THE DUE PROCESS LIMITS OF STATUTORY ALTERNATIVE METHODS: AN ABSENT ANALYSIS IN NORTH DAKOTA ALTERNATIVE METHODS JURISPRUDENCE

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ABSTRACT

In *State v. Gardner*, the North Dakota Supreme Court considered whether North Dakota's child abuse statute created separate crimes or merely alternative methods of committing the singular offense of child abuse. The North Dakota Supreme Court ultimately held the statute created alternative methods of committing the singular crime of child abuse based on the plain language and legislative history of North Dakota Century Code Section 14-09-22. But the North Dakota Supreme Court ended its analysis of the statute there and did not consider whether the statutory alternative methods violated the defendant's right to due process. Despite repeatedly analyzing whether statutes providing alternative methods of committing a singular crime, the North Dakota Supreme Court has yet to opine on the related—and necessary—question of when the creation of statutory alternative methods violates a criminal defendant's right to due process. As a result, a gap exists in North Dakota jurisprudence regarding when alternative method statutes adopted by the North Dakota Legislature will violate a criminal defendant's right to due process. This article outlines that gap, identifies potential answers provided by other courts, and analyzes how the resolution of this open question could affect "settled" North Dakota law.

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I. INTRODUCTION

The North Dakota Supreme Court has repeatedly considered challenges to whether it is improper for a jury to convict a defendant without unanimously agreeing to the particular method by which the defendant committed the offense.[1] In considering whether jurors are required to unanimously agree to the method of commission of a crime, the North Dakota Supreme Court has consistently cited the United States Supreme Court's

1. *See* State v. Gardner, 2023 ND 116, ¶¶ 10-19, 992 N.W.2d 535, 539-41 (construing whether North Dakota Century Code Section 14-09-22 provides alternative methods of committing the singular offense of child abuse so as not to require juror unanimity); State v. Tompkins, 2023 ND 61, ¶¶ 10-15, 988 N.W.2d 556, 560-61 (construing whether North Dakota Century Code Section 39-08-01 provides alternative methods of committing the singular offense of driving under the influence so as not to require juror unanimity); State v. Pulkrabek, 2017 ND 203, ¶¶ 14-16, 900 N.W.2d 798, 801-02 (construing whether North Dakota Century Code Section 12.1-23-02 provides alternative methods of committing the singular offense of theft so as not to require juror unanimity); City of Mandan v. Sperle, 2004 ND 114, ¶¶ 13-14, 680 N.W.2d 275, 278-79 (construing whether Mandan City Ordinance Section 19-05-01 provides alternative methods of committing the singular offense of disorderly conduct so as not to require juror unanimity).

decision in *Schad v. Arizona*[2] for the proposition that when a single crime can be committed in alternative ways, jurors need not agree upon the method of commission.[3]

In *Schad*, the United States Supreme Court held that when a single crime can be committed in alternative ways, jurors need not unanimously agree upon the particular method of commission.[4] As Justice Scalia explained in his concurring opinion, pragmatism provides the basis for the rule:

> That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.[5]

But the United States Supreme Court did not end its *Schad* analysis with simply whether a statute may provide alternative methods for the commission of a single offense. Instead, the Court also considered whether statutory alternative methods of committing a singular offense can violate a criminal defendant's right to due process, and if so, when.[6]

Despite repeatedly relying on *Schad*,[7] the North Dakota Supreme Court has not applied *Schad*'s analysis with respect to the issue of whether statutory alternative methods violate a criminal defendant's right to due process. This article seeks to provide an objective analysis of the complete holding of *Schad*, and an understanding of how the application of the complete holding could impact the law in North Dakota.[8]

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2. 501 U.S. 624, 635-36 (1991) (plurality opinion) *abrogation on other grounds recognized by* Edwards v. Vannoy, 141 S. Ct. 1547, 1556 n.4 (2021).

3. *See, e.g.*, *Gardner*, 2023 ND 116, ¶¶ 15-16, 992 N.W.2d at 540-41; *Pulkrabek*, 2017 ND 203, ¶ 16, 900 N.W.2d at 802-03; *Sperle*, 2004 ND 114, ¶ 14, 680 N.W.2d at 279.

4. *See* 501 U.S. at 632-33. *See also id.* at 649 (Scalia, J., concurring in part and concurring in the judgment) ("[I]t 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.").

5. *Id.* at 650.

6. *Id.* at 632-45 (plurality opinion); *id.* at 650-52 (Scalia, J., concurring in part and concurring in the judgment).

