Notes from main opinion

1
The full statute provided:

"A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree."
The statute has since been revised, but both premeditated murder and murder in the course of a robbery still constitute first degree murder. See Ariz. Rev. Stat. Ann. MDRV 13-1105.A (1989).

2
Respondent contends that petitioner waived this contention by failing to raise it in the lower Arizona courts. Brief for Respondent 8-10. The Arizona Supreme Court, however, addressed the contention on the merits, 163 Ariz. 411, 417, 788 P. 2d 1162, 1168 (1989), thereby preserving the issue for our review. See Orr v. Orr, 440 U. S. 268, 274-275 (1979).

3
See also Wechsler, A Rationale of the Law of Homicide: I, 37 Colum. L. Rev. 701, 702-703 (1937); Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 905, 926 (1939).

4
Although our vagueness cases support the notion that a requirement of proof of specific illegal conduct is fundamental to our system of criminal justice, the principle is not dependent upon or limited by concerns about vagueness. A charge allowing a jury to combine findings of embezzlement and murder would raise identical problems regardless of how specifically embezzlement and murder were defined.

5
The court identified this right as a concomitant of the federal criminal defendant's Sixth Amendment right to a unanimous verdict, and subsequent courts following Gipson have adopted that characterization. E. g., United States v. Beros, 833 F. 2d 455 (CA3 1987). For the reasons given earlier, we think the right is more accurately characterized as a due process right than as one under the Sixth Amendment. Although this difference in characterization is important in some respects (chiefly, because a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict, see Johnson v. Louisiana, 406 U.
S. 356 (1972); Apodaca v. Oregon, 406 U. S. 404 (1972)), it is immaterial to the problem of how to go about deciding what level of verdict specificity is constitutionally necessary.

6
Because statutes frequently enumerate alternatives that clearly are mere means of satisfying a single element of an offense, adoption of the dissent's approach of requiring a specific verdict as to every alternative would produce absurd results. For example, the Arizona first-degree murder statute at issue here prohibited, inter alia, "wilful, deliberate or premeditated killing." Ariz. Rev.

Stat. Ann. MDRV 13-452 (Supp. 1973) (emphasis added). Under the dissent's approach, juries in prosecutions brought under the statute presumably should have been required to deliver specific verdicts as to each of the three: wilfullness, deliberation, and premeditation.

7

We note, however, the perhaps obvious proposition that history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common law roots than it is in cases, like this one, that deal with crimes that existed at common law.

8
The Pennsylvania statute provided:

"[A]ll murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and 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." 1794 Pa. Laws, ch. 1766, MDRV 2.

9
The dissent's focus on the "risks of different punishment," post, at 7-8, and n. 4, for premeditated and felony murder, ignores the fact that the Arizona sentencing statute applicable to petitioner, Ariz. Rev. Stat. Ann. MDRV 13-453 (Supp. 1973), authorized the same maximum penalty (death) for both means of committing first-degree murder. See McMillan v. Pennsylvania, 477 U. S. 79, 87-88 (1986) (relying on fact that under Pennsylvania law possession of a weapon "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty"). Moreover, the dissent's concern that a general verdict does not provide the sentencing judge with sufficient information about the jury's findings to provide a proper premise for the decision whether or not to impose the death penalty, post, at 7-8, goes only to the permissibility of a death sentence imposed in such circumstances, not to the issue currently before us, which is the permissibility of the conviction. To make the point by example, even if the trial judge in this case had satisfied any possible specific verdict concerns by instructing the jurors that they were required to agree on a single theory of the crime, the dissent's "insufficient sentencing information" concern would remain unless the judge had also taken the additional step (a step unrelated to petitioner's right to jury agreement on the specific conduct he committed) of requiring them to return separate forms of verdict. The only relevant question for present purposes is what the jury must decide, not what information it must provide the sentencing judge.

10
Petitioner also contends that the jury should have been instructed on the offense of theft, against which respondent argues that any claim for a lesser included theft offense instruction was waived. Given respondent's concession that petitioner has preserved his claim for a robbery instruction, and our view of the scope of Beck, see infra, at 20-22, there is no need to resolve this waiver issue.

Justice Scalia, concurring in part and concurring in the judgment.

