a real test.

The dissent would avoid the indeterminacy of the Gipson approach by adopting an inflexible rule of maximum verdict specificity. In the dissent's view, whenever a statute lists alternative means of committing a crime, "the jury [must] indicate on which of the alternatives it has based the defendant's guilt," post, at 5, even where there is no indication that the statute seeks to create separate crimes. This approach rests on the erroneous assumption that any statutory alternatives

are ipso facto independent elements defining independent crimes under state law, and therefore subject to the axiomatic principle that the prosecution must prove independently every element of the crime. See post, at 5-7 (citing In re Winship, 397 U. S. 358 (1970), and Sandstrom v. Montana, 442 U. S. 510 (1979)). In point of fact, as the statute at issue in Gipson demonstrates, legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes. {6} The question whether statutory alternatives constitute independent elements of the offense therefore does not, as the dissent would have it, call for a mere tautology; rather, it is a substantial question of statutory construction. See, e. g., United States v. UCO Oil Co., 546 F. 2d, at 835-838.

In cases, like this one, involving state criminal statutes, the dissent's "statutory alternatives" test runs afoul of the fundamental principle that we are not free to substitute our our own interpretations of state statutes for those of a State's courts. If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law. See Mullaney v. Wilbur, 421 U. S. 684, 690-691 (1975) (declining to reexamine the Maine Supreme Judicial Court's decision that, under Maine law, all intentional or criminally reckless killings are aspects of the single crime of felonious homicide); Murdock v. City of Memphis, 20 Wall. 590 (1875). In the present case, for example, by determining that a general verdict as to first-degree murder is permissible under Arizona law, the Arizona Supreme Court has effectively decided that, under state law, premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element. The issue in this case therefore is not whether "the State must be held to its choice," post, at 6-7, for the Arizona Supreme Court has authoritatively determined that the State has chosen not to treat premeditation and the commission of a felony as independent elements of the crime, but rather whether Arizona's choice is unconstitutional.

B

It is tempting, of course, to follow the example of Gipson to the extent of searching for some single criterion that will serve to answer the question facing us. We are convinced, however, of the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution, and we think that instead of such a test our sense of appropriate specificity is a distillate of the concept of due process with its demands for fundamental fairness, see, e. g., Dowling v. United States, 493 U. S. 342, 352-353 (1990), and for the rationality that is an essential component of that fairness. In translating these demands for fairness and rationality into concrete judgments about the adequacy of legislative determinations, we look both to history and wide practice as guides to fundamental values, as well as to narrower analytical methods of testing the moral and practical equivalence of the different mental states that may satisfy the mens rea element of a single offense. The enquiry is undertaken with a threshold presumption of legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime.

1

Judicial restraint necessarily follows from a recognition of the impossibility of determining, as an

a priori matter, whether a given combination of facts is consistent with there being only one offense. Decisions about what facts are material and what are immaterial, or, in terms of Winship, 397 U. S., at 364, what "fact[s] [are] necessary to constitute the crime," and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court. Respect for this legislative competence counsels restraint against judicial second-guessing, cf. Rostker v. Goldberg, 453 U. S. 57, 65 (1981) ("lack of competence on the part of the courts" relative to the legislature so counsels), which is particularly appropriate in cases, like this one, that call state definitions into question. "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U. S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." Patterson v. New York, 432 U. S. 197, 201 (1977).

There is support for such restraint in our "burden-shifting" cases, which have made clear, in a slightly different context, that the States must be permitted a degree of flexibility in defining the "fact[s] necessary to constitute the crime" under Winship. Each of those cases arose because a State defined an offense in such a way as to exclude some particular fact from those to be proved beyond a reasonable doubt, either by placing the burden on defendants to prove a mitigating fact, see Patterson, supra (extreme emotional disturbance); Martin v. Ohio, 480 U. S. 228 (1987) (self-defense); see also Mullaney, supra (heat of passion or sudden provocation), or by allowing the prosecution to prove an aggravating fact by some standard less than that of reasonable doubt, McMillan v. Pennsylvania, 477 U. S. 79 (1986) (possession of a firearm). In each case, the defendant argued that the excluded fact was inherently "a fact necessary to constitute the offense" that required proof beyond a reasonable doubt under Winship, even though the fact was not formally an element of the offense with which he was charged. See, e. g., 477 U. S., at 90.

The issue presented here is similar, for under Arizona law neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a mens rea element of high culpability. The essence of petitioner's argument is that, despite this unitary definition of the offense, each of these means must be treated as an independent element as to which the jury must agree, because premeditated murder and felony murder are inherently separate offenses. Both here and in the burden-shifting cases, in other words, a defendant argues that the inherent nature of the offense charged requires the State to prove as an element of the offense some fact that is not an element under the legislative definition.