7. *See, e.g.*, *Gardner*, 2023 ND 116, ¶¶ 15-16, 992 N.W.2d at 540-41; *Pulkrabek*, 2017 ND 203, ¶ 16, 900 N.W.2d at 802-03; *Sperle*, 2004 ND 114, ¶ 14, 680 N.W.2d at 279.

8. In *Schad*, the Court also held "a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict." 501 U.S. at 634 n.5 (citations omitted). Subsequently, the Court held the Sixth Amendment right to a jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires juror unanimity to convict a criminal defendant of a serious offense. Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020). Accordingly, the Court has recognized that *Shad* has at least been partially abrogated. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1556 n.4 (2021). But this partial abrogation is immaterial to the central holding of *Schad* regarding statutory alternative means.

II. SCHAD V. ARIZONA

A. FACTUAL BACKGROUND

In August 1978, the badly decomposed body of Lorimer Grove was found near U.S. Highway 89 with a rope around his neck.[9] Edward Schad was indicted for the first-degree murder of Grove.[10] At the time, Arizona's first-degree murder statute provided that premeditated murder, as well as felony murder, could be alternative means of satisfying the mens rea requirement for a first-degree murder charge.[11]

At trial, "the prosecutor advanced theories of both premeditated murder and felony murder."[12] Jury instructions stated "[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."[13] The jury convicted Schad of first-degree murder, and the judge sentenced Schad to death.[14] The United States Supreme Court ultimately granted certiorari on the question of "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."[15]

B. THE PLURALITY OPINION

Writing for the plurality,[16] Justice Souter noted the United States Supreme Court had never required jurors to unanimously agree upon a single method of the commission of a crime.[17] While agreeing that prior cases had

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9. *Schad,* 501 U.S. at 627.

10. *Id.* at 628.

11. *Id.* ("The Arizona statute appliable to [Schad's] case defined first-degree murder as 'murder which is . . . willful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpetrate, . . . robbery.'" (quoting ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1973) (repealed 1978))).

12. *Id.* at 629.

13. *Id.* (alteration and omission in original).

14. *Id.*

15. *Id.* at 627. The United States Supreme Court also granted certiorari on the question of whether a defendant is entitled "to instructions on all offenses that are lesser than, and included within, a capital offense as charged." *Id.* This question, and the Court's answer, is immaterial to the focus of this article.

16. "Justice Souter announced the judgment of the Court and delivered the opinion of the Court with respect to Part III . . . ." *Id*. Part III dealt with the question of whether a defendant is entitled to instructions on all offenses that are less than, and included within, a capital offense as charged. *See id.* at 645-48. With respect to Part II, the portion of the opinion that considered the question of 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, Justice Souter only announced "an opinion" joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy. *See id.* at 626. Justice Scalia did not join Part II and only concurred in the judgment. *Id.*

17. *Id.* at 631.

construed alternative actus rei rather than alternative mens rei, the plurality found "no reason . . . why the rule that a jury need not agree as to mere means to satisfy the *actus reus* element of an offense should not apply equally to alternative means of satisfying the element of *mens rea*."[18] In other words, when a single crime can be committed in various ways, whether through alternative mens rei or alternative actus rei, jurors need not agree upon the specific mode of commission.[19]

The plurality did not end there. "That is not to say . . . 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."[20] Indeed, "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."[21]

In recognizing that the Due Process Clause created limits on how broadly a legislature could define a crime's alternative methods, the plurality recognized the Court had "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 jury findings."[22] Despite recognizing the openness of the question, the plurality rejected the then-existing "body of law in the federal circuits . . . that addresses this problem" as "too indeterminate to provide concrete guidance to courts faced with verdict specificity questions."[23] The plurality also rejected the dissent's "statutory alternatives" test,[24] reasoning that the courts "simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law."[25]

The plurality also rejected the "tempting" notice that any "single criterion . . . will serve to answer the question,"[26] instead concluding the traditional due process "fundamental fairness" test must guide the inquiry.[27]

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18. *Id.* at 632.
19. *Id.*
20. *Id.*
21. *Id.* at 633.
22. *Id.*
23. *Id.* at 633, 635. *See also id.* at 635 ("In short, the notion of 'distinct conceptual groupings' is simply too conclusory to serve as a real test.").
24. *Id.* at 635-37.
25. *Id.* at 636.
26. *Id.* at 637.
27. *See id.* ("We are convinced, however, of the impracticality 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