The crime for which a jury in Yavapai County, Arizona, convicted Edward Harold Schad in 1985 has existed in the Anglo-American legal system, largely unchanged, since at least the early 16th century, see 3 J. Stephen, A History of the Criminal Law of England 45 (1883); R. Moreland, Law of Homicide 9-10 (1952). The common-law crime of murder was the unlawful killing of a human being by a person with "malice aforethought" or "malice prepense," which consisted of an intention to kill or grievously injure, knowledge that an act or omission would probably cause death or grievous injury, an intention to commit a felony, or an intention to resist lawful arrest. Stephen, supra, at 22; see also 4 W. Blackstone, Commentaries 198-201 (1769); 1 M. Hale, Pleas of the Crown 451-466 (1st Am. ed. 1847).

The common law recognized no degrees of murder; all unlawful killing with malice aforethought received the same punishment -- death. See F. Wharton, Law of Homicide 147 (3d ed. 1907); Moreland, supra, at 199. The rigor of this rule led to widespread dissatisfaction in this country. See McGautha v. California, 402 U. S. 183, 198 (1971). In 1794, Pennsylvania divided common-law murder into two offenses, defining the crimes thus:

> [A]ll murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate, 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." 1794 Pa. Laws, ch. 1766, MDRV 2.

That statute was widely copied, and down to the present time the United States and most States have a single crime of first-degree murder that can be committed by killing in the course of a robbery as well as premeditated killing. See, e. g., 18 U. S. C. MDRV 1111; Cal. Penal Code Ann. MDRV 189 (West 1988 and Supp. 1991); Kan. Stat. Ann. MDRV 21.3401 (Supp. 1990); Mich. Comp. Laws Ann. MDRV 750.316 (1991); Neb. Rev. Stat. MDRV 28-303 (1989). {1} It is Arizona's variant of the 1794 Pennsylvania statute under which Schad was convicted in 1985 and which he challenges today.

Schad and the dissenting Justices would in effect have us abolish the crime of first-degree murder and declare that the Due Process Clause of the Fourteenth Amendment requires the subdivision of that crime into (at least) premeditated murder and felony murder. The plurality rejects that course-- correctly, but not in my view for the correct reason.

As the plurality observes, 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. See, e. g., People v. Sullivan, 173 N. Y. 122, 65 N.E. 989 (1903); cf. H. Joyce, Indictments 15 561-562, pp. 654-657 (2d ed. 1924); W. Clark, Criminal Procedure 15 99-103, pp. 322-330 (2d. ed. 1918); 1 J. Bishop, Criminal Procedure 15 434-438, pp. 261-265 (2d. ed. 1872). 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. While that seems perfectly obvious, it is also true, as the plurality points out, see ante, at 7, that one can conceive of novel "umbrella" crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-6 verdict would seem contrary to due process.

The issue before us is whether the present crime falls into the former or the latter category. The plurality makes heavy weather of this issue, because it starts from the proposition that "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," ante, at 15 (internal quotations omitted). That is true enough with respect to some constitutional attacks, but not, in my view, with respect to attacks under either the procedural component, see Pacific Mutual Life Insurance Co. v. Haslip, 499 U. S. ---, --- (1991) (slip op., at 15) (Scalia, J., concurring in judgment), or the so-called "substantive" component, see Michael H. v. Gerald D., 491 U. S. 110, 121-130 (1989) (plurality opinion), of the Due Process Clause. It is precisely the historical practices that define what is "due." "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.

And that is the case here. 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."

If I did not believe that, I might well be with the dissenters in this case. Certainly the plurality provides 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. The only point it makes is that the depravity of mind required for the two may be considered morally equivalent. Ante, at 17-19. But the petitioner here does not complain about lack of moral equivalence: he complains that, as far as we know, only six jurors believed he was participating in a robbery, and only six believed he intended to kill. Perhaps moral 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.) Thus, the plurality approves the Arizona practice in the present case because it meets one of the conditions for constitutional validity. It does not say what the other conditions are, or why the Arizona practice meets them. With respect, I do not think this delivers the "critical examination," ante, at 17, which the plurality promises as a substitute for reliance upon historical practice. In fact, I think its analysis ultimately relies upon nothing but historical practice (whence does it derive even the "moral equivalence" requirement?) -- but to acknowledge that reality would be to acknowledge a rational limitation upon our power, which bob-tailed "critical examination" obviously is not. "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." Walker v. Sauvinet, 92 U. S. 90, 93 (1876)

(citation omitted).