In the burden-shifting cases, as here, we have faced the difficulty of deciding, as an abstract matter, what elements an offense must comprise. Recognizing "[o]ur inability to lay down any `bright-line' test," McMillan, supra, at 91, we have "stressed that . . . the state legislature's definition of the elements of the offense is usually dispositive." Id., at 85; see also Patterson, supra, at 201-202. We think that similar restraint is appropriate here, although we recognize that, as in the burden-shifting cases, "there are obviously constitutional limits beyond which the States may not go." Patterson, supra, at 210; see also McMillan, supra, at 86. 2

The use here of due process as a measurement of the sense of appropriate specificity assumes the importance of history and widely shared practice as concrete indicators of what fundamental

fairness and rationality require. In turning to these sources we again follow the example set in the burdenshifting cases, where we have often found it useful to refer both to history and to the current practice of other States in determining whether a State has exceeded its discretion in defining offenses. See Patterson, supra, at 202, 207-209 nn. 10-11; see also Martin, supra, at 235-236; Mullaney, supra, at 692-696. Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history {7} or in the criminal law of other jurisdictions will lighten the defendant's burden.

/* This is on the strange hypothesis that if a state criminal law is unclear but has been construed so not to be as so obscure, it is legal. This presumes that not only is the defendant responsible for reading the state statutes, but also the cases construing the statute. */

Thus it is significant that Arizona's equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes. At common law, murder was defined as the unlawful killing of another human being with "malice aforethought." The intent to kill and the intent to commit a felony were alternative aspects of the single concept of "malice aforethought." See 3 J.Stephen, History of the Criminal Law of England 21-22 (1883). Although American jurisdictions have modified the common law by legislation classifying murder by degrees, the resulting statutes have in most cases retained premeditated murder and some form of felony murder (invariably including murder committed in perpetrating or attempting to perpetrate a robbery) as alternative means of satisfying the mental state that first-degree murder presupposes. See 2 W. LaFave & A. Scott, Substantive Criminal Law MDRV 7.5, pp. 210-211, and nn. 21, 23, 24 (1986); ALI, Model Penal Code MDRV 210.2, p. 32, and n. 78 (1980). Indeed, the language of the Arizona first-degree murder statute applicable here is identical in all relevant respects to the language of the first statute defining murder by differences of degree, passed by the Pennsylvania Legislature in 1794. {8}

A series of state court decisions, beginning with the leading case of People v. Sullivan, 173 N. Y. 122, 65 N. E. 989 (1903), have agreed that "it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one; it was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute." Id., at 127, 65 N. E., at 989-990. See People v. Milan, 9 Cal. 3d 185, 507 P. 2d 956 (1973); People v. Travis, 170 Ill. App. 3d 873, 525 N. E. 2d 1137 (1988), cert. denied, 489 U. S. 1024 (1989); State v. Fuhrmann, 257 N. W. 2d 619 (Iowa 1977); State v. Wilson, 220 Kan. 341, 552 P. 2d 931 (1976); Commonwealth v. Devlin, 335 Mass. 555, 141 N. E. 2d 269 (1957); People v. Embree, 70 Mich. App. 382, 246 N. W. 2d 6 (1976); State v. Buckman, 237 Neb. 936, --- N. W. 2d --- (1991); James v. State, 637 P. 2d 862 (Okla. Crim. 1981); State v. Tillman, 750 P. 2d 546 (Utah 1987); see also Brown v. State, 473 So. 2d 1260 (Fla.), cert. denied, 474 U. S. 1038 (1985). Although the state courts have not been unanimous in this respect, see State v. Murray, 308 Ore. 496, 782 P. 2d 157 (1989), there is sufficiently widespread acceptance of the two mental states as alternative means of satisfying the mens rea

element of the single crime of first-degree murder to persuade us that Arizona has not departed from the norm.

Such historical and contemporary acceptance of Arizona's definition of the offense and verdict practice is a strong in dication that they do not " `offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " Patterson, 432 U.S., at 202 (quoting Speiser, 357 U. S., at 523), for we recognize the high probability that legal definitions, and the practices comporting with them, are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process. Cf. Jackman v. Rosenbaum Co., 260 U. S. 22, 31 (1922) (Holmes, J.); Snyder, 291 U. S., at 111.

This is not to say that either history or current practice is dispositive. In McMillan, for example, even though many States had made the fact at issue (possession of a weapon) an element of various aggravated offenses, we were unwilling to conclude that Pennsylvania's decision to treat it as an aggravating circumstance provable at sentencing by a mere preponderance of the evidence deviated so far from the constitutional norm as to violate the Due Process Clause. "That Pennsylvania's particular approach has been adopted in few other States," we observed, "does not render Pennsylvania's choice unconstitutional." 477 U. S., at 90; see also Martin, 480 U. S., at 235-236 (relying on history, but not current practice); Patterson, supra, at 211. Conversely, " `neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.' " Pacific Mutual Life Ins. Co. v. Haslip, 499 U. S. 1, ---- (1991) (slip op. at 15) (quoting Williams v. Illinois, 399 U. S. 235, 239 (1970)). In fine, history and current practice are significant indicators of what we as a people regard as fundamentally fair and rational ways of defining criminal offenses, which are nevertheless always open to critical examination. 3

It is, as we have said, impossible to lay down any single analytical model for determining when two means are so disparate as to exemplify two inherently separate offenses. In the case before us, however, any scrutiny of the two possibilities for proving the mens rea of first degree murder may appropriately take account of the function that differences of mental state perform in defining the relative seriousness of otherwise similar or identical criminal acts. See generally ALI, Model Penal Code MDRV 2.02(2) (1985) (defining differing mental states). If, then, two mental states are supposed to be equivalent means to satisfy the mens rea element of a single offense, they must reasonably reflect notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether. Petitioner has made out no case for such moral disparity in this instance.