In adopting the fundamental fairness analysis, the plurality believed courts must "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" methods that may satisfy the alternative methods of committing a singular offense.[28]

> 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 or in the criminal law of other jurisdictions will lighten the defendant's burden.[29]

The plurality then applied its newly adopted test, finding it "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."[30] Specifically, the plurality explained that both the intent to kill and intent to commit a felony exhibited "malice aforethought" at common law.[31] And even though the states—Arizona in particular—had "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 . . . as alternative means of satisfying the mental state that first-degree murder presupposes." [32] The plurality also found considerable contemporary acceptance of a legal rule that allows two mental states as alternative means of satisfying the mens rea element of the single crime of first-degree murder.[33] Based on this historical and contemporary acceptance, the plurality held that allowing both the intent to kill and intent to commit a felony to be alternative methods of satisfying the mens rea requirement for the singular crime of first-degree murder did not violate the Due Process Clause's requirement of fundamental fairness.[34]

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process with its demands for fundamental fairness, and for the rationality that is an essential component of that fairness." (citation omitted)).

28. *Id.*
29. *Id.* at 640 (footnote omitted).
30. *Id.*
31. *Id.*
32. *Id.* at 640-41.
33. *Id.* at 641-42.
34. *Id.* at 642-43.

C. JUSTICE SCALIA'S CONCURRENCE

While concurring in the judgment of the plurality, Justice Scalia did not join the plurality opinion with respect to its answer to the question of whether a first-degree murder conviction under jury instructions that did not require agreement on if the defendant was guilty of premeditated murder or if felony murder was unconstitutional.[35] Justice Scalia explicitly agreed that due process prevented the government from adopting "'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return)" without violating a defendant's right to due process.[36] But Justice Scalia espoused a narrower test for assessing the requirements of the Due Process Clause, explaining "the plurality provide[d] no satisfactory explanation of why (apart from the endorsement of history) it is permissible to combine in one count killing in the course of robbery and killing by premeditation."[37] Rather, Justice Scalia averred the plurality "ultimately relie[d] upon nothing but historical practice."[38]

Instead, analyzing the Arizona statute before the Court, Justice Scalia concluded that alternative methods of committing a singular offense will satisfy due process so long as it is historically accepted because "[i]t is precisely the historical practices that *define* what is 'due.'"[39] In other words, in Justice Scalia's view, only if statutory alternative methods depart from historical practice should courts apply broader "fundamental fairness" analyses.[40]

Applying historical understanding, Justice Scalia found the origin of the first-degree murder crime came from Pennsylvania in 1794, which defined the crime as:

> [A]ll murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and or premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree.[41]

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35. *See id.* at 648-52 (Scalia, J., concurring in part and concurring in the judgment).
36. *Id.* at 650.
37. *Id.* at 651.
38. *Id.*
39. *Id.* at 650.
40. *See id.* ("'Fundamental fairness' analysis may appropriately be applied to *departures* from traditional American conceptions of due process; but when judges test their individual notions of 'fairness' against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges.").
41. *Id.* at 649 (quoting 1794 Pa. Laws, ch. 1766, § 2).

Thus, Justice Scalia held that because history provided that both the intent to kill and intent to commit a felony were alternative methods of satisfying the mens rea requirement for the singular crime of first-degree murder, the Arizona statute did not violate the Due Process Clause.[42]

D. DISCERNING THE HOLDING OF SCHAD

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[43] Accordingly, distilling the holding of *Schad* requires discernment of the narrowest grounds on which the plurality and Justice Scalia agreed that Arizona's alternative mens rei for the crime of first-degree did not violate a defendant's right to due process.

The *Schad* plurality concluded the statute passed its fundamental fairness test because—amongst other reasons—premeditated killings and felony murder had historically been considered alternative mens rei for committing the crime of first-degree murder.[44] Justice Scalia's opinion narrowed the *Schad* plurality, concluding Arizona's first-degree murder statute was constitutional simply because it was historically permitted.[45] Because Justice Scalia's opinion is the narrowest grounds on which five justices agreed, Justice Scalia's opinion is likely interpreted as the controlling holding from *Schad* on the issue of whether a first-degree murder conviction is unconstitutional under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder.[46]

III. STATE V. GARDNER

With this background in mind, we now turn to *Schad*'s application to North Dakota law. In *State v. Gardner*, the defendant was charged and convicted of child abuse.[47] At the trial, the jury instructions provided it was an element of the offense that the defendant "[w]illfully inflicted or willfully

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42. *Id.* at 651 ("Submitting killing in the course of a robbery and premeditated killing to the jury under a single charge is not some novel composite that can be subjected to the indignity of 'fundamental fairness' review. It was the norm when this country was founded, was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today. Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.'").

43. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)) (omission in original).

44. 501 U.S. at 640-41.

45. *Id.* at 651-52 (Scalia, J., concurring in part and concurring in the judgment).

46. *Cf. Marks*, 430 U.S. at 193.

47. 2023 ND 116, ¶ 1, 992 N.W.2d 535, 537.

allowed to be inflicted upon the child, bodily injury."[48] So instructed, the defendant argued on appeal that the instructions improperly "allowed the jury to convict her of the crime without all the jurors agreeing on which of the underlying actions constituted child abuse beyond a reasonable doubt."[49]

On appeal, the North Dakota Supreme Court agreed with the defendant that "[a]ll verdicts in criminal cases must be unanimous."[50] But—relying on *Schad*—the court explained the unanimity requirement does not require jurors to unanimously agree as to how a defendant committed a criminal offense when a statute provides alternative methods of committing a singular offense.[51] Accordingly, the court proceeded to analyze whether the conviction violated the defendant's right to a unanimous verdict by assessing whether the statute set forth alternative methods of committing a singular offense or whether the alternatives were instead separate offenses requiring juror unanimity.[52]

The North Dakota Supreme Court found the North Dakota Legislature amended the child abuse statute in 2015, and "[i]n doing so, the Legislature separated conduct resulting in an offense of child abuse from conduct resulting in an offense of child neglect."[53] Following this separation, the court found that what remains in the child abuse statute "is conduct resulting in the offense of child abuse, which includes two alternative means of committing the crime: (1) a custodian inflicting upon the child mental or bodily injury or (2) a custodian allowing mental or bodily injury to be inflicted upon the child."[54] Because the child abuse statute provided alternative methods, the court held "[t]he jury was not required to unanimously agree upon which of the two alternative means of committing child abuse . . . it believed the State proved beyond a reasonable doubt."[55] However, the court did not consider whether the inclusion of two alternative methods to commit the crime of child abuse violated the defendant's rights under the Due Process Clause.

48. *Id.* ¶ 3.
49. *Id.* ¶ 13.
50. *Id.* ¶ 14 (citations omitted).
51. *Id.* ¶¶ 15-16.
52. *Id.* ¶¶ 17-18.
53. *Id.* ¶ 17.
54. *Id. See also id.* ¶ 18 ("We conclude in adopting N.D.C.C. § 14-09-22 the Legislature enumerated alternative means of committing child abuse and did not define separate elements or separate crimes.").
55. *Id.* ¶ 19.

IV. HOW A FULL ANALYSIS OF DUE PROCESS PROTECTIONS COULD COMPEL MODIFICATION OF NORTH DAKOTA ALTERNATIVE METHODS JURISPRUDENCE

Gardner is not an outlier. In prior alternative methods cases—through a failure to raise the issue by the parties or some alternative reasoning—the North Dakota Supreme Court has not analyzed whether the enactment of statutory alternative methods to commit a singular offense violates a criminal defendant's due process rights.[56] This section provides an example of how such an analysis could compel a modification of North Dakota jurisprudence.

A. STATE V. PULKRABEK

In *Pulkrabek*, the defendant was charged with theft for possessing stolen sports memorabilia.[57] Despite charging a single count, the prosecution advanced alternative theories of taking stolen property and receiving stolen property.[58] The trial court ultimately instructed the jury the defendant was guilty of theft if he "knowingly took or exercised unauthorized control over certain property, or knowingly received, retained, or disposed of certain property which had been stolen, namely items of sports memorabilia."[59] After the jury returned a guilty verdict,[60] the defendant appealed, arguing that