With respect to the second claim asserted by petitioner, I agree with Justice Souter's analysis, and join Part III of his opinion. For these reasons, I would affirm the judgment of the Supreme Court of Arizona.

NOTES TO OPINION OF JUSTICE SCALIA

1
Still other States never established degrees of murder, and retain a single crime of "murder" that encompasses both premeditated killing and killing in the course of a robbery. See, e. g., S. C. Code MDRV 16-3-10 (1985).

Because I disagree with the result reached on each of the two separate issues before the Court, and because what I deem to be the proper result on either issue alone warrants reversal of petitioner's conviction, I respectfully dissent.

I

As In re Winship, 397 U. S. 358 (1970), makes clear, due process mandates "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." Id., at 364. In finding that the general jury verdict returned against petitioner meets the requirements of due process, the plurality ignores the import of Winship's holding. In addition, the plurality mischaracterizes the nature of the constitutional problem in this case.

/* The point that the dissent is make is that the government must prove within a reasonable doubt that the defendant did one or another: kill the victim during a robbery, or with premediatation kill the victim, and that a case which does not convince all jurors on ONE of these points lessens the government's burden. */

It is true that we generally give great deference to the States in defining the elements of crimes. I fail to see, however, how that truism advances the plurality's case. There is no failure to defer in recognizing the obvious: that pre meditated murder and felony murder are alternative courses of conduct by which the crime of first-degree murder may be established. The statute provides:

"A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree." Ariz. Rev. Stat. Ann. MDRV 13-452 (Supp. 1973).

The statute thus sets forth three general categories of conduct which constitute first-degree murder: a "wilful, deliberate or premeditated killing"; a killing committed to avoid arrest or effect escape; and a killing which occurs during the attempt or commission of various specified

felonies.

Here, the prosecution set out to convict petitioner of first-degree murder by either of two different paths, premeditated murder and felony murder/robbery. Yet while these two paths both lead to a conviction for first-degree murder, they do so by divergent routes possessing no elements in common except the fact of a murder. In his closing argument to the jury, the prosecutor himself emphasized the difference between premeditated murder and felony murder:

"There are two types of first degree murder, two ways for first degree murder to be committed. [One] is premeditated murder. There are three elements to that. One, that a killing take place, that the defendant caused someone's death. Secondly, that he do so with malice. And malice simply means that he intended to kill or that he was very reckless in disregarding the life of the person he killed. . . .
"And along with the killing and the malice, attached to that killing is a third element, that of premeditation, which simply means that the defendant contemplated that he would cause death, he reflected upon that.
"The other type of first degree murder, members of the jury, is what we call felony murder. It only has two components [sic] parts. One, that a death be caused, and, two, that that death be caused in the course of a felony, in this case a robbery. And so if you find that the defendant committed a robbery and killed in the process of that robbery, that also is first degree murder." App. 6-7.

Unlike premeditated murder, felony murder does not require that the defendant commit the killing or even intend to kill, so long as the defendant is involved in the underlying felony. On the other hand, felony murder -- but not premeditated murder -- requires proof that the defendant had the requisite intent to commit and did commit the underlying felony. State v. McLoughlin, 139 Ariz. 481, 485, 679 P. 2d 504, 508 (1984). Premeditated murder, however, demands an intent to kill as well as premeditation, neither of which is required to prove felony murder. Thus, contrary to the plurality's assertion, see ante, at 13, the difference between the two paths is not merely one of a substitution of one mens rea for another. Rather, each contains separate elements of conduct and state of mind which cannot be mixed and matched at will. {1} It is particularly fanciful to equate an intent to do no more than rob with a premeditated intent to murder.