The proper critical question is not whether premeditated murder is necessarily the moral equivalent of felony murder in all possible instances of the latter. Our cases have recognized that not all felony murders are of identical culpability, compare Tison v. Arizona, 481 U. S. 137 (1987), with Enmund v. Florida, 458 U. S. 782 (1982), and the same point is suggested by examining state murder statutes, which frequently diverge as to what felonies may be the predicate of a felony murder conviction. Compare, e. g., Tenn. Code Ann. MDRV 39-13-202 (Supp. 1990) (theft as predicate of first-degree felony-murder) with, e. g., Ariz. Rev. Stat. Ann. MDRV 13-1105.A (1989) (theft not such a predicate).

The question, rather, is whether felony murder may ever be treated as the equivalent of murder by deliberation, and in particular whether robbery murder as charged in this case may be treated as thus equivalent. This is in fact the very question we considered only three Terms ago in the context of our capital sentencing jurisprudence in Tison, supra. There we held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents [such] a highly culpable mental state . . . that [it] may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though not inevitable, lethal result." Id., at 157-158. We accepted the proposition that this disregard occurs, for example, when a robber "shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property." Id., at 157. Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense. {9}

We would not warrant that these considerations exhaust the universe of those potentially relevant to judgments about the legitimacy of defining certain facts as mere means to the commission of one offense. But they do suffice to persuade us that the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality. We do not, of course, suggest that jury instructions requiring increased verdict specificity are not desirable, and in fact the Supreme Court of Arizona has itself recognized that separate verdict forms are useful in cases submitted to a jury on alternative theories of premeditated and felony murder. State v. Smith, 160 Ariz. 507, 513, 774 P. 2d 811, 817 (1989). We hold only that the Constitution did not command such a practice on the facts of this case.

III

Petitioner's second contention is that under Beck v. Alabama, 447 U. S. 625 (1980), he was entitled to a jury instruction on the offense of robbery, which he characterizes as a lesser included offense of robbery murder. {10} Beck held unconstitutional an Alabama statute that prohibited lesser included offense instructions in capital cases. Unlike the jury in Beck, the jury here was given the option of finding petitioner guilty of a lesser included noncapital offense, seconddegree murder. While petitioner cannot, therefore, succeed under the strict holding of Beck, he contends that the due process principles underlying Beck require that the jury in a capital case be instructed on every lesser included noncapital offense supported by the evidence, and that robbery was such an offense in this case.

Petitioner misapprehends the conceptual underpinnings of Beck. Our fundamental concern in Beck was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all. We explained:

> [O]n the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason -- its belief that the defendant is guilty of some serious crime and should be

> punished. On the other hand, the apparently mandatory nature of the death penalty [in Alabama] may encourage it to acquit for an equally impermissible reason -- that, whatever his crime, the defendant does not deserve death. . . . [T]hese two extraneous factors . . . . introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Id., at 642 (footnote omitted).

We repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented. See id., at 629, 630, 632, 634, 637, 642-643, and n. 19. As we later explained in Spaziano v. Florida, 468 U. S. 447, 455 (1984), "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . . The goal of the Beck rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." See also Hopper v. Evans, 456 U. S. 605, 609 (1982). This central concern of Beck simply is not implicated in the present case, for petitioner's jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence.

Petitioner makes much of the fact that the theory of his defense at trial was not that he murdered Mr. Grove without premeditation (which would have supported a second-degree murder conviction), but that, despite his possession of some of Mr. Grove's property, someone else had committed the murder (which would have supported a theft or robbery conviction, but not second-degree murder). Petitioner contends that if the jurors had accepted his theory, they would have thought him guilty of robbery and innocent of murder, but would have been unable to return a verdict that expressed that view. Because Beck was based on this Court's concern about "rules that diminish the reliability of the guilt determination" in capital cases, 447 U.S., at 638, the argument runs, the jurors should have been given the opportunity "to return a verdict in conformity with their reasonable view of the evidence." Reply Brief for Petitioner 8. The dissent makes a similar argument. Post, at 9.

The argument is unavailing, because the fact that the jury's "third option" was second-degree murder rather than robbery does not diminish the reliability of the jury's capital murder verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

That is not to suggest that Beck would be satisfied by instructing the jury on just any lesser included offense, even one without any support in the evidence. Cf. Roberts v. Louisiana, 428 U. S. 325, 334-335 (1976) (plurality opinion). In the present case, however, petitioner concedes that the evidence would have supported a second-degree murder conviction, Brief for Petitioner 18-19, and that is adequate to indicate that the verdict of capital murder represented no impermissible choice.

* * *

The judgment of the Supreme Court of Arizona is

Affirmed.