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56. *See* State v. Pulkrabek, 2017 ND 203, ¶ 22, 900 N.W.2d 798, 804 ("[I]t is clear the subsections of § 12.1-23-02 are alternative means of completing the crime of 'theft' and are not separate offenses. The jury was not required to unanimously agree upon which of the State's theories, Pulkrabek taking the property himself or Pulkrabek receiving the property, it believed the State proved beyond a reasonable doubt. Therefore, the district court did not err in combining subsections (1) and (3) of § 12.1-23-02 into one jury instruction."); *see also* City of Mandan v. Sperle, 2004 ND 114, ¶ 15, 680 N.W.2d 275, 279 ("The ordinance in this case permitted the jury to find Sperle guilty of disorderly conduct through a number of alternative behaviors, any one of which is deemed disorderly conduct and none of which is exclusive. The alternative behaviors include fighting, threatening behavior, and abusive language that result in harassing another person. The evidence in this case would support a rational factfinder's concluding that Sperle had committed all of these behaviors, any one of which was sufficient to constitute prohibited conduct and a violation of the ordinance. We conclude Sperle has failed to show the alleged error by the court in submitting a general verdict form constitutes an exceptional case involving obvious serious injustice.").

57. 2017 ND 203, ¶ 2, 900 N.W.2d at 799. At the time, North Dakota's theft statute defined the crime as a person:

> 1. Knowingly tak[ing] or exercise[ing] unauthorized control over, or mak[ing] an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;
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> 2. Knowingly obtain[ing] the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally depriv[ing] another of his property by deception or by threat; or
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> 3. Knowingly receiv[ing], retain[ing], or dispos[ing] of property of another which has been stolen, with intent to deprive the owner thereof.

Id. ¶ 7 (quoting N.D. CENT. CODE § 12.1-23-02).

58. *See id.* ¶ 2.

59. *Id.* ¶ 8.

60. *Id.* ¶ 1.

"the district court erred by not instructing the jury it must unanimously decide upon which of the two theories it found him guilty."[61]

The North Dakota Supreme Court began its analysis by reviewing the history of North Dakota's theft statute.[62] The court found that in 1973 "the numerous different types of thievery, i.e., false pretenses, larceny, and possession of stolen goods" were consolidated "into the single crime of theft."[63] The impetus of this consolidation was the proposed Federal Criminal Code,[64] with the purpose of the consolidation being to create a single crime for one criminal actus reus—the exercise of unauthorized control over the property of another.[65] Based on this history and legislative purpose, the court held that taking or receiving stolen property were simply alternative methods of committing the singular crime of theft[66] and that "[t]he jury was not required to unanimously agree upon which of the State's theories . . . it believed the State proved beyond a reasonable doubt."[67] The court then ended its analysis.[68]

B. DOES COMBINING THE SEPARATE, NONOVERLAPPING CRIMES OF LARCENY, EMBEZZLEMENT, AND FALSE PRETENSES INTO A SINGULAR CRIME OF "THEFT" VIOLATE A DEFENDANT'S RIGHT TO DUE PROCESS?

Unlike *Schad*, the North Dakota Supreme Court did not consider whether the alternative methods of committing "theft" complied with the requirements of due process.[69] This leads to lingering—and difficult—questions.

As the court found, the consolidation of various actus rei to create a singular "theft" crime was a departure from historic practice.[70] Because the treatment of the separate, nonoverlapping crimes of larceny, embezzlement, and false pretenses was not historically permitted, *Schad's* holding does not answer whether due process allows for the creation of a singular crime of

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61. *Id.* ¶ 4.
62. *Id.* ¶¶ 10-15.
63. *Id.* ¶ 10 (citation omitted).
64. *Id.* (citing State v. Bourbeau, 250 N.W.2d 259, 264 (N.D. 1977)).
65. *Id.* ¶¶ 10-15.
66. *Id.* ¶ 15.
67. *Id.* ¶ 22.
68. *Id.* ("Therefore, the district court did not err in combining subsections (1) and (3) of § 12.1-23-02 into one jury instruction.").
69. *See id.*
70. State v. Bourbeau, 250 N.W.2d 259, 263 (N.D. 1977) ("We have seen that English legal history explains the fact that, in most American jurisdictions today, the wrongful appropriation of another's property is covered by three related but separate, nonoverlapping crimes—larceny, embezzlement and false pretenses." (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW, at 673 (1972) (footnote omitted))).