Consequently, a verdict that simply pronounces a defendant "guilty of first-degree murder" provides no clues as to whether the jury agrees that the three elements of premed itated murder or the two elements of felony murder have been proven beyond a reasonable doubt. Instead, it is entirely possible that half of the jury believed the defendant was guilty of premeditated murder and not guilty of felony murder/robbery, while half believed exactly the reverse. To put the matter another way, the plurality affirms this conviction without knowing that even a single element of either of the ways for proving first-degree murder, except the fact of a killing, has been found by a majority of the jury, let alone found unanimously by the jury as required by Arizona law. A defendant charged with first-degree murder is at least entitled to a verdict -- something petitioner did not get in this case as long as the possibility exists that no more than six jurors voted for any one element of first-degree murder, except the fact of a killing. {2}

The means by which the plurality attempts to justify the result it reaches do not withstand

scrutiny. In focusing on our vagueness cases, see ante, at 6-7, the plurality misses the point. The issue is not whether the statute here is so vague that an individual cannot reasonably know what conduct is criminalized. Indeed, the statute's specificity renders our vagueness cases inapplicable. The problem is that the Arizona statute, under a single heading, criminalizes several alternative patterns of conduct. While a State is free to construct a statute in this way, it violates due process for a State to invoke more than one statutory alternative, each with different specified elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt.

The plurality concedes that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of `Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." Ante, at 7. But this is very close to the effect of the jury verdict in this case. Allowing the jury to return a generic verdict following a prosecution on two separate theories with specified elements has the same effect as a jury verdict of "guilty of crime" based on alternative theories of embezzlement or reckless driving. Thus the statement that "[i]n Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder," State v. Encinas, 132 Ariz. 493, 496, 647 P. 2d 624, 627 (1982), neither recognizes nor resolves the issue in this case.

The plurality likewise misses the mark in attempting to compare this case to those in which the issue concerned proof of facts regarding the particular means by which a crime was committed. See ante, at 5-6. In the case of burglary, for example, the manner of entering is not an element of the crime; thus, Winship would not require proof beyond a reasonable doubt of such factual details as whether a defendant pried open a window with a screwdriver or a crowbar. It would, however, require the jury to find beyond a rea sonable doubt that the defendant in fact broke and entered, because those are the "fact[s] necessary to constitute the crime." 397 U. S., at 364. {3}

Nor do our cases concerning the shifting of burdens and the creation of presumptions help the plurality's cause. See ante, at 12. Although this Court consistently has given deference to the State's definition of a crime, the Court also has made clear that having set forth the elements of a crime, a State is not free to remove the burden of proving one of those elements from the prosecution. For example, in Sandstrom v. Montana, 442 U.S. 510 (1979), the Court recognized that "under Montana law, whether the crime was committed purposely or knowingly is a fact necessary to constitute the crime of deliberate homicide," and stressed that the State therefore could not shift the burden of proving lack of intent to the defendant. Id., at 520-521. Conversely, in Patterson v. New York, 432 U.
S. 197, 205-206 (1977), the Court found that it did not violate due process to require a defendant to establish the affirmative defense of extreme emotional disturbance, because "[t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime." Here, the question is not whether the State "must be permitted a degree of flexibility" in defining the elements of the offense. See ante, at 12. Surely it is entitled to that deference. But having determined that premeditated murder and felony murder are separate paths to establishing first-degree murder, each containing a separate set of elements from the other, the State must be held to its choice. {4} Cf. Evitts v. Lucey, 469 U.S. 387, 401 (1985). To allow the State to avoid the consequences of its legislative choices through judicial

interpretation would permit the State to escape federal constitutional scrutiny even when its actions violate rudimentary due process.

The suggestion that the state of mind required for felony murder/robbery and that for premeditated murder may reasonably be considered equivalent, see ante, at 18, is not only unbelievable, but it also ignores the distinct consequences that may flow from a conviction for each offense at sentencing. Assuming that the requisite statutory aggravating circumstance exists, the death penalty may be imposed for premeditated murder, because a conviction necessarily carries with it a finding that the defendant intended to kill. See Ariz. Rev. Stat. Ann. MDRV 13-703 (1989). This is not the case with felony murder, for a conviction only requires that the death occur during the felony; the defendant need not be proven to be the killer. Thus, this Court has required that in order for the death penalty to be imposed for felony murder, there must be a finding that the defendant in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used, Enmund v. Florida, 458 U. S. 782, 797 (1982), or that the defendant was a major participant in the felony and exhibited reckless indifference to human life, Tison v. Arizona, 481 U. S. 137, 158 (1987).

In the instant case, the general verdict rendered by the
jury contained no finding of intent or of actual killing by petitioner. The sentencing judge declared, however:

"[T]he court does consider the fact that a felony murder instruction was given in mitigation, however there is not evidence to indicate that this murder was merely incidental to a robbery. The nature of the killing itself belies that. . . .
"The court finds beyond a reasonable doubt that the defendant attempted to kill Larry Grove, intended to kill Larry Grove and that defendant did kill Larry Grove.

