Notes

# Jury Unanimity and the Problem with Specificity: Trying to Understand What Jurors Must Agree About by Examining the Problem of Prosecuting Child Molesters*


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## Introduction

Debates about jury unanimity in criminal trials currently focus on whether the requirement should be applied to states through the Due Process Clause of the Fourteenth Amendment.[1] Although the answer to this has been


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1. Joshua Dressler and Alan Michaels provide a description of the current status of the requirement of jury unanimity in state criminal trials. *See* JOSHUA DRESSLER & ALAN C.

"no" ever since the Supreme Court decision in *Apodaca v. Oregon*,[2] academics continue to focus on the topic.[3] Despite this attention on incorporation, a looming background question remains mostly untouched by academics[4]—one that matters regardless of whether the requirement for juries is unanimity or a supermajority. This is the question of what exactly jurors have to agree about. To be more precise: What is the level of specificity that must be agreed on by jurors?

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MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOLUME 1: INVESTIGATION 47 & n.32 (5th ed. 2010) (discussing *Apodaca v. Oregon*, 406 U.S. 404 (1972), in which "the Court split 4–4 on whether the Sixth Amendment requires that jury verdicts be unanimous" and noting that Justice Powell's concurring opinion, which "concluded that the Sixth Amendment requires unanimous verdicts, but that the Fourteenth Amendment does not impose this requirement on the states" produced "the anomalous result that, although eight of the justices would have applied the same constitutional rule regarding jury unanimity to the states and to the federal government, the unanimity requirement in fact applies to the latter but not to the former"). For a brief discussion of the history of the incorporation of the Bill of Rights, see *id.* at 41–48.

2. 406 U.S. 404, 410–12 (1972).

3. Jury unanimity advocates were given a potential constitutional opening after *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), a Second Amendment incorporation case where a majority of the Court expressed support for full incorporation of the Bill of Rights. *See id.* at 3047 (plurality opinion) ("[T]his Court decades ago abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'" (citation omitted)); *id.* at 3058–59 (Thomas, J., concurring in part and concurring in the judgment) (expressing agreement with the plurality regarding the scope of incorporation but preferring that incorporation of the Bill of Rights go through the Fourteenth Amendment's Privileges or Immunities Clause, rather than the Fourteenth Amendment's Due Process Clause). But advocates of jury unanimity have so far been rebuffed in their recent attempts to get a case before the Supreme Court. The most recent example of the Supreme Court denying a petition for writ of certiorari on this issue is *Herrera v. Oregon*, 131 S. Ct. 904 (2011). *See* Petition for a Writ of Certiorari at i, *Herrera*, 131 S. Ct. 904 (No. 10-344) (framing the question before the Court as "[w]hether the Sixth Amendment, as incorporated against the States by the Fourteenth, likewise requires a unanimous jury verdict to convict a person of a crime"). Seventeen professors were accounted for in four amicus briefs, and Eugene Volokh wrote the petition for certiorari for Herrera. *See* Brief of Oregon Criminal-Law and Criminal-Procedure Professors as *Amici Curiae* in Support of Petitioner at 1–2, *Herrera*, 131 S. Ct. 904 (No. 10-344) (listing the eight law professors who prepared the brief); Brief of *Amicus Curiae* Professor Jeffrey B. Abramson in Support of Petitioner at 1, *Herrera*, 131 S. Ct. 904 (No. 10-344) (introducing the amicus as a professor of law and government); Brief of *Amicus Curiae* Professor Kate Stith at 1, *Herrera*, 131 S. Ct. 904 (No. 10-344) (identifying the amicus as a professor at Yale Law School); Brief of Shari Seidman Diamond, Valerie Hans, Kenneth S. Klein, Stephan Landsman, Michael Saks, Rita Simon, and Neil Vidmar as Amici Curiae in Support of Petitioner at 1, *Herrera*, 131 S. Ct. 904 (No. 10-344) (identifying the seven amici as "law school professors"); Petition for a Writ of Certiorari, *Herrera*, 131 S. Ct. 904 (No. 10-344) (listing the author as Eugene Volokh on the cover page of the petition).

4. For a sampling of the few scholars who have addressed this question more directly, see generally Brian M. Morris, *Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases*, 62 MONT. L. REV. 1 (2001); Jessica A. Roth, *Alternative Elements*, 59 UCLA L. REV. 170 (2011); Peter Westen & Eric Ow, *Reaching Agreement on When Jurors Must Agree*, 10 NEW CRIM. L. REV. 153 (2007); Eric S. Miller, Note, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 YALE L.J. 2277 (1995).

One way to approach questions about the level of specificity required for jury agreement[5] is by examining current state laws and their various jury agreement doctrines.[6] Continuous course of conduct offenses in particular can be helpful in examining these types of questions. Continuous course of conduct offenses can allow defendants to be found guilty without jury agreement on particular events, acts, or dates, as long as other requirements are met.[7] This Note will focus on one particular type of continuous course of conduct offenses—"continuous sexual abuse of a child" (CSA) statutes—that has become popular in the last two decades.

CSA statutes are meant to battle a difficulty in convicting child molesters: many of these cases revolve around alleged repeated sexual abuse with only generic evidence available since the child in question has difficulty providing event-specific evidence.[8] I use the term "generic evidence" to refer to evidence regarding abuse in general that is not specific to any one particular event in time. There is a tension present between trying to enforce offenses like this and traditional notions imbedded in our criminal law system.[9] CSA statutes have been written by states to increase prosecutors'

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5. I use the term "jury agreement" to mean the jury decision-making rule in general—whether it is a supermajority requirement or a unanimity requirement. Given that forty-eight out of fifty states still have a unanimity requirement for criminal trials, jury agreement doctrines will often be referred to as unanimity doctrines. Petition for a Writ of Certiorari, *supra* note 3, at 12 (recognizing that forty-eight states "require unanimity for a criminal jury verdict").

6. Another approach in analyzing the level of specificity required is to focus on the nature and limits of *actus reus* requirements. This approach might actually be more theoretically consistent with the underlying question of specificity. This Note, though, will focus on state and Supreme Court doctrines