"theft" from what had—historically—been three separate crimes. Worse, the dicta from the plurality and Justice Scalia's concurrence appear to conflict on how to answer this lingering question.[71]

1. The Schad Plurality's "Fundamental Fairness" Analysis

Under the plurality opinion, any alternative methods statute must pass a "fundamental fairness" analysis.[72] Under this analysis, as explained by the plurality, if an alternative methods statutory scheme enjoys historical or contemporary acceptance, that "is a strong indication" of satisfying the fundamental fairness standard.[73] "Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden."[74] In either case, the plurality believed the fundamental fairness analysis must answer whether it is fair to treat the alternatives as "equivalent."[75]

The Supreme Court of Wisconsin has embraced the *Schad* plurality's test.[76] In *State v. Derango*, the court considered whether alternative mental states for committing the crime of child enticement were permissible.[77] The court began with the "presumption in favor of the legislative determination to create a single crime with alternative modes of commission, for which unanimity is not required."[78] Expanding from that presumption, the court held that even though the practice did not have historical support, the statute did not violate due process because "[t]he alternate mental states for the crime

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71. Again, the question presented in *Schad* was "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." Schad v. Arizona, 501 U.S. 624, 627 (1991) (plurality opinion). Because the plurality and Justice Scalia agreed that treating premeditated murder and felony murder as alternative mens rei for the singular crime of first-degree murder was historically supported, *see id.* at 640-41, 648-49 (Scalia, J., concurring in part and concurring in the judgment), any analysis regarding the test for when alternative methods were not historically supported is necessarily dicta. *Cf.* Kastigar v. United States, 406 U.S. 441, 454-55 (1972) (Broad language of an opinion which "was unnecessary to Court's decision [could not] be considered binding authority.").

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

73. *Id*. at 642; *see also id*. ("[W]e 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." (citations omitted)).

74. *Id*. at 640.

75. *Id*. at 644 ("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."); *cf. id*. ("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.").

76. *See* State v. Derango, 2000 WI 89, ¶ 24, 236 Wis. 2d 721, 613 N.W.2d 833.

77. *Id*. ¶ 1.

78. *Id*. ¶ 24.

of child enticement are clearly conceptually and morally equivalent: they all relate to causing physical, sexual or mental harm to a child."[79]

If the North Dakota Supreme Court embraced the *Schad* plurality's fundamental fairness test, North Dakota's theft statute is likely constitutional. Despite a lack of historical support—indeed, the statute is contrary to tradition[80]—the modern trend is to treat the separate, nonoverlapping crimes of larceny, embezzlement, and false pretenses as a singular crime.[81] Indeed, in that the ultimate purpose of any larceny, embezzlement, or false pretenses is the unlawful acquisition of the property of another, it strains credulity to believe the separate crimes are not morally equivalent.[82] Accordingly, if the North Dakota Supreme Court were to embrace the test put forth by the *Schad* plurality, it is believed the court would find North Dakota's theft statute to be constitutional.

2. Justice Scalia's Analysis

Justice Scalia's dicta is unclear as to how he would construe a statute enacting alternative methods that did not find support in historical practice. Initially, Justice Scalia opines a "'[f]undamental fairness' analysis may appropriately be applied to *departures* from traditional American conceptions of due process."[83] As such, because treating "theft" as a singular crime departs from traditional American conceptions of due process, a "'fundamental fairness' analysis may be appropriate."[84]

Additionally, Justice Scalia expressed skepticism—at best—to applying a fundamental fairness analysis when statutory alternative methods do not find support in historical practice:

> If I did not believe [that submitting killing in the course of a robbery and premeditated killing to the jury under a single charge was historically permitted], I might well be with the dissenters in this case. Certainly the plurality provides no satisfactory explanation of

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79. *Id.*; *see also* State v. Johnson, 2001 WI 52, ¶ 18, 243 Wis. 2d 365, 627 N.W.2d 455 (holding lack of unanimity in individual acts of child sexual assault for crime of repeated sexual assault of same child did not violate defendant's due process right because alternatives were "basically morally and conceptually equivalent").

80. *See* State v. Bourbeau, 250 N.W.2d 259, 263 (N.D. 1977).

81. *See id.* ("The modern remedy is to consolidate these three separate crimes (perhaps including also the separate crimes of receiving stolen property, and blackmail or extortion) into one consolidated crime called 'theft.'" (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW, at 673 (1972))).

82. *Cf. Johnson*, 2001 WI 52, ¶ 18 ("[T]hese variations are not of such a degree or nature as to call into question the basic moral and conceptual equivalence of first- and second-degree sexual assault of a child.").

83. Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment).