"The victim was strangled to death by a ligature drawn very tightly about the neck and tied in a double knot. No other reasonable conclusion can be drawn from the proof in this case, notwithstanding the felony murder instruction." Tr. 8-9 (Aug. 29, 1985).

Regardless of what the jury actually had found in the guilt phase of the trial, the sentencing judge believed the murder was premeditated. Contrary to the plurality's suggestion, see ante, at 18, n. 9, the problem is not that a general verdict fails to provide the sentencing judge with sufficient information concerning whether to impose the death sentence. The issue is much more serious than that. If in fact the jury found that premeditation was lacking, but that petitioner had committed felony murder/robbery, then the sentencing judge's finding was in direct contravention of the jury verdict. It is clear, therefore, that the general jury verdict creates an intolerable risk that a sentencing judge may subsequently impose a death sentence based on findings that contradict those made by the jury during the guilt phase, but not revealed by their general verdict. Cf. State v. Smith, 160 Ariz. 507, 513, 774 P. 2d 811, 817 (1989).

/* The majority did not even attempt to discuss the fact that the Judge premised the sentencing on solely a theory of pre-mediatated murder. */

II

I also cannot agree that the requirements of Beck v. Alabama, 447 U. S. 625 (1980), were satisfied by the instructions and verdict forms in this case. Beck held that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the `third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." Id., at 637. The majority finds Beck satisfied because the jury here had the opportunity to convict petitioner of second-degree murder. See ante, at 20-21. But that alternative provided no "third option" to a choice between convicting petitioner of felony murder/robbery and acquitting him completely, because, as the State concedes, see Tr. of Oral Arg. 51-52, second-degree murder is a lesser included offense only of premeditated murder. Thus, the Arizona Supreme Court has declared that " `[t]he jury may not be instructed on a lesser degree of murder than first degree where, under the evidence, it was committed in the course of a robbery.' " State v. Clayton, 109 Ariz. 587, 595, 514 P. 2d 720, 728 (1973), quoting State v. Kruchten, 101 Ariz. 186, 196, 417 P. 2d 510, 520 (1966), cert. denied, 385 U. S. 1043 (1967) (emphasis added). Consequently, if the jury believed that the course of events led down the path of felony murder/robbery, rather than premeditated murder, it could not have convicted petitioner of second-degree murder as a legitimate "third option" to capital murder or acquittal.

The State asserts that felony murder has no lesser included offenses. {5} In order for a defendant to be convicted of felony murder, however, there must be evidence to support a conviction on the underlying felony, and the jury must be instructed as to the elements of the underlying felony. Although the jury need not find that the underlying felony was completed, the felony murder statute requires there to be at least an attempt to commit the crime. As a result, the jury could not have convicted petitioner of felony murder/robbery without first finding him guilty of robbery or attempted robbery. {6} Indeed, petitioner's first conviction was reversed because the trial judge had failed to instruct the jury on the elements of robbery. 142 Ariz. 619, 691 P. 2d 710 (1984). As the Arizona Supreme Court declared, "Fundamental error is present when a trial judge fails to instruct on matters vital to a proper consideration of the evidence. Knowledge of the elements of the underlying felonies was vital for the jurors to properly consider a felony murder theory." Id., at 620-621, 691 P. 2d, at 711-712 (citation omitted).

It is true that the rule in Beck only applies if there is in fact a lesser included offense to that with which the defendant is charged, for "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." Spaziano v. Florida, 468 U. S. 447, 455 (1984). But while deference is due state legislatures and courts in defining crimes, this deference has constitutional limits. In the case of a compound crime such as felony murder, in which one crime must be proven in order to prove the other, the underlying crime must, as a matter of law, be a lesser included offense of the greater.

Thus, in the instant case, robbery was a lesser included offense of the felony murder/robbery for which petitioner was tried. The Arizona Supreme Court acknowledged that "the evidence supported an instruction and conviction for robbery," had robbery been a lesser included offense of felony murder/robbery. 163 Ariz. 411, 417, 788 P. 2d 1162, 1168 (1989). Consequently, the evidence here met "the independent prerequisite for a lesser included offense instruction that the

evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." Schmuck v. United States, 489 U.S. 705, 716, n. 8 (1989); see Keeble v. United States, 412 U. S. 205, 208 (1973). Due process required that the jury be given the opportunity to convict petitioner of robbery, a necessarily lesser included offense of felony murder/robbery. See Stevenson v. United States, 162 U. S. 313, 319-320 (1896).

Nor is it sufficient that a "third option" was given here for one of the prosecution's theories but not the other. When the State chooses to proceed on various theories, each of which has lesser included offenses, the relevant lesser included instructions and verdict forms on each theory must be given in order to satisfy Beck. Anything less renders Beck, and the due process it guarantees, meaningless.

With all due respect, I dissent.

NOTES TO DISSENTING OPINION

1
Changes to the Arizona first-degree murder statute since the date of the murder in question make it even clearer that felony murder and premeditated murder have different elements and involve different mentes reae. The statute now provides that the two offenses are alternative means of establishing first-degree murder. First, a person is guilty if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation." Ariz. Rev. Stat. Ann. MDRV 13-1105(A)(1) (1989). Second, a person is guilty if "[a]cting either alone or with one or more other persons such person commits or attempts to commit [any one of a series of specified felonies], and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person." MDRV 13-1105(A)(2). The antecedent of the current statute, which used substantially the same language, took effect on October 1, 1978, less then two months after the killing at issue occurred. 1977 Ariz. Sess. Laws, Ch. 142, MDRV 60.

2
Even the Arizona Supreme Court has acknowledged that the lack of information concerning juror agreement may call into question the validity of a general jury verdict when the prosecution proceeds under alternative theories. State v. Smith, 160 Ariz. 507, 513, 774 P. 2d 811, 817 (1989). Indeed, petitioner's first trial exemplified this danger. There the State proceeded on three theories: premeditated murder, felony murder/robbery, and felony murder/kidnapping. The trial judge failed to instruct the jury on either of the underlying felonies, and the Arizona Supreme Court held this to be fundamental error. 142 Ariz. 619, 620, 691 P. 2d 710, 711 (1984). Petitioner's conviction was reversed because it was impossible to tell from the general jury verdict whether petitioner had been found guilty of premeditated murder or felony murder, for which the instructions had been deficient. Id., at 621, 691 P. 2d, at 712. Cf. Sandstrom v. Montana, 442 U. S. 510, 526 (1979).

3
For similar reasons, the plurality's focus on the statutorily enumerated means of satisfying a given element of an offense, see ante, at 10, n. 6, is misplaced.

4
Even if the crime of first-degree murder were generic, that different categories of the offense carry risks of different punishment is constitu tionally significant. In Mullaney v. Wilbur, 421 U. S. 684 (1975), for example, this Court concluded that the absence of "heat of passion on sudden provocation," while not an expressly stated element of the offense of "homicide," was essential to reduce the punishment category of the crime from that of murder to manslaughter. Id., at 697, 699. Consequently, the State there violated In re Winship, 397 U. S. 358 (1970), and principles of due process by requiring the defendant to establish the absence of the intent required for murder, and thereby rebut the presumption of malice. Mullaney, supra, at 703-704. As discussed below, the disparate intent requirements of premeditated murder and felony murder have lifeor-death consequences at sentencing.

5
Arizona law has not been consistent on this point. Arizona cases have long said that "there is no lesser included homicide offense of the crime of felony murder since the mens rea necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony." State v. Arias, 131 Ariz. 441, 444, 641 P. 2d 1285, 1288 (1982) (emphasis added). Recent cases have omitted the crucial word "homicide." See, e. g., State v. LaGrand, 153 Ariz. 21, 29-30, 734 P. 2d 563, 571-572, cert. denied, 484 U. S. 872-873 (1987).

6
In this Court's recent decision in Schmuck v. United States, 489 U. S. 705 (1989), we adopted the "elements" test for defining "necessarily included" offenses for purposes of Federal Rule of Criminal Procedure 31(c). "Under this test, one offense is not `necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." Schmuck, supra, at 716. See also Berra v. United States, 351 U. S. 131, 134 (1956). Here that test is met, for petitioner could not be convicted of felony murder/robbery unless the jury found that a robbery, or an attempt to commit robbery, had occurred.