84. *Id.*

> why (*apart from the endorsement of history*) it is permissible to combine in one count killing in the course of robbery and killing by premeditation.[85]

Justice Scalia continued that the plurality's "critical examination" as to when alternative methods are equivalent "ultimately relies upon nothing but historical practice."[86] Accordingly, Justice Scalia appears to default to the position that statutory alternative methods for committing a singular offense pass due process analysis if—and only if—historically permitted.[87]

The Supreme Court of Washington appears to have embraced Justice Scalia's analysis.[88] In *State v. Fortune*, the court considered the substantively identical question posed in *Schad*, whether Washington's first-degree murder statute was constitutional when it allowed premeditated and felony murder to be alternative means of committing the offense.[89] Like Scalia's concurrence in *Schad*, the *Fortune* court found the *Schad* "plurality's reasoning was based entirely on an analysis of historical and current practice."[90] Instead, like Scalia's concurring opinion in *Schad*, the court upheld the statute as deeply rooted in Washington's history.[91]

If the North Dakota Supreme Court embraced Scalia's narrow view of the process due under the Due Process Clause, North Dakota's theft statute is likely unconstitutional. As already explicitly found by the court, the current theft statute departs from the historical practice of treating the separate, nonoverlapping crimes of larceny, embezzlement, and false pretenses as separate crimes. Absent historical practice, the moral equivalence of trying to unlawfully acquire the property of another alone does not provide a basis for allowing separate crimes to be treated as a singular crime.[92] Accordingly,

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85. *Id.* at 651 (emphasis added).

86. *Id.*

87. *See id.* at 652 ("Th[e] requirement of [due process] is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land." (quoting Walker v. Sauvinet, 92 U.S. 90, 93 (1875)) (alterations in original)). Arguably, five justices may have narrowly agreed that non-historically permitted alternative methods laws do not satisfy due process. *See id.* at 652-59 (White, J., dissenting). But even if that were the case, such agreement of five justices would remain non-controlling dicta. *Cf.* Kastigar v. United States, 406 U.S. 441, 454-55 (1972) (Broad language of an opinion which "was unnecessary to Court's decision [could not] be considered binding authority.").

88. *See* State v. Fortune, 909 P.2d 930 (Wash. 1996).

89. *Id.* at 930.

90. *Id.* at 934; *see also id.* at 932 (characterizing the plurality's moral equivalent test as "new and extremely vague"); *id.* at 934 (characterizing the plurality's moral equivalent test as "vague and unprecedented").

91. *Id.*

92. *See Schad*, 501 U.S. at 651 (Scalia, J., concurring in part and concurring in the judgment) ("Perhaps moral equivalence is a *necessary* condition for allowing such a verdict to stand, but surely the plurality does not pretend that it is *sufficient*. (We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts.)").

if the North Dakota Supreme Court embraced a due process test based on history as outlined in Scalia's concurrence, it is believed the court would find North Dakota's theft statute to be unconstitutional.[93]

V. CONCLUSION

Respectfully, it is submitted that Justice Scalia's reasoning should prevail when this issue reaches the North Dakota Supreme Court. While amorphous phrases such as "morally equivalent" and "fundamentally fair" may ring sweetly in the ear, they do little to provide the courts—let alone the public—with a readily applicable standard to apply to complex cases and charging decisions. And in the absence of a readily applicable standard, as explained by Justice Scalia, the courts are generally ill-equipped to second guess policy determinations as to when two unlawful acts should be deemed "morally equivalent."[94]

At first blush, because the North Dakota Supreme Court has only considered whether statutory alternative methods of committing a singular offense in limited circumstances,[95] a full application of *Schad* may facially appear to be of limited effect. However, a full application of *Schad* has implications beyond the crimes of theft, disorderly conduct, or child abuse. For example, North Dakota law defines the singular crime of "murder" as including premeditated killings,[96] depraved-heart killings,[97] or killings committed in the course of the commission of a felony.[98] Historically, a depraved-heart killing would be second-degree murder, unlike premeditated killings and felony murder.[99] Yet North Dakota law—facially—makes

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93. *See* Ngo v. State, 175 S.W.3d 738, 752 (Tex. Crim. App. 2005) (en banc) (overturning defendant's conviction when jury instructions did not require unanimity for alternative means of committing credit card abuse).

94. *Schad*, 501 U.S. at 650 (Scalia, J., concurring in part and concurring in the judgment) ("'Fundamental fairness' analysis may appropriately be applied to *departures* from traditional American conceptions of due process; but when judges test their individual notions of 'fairness' against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges." (emphasis in original)).

95. *See* State v. Gardner, 2023 ND 116, ¶¶ 10-19, 992 N.W.2d 535, 539-41 (construing whether North Dakota Century Code Section 14-09-22 provides alternative methods of committing the singular offense of child abuse so as not to require juror unanimity); State v. Pulkrabek, 2017 ND 203, ¶¶ 14-16, 900 N.W.2d 798, 801-02 (construing whether North Dakota Century Code Section 12.1-23-02 provides alternative methods of committing the singular offense of theft so as not to require juror unanimity); City of Mandan v. Sperle, 2004 ND 114, ¶¶ 13-14, 680 N.W.2d 275, 278-79 (construing whether Mandan City Ordinance Section 19-05-01 provides alternative methods of committing the singular offense of disorderly conduct so as not to require juror unanimity).

96. N.D. CENT. CODE § 12.1-16-01(1)(a) (1993).

97. *Id.* § 12.1-16-01(1)(b).

98. *Id.* § 12.1-16-01(1)(c).

99. *See Schad*, 501 U.S. at 648-49 (Scalia, J., concurring in part and concurring in the judgment).

depraved-heart killings an alternative method of committing the singular crime of "murder."[100]

Whether North Dakota's murder statutory alternative methods scheme is constitutional is not merely an academic question. Defendants have been prosecuted under charging documents making depraved-heart killings an alternative method of committing murder.[101] *Schad* minimally questions the permissibility of this practice, with Justice Scalia's concurrence appearing outright hostile to it. Accordingly, the question is not whether due process limitations on statutory alternative methods will affect North Dakota law but how robust the effect will be. The sooner the North Dakota Supreme Court adopts a definitive test for answering this question, the better for all involved.

100. *Compare* N.D. CENT. CODE § 12.1-16-01(1) (using "or" to set apart the alternative means of committing "murder"), *with Gardner*, 2023 ND 116, ¶ 18, 992 N.W.2d at 541 ("The statute uses 'or' to set apart the two nonexclusive means of committing" a crime.).

101. *See, e.g.*, State v. Aune, 2021 ND 7, ¶ 3, 953 N.W.2d 601, 604 ("Aune was charged with murder in violation of N.D.C.C. § 12.1-16-01(1)(a) and (b), a class AA felony, defined as intentionally or knowingly causing the death of another human being, or causing the death of another human under circumstances manifesting extreme indifference to the value of human life."); State v. Brickle-Hicks, 2018 ND 194, ¶ 4, 916 N.W.2d 781, 783 ("The State charged Brickle-Hicks with murder, a class AA felony under N.D.C.C. § 12.1-16-01(1), alleging he intentionally or knowingly caused the death of another on April 14, 2016, or caused the death of another under circumstances manifesting an extreme indifference to the value of human life."); Dominguez v. State, 2013 ND 249, ¶ 2, 840 N.W.2d 596, 598 ("Dominguez was charged with attempted murder under N.D.C.C. §§ 12.1-06-01 and 12.1-16-01(1)(a) and (b) . . . ."); State v. Keller, 2005 ND 86, ¶ 35, 695 N.W.2d 703, 712 ("Under those statutes and the charges in this case, Keller was guilty of conspiracy to commit murder if he agreed with Sherman to intentionally or knowingly cause the death of another or to cause the death of another under circumstances manifesting extreme indifference to the value of human life . . . ."); State v. Erickstad, 2000 ND 202, ¶ 24, 620 N.W.2d 136, 143 ("The defendants were charged alternatively with murder under both subsections (a) and (b)."); State v. Magnuson, 1997 ND 228, ¶ 2, 571 N.W.2d 642, 643 ("Magnuson was charged with murder under N.D.C.C. § 12.1-16-01(1)(a) and (b) for the May 1996 death of Alex Vondal."); State v. VanNatta, 506 N.W.2d 63, 65 (N.D. 1993) ("VanNatta was charged with murder, a class AA felony under Section 12.1-16-01(1)(a) and (b), N.D.C.C., for the March 1991 death of Iona Ostlund."); State v. Skjonsby, 319 N.W.2d 764, 772 (N.D. 1982) ("The trial judge instructed the jury, using the statutory language, that they could find Skjonsby guilty of the murder of Kurtz if the shooting '(a) was done by the defendant, Richard Skjonsby, intentionally or knowingly so as to cause the death of Michael Kurtz [N.D.C.C. § 12.1-16-01(1)]; or (b) was done by the defendant, Richard Skjonsby, to cause the death of Michael Kurtz under circumstances manifesting extreme indifference to the value of human life [N.D.C.C. § 12.1-16-01(2)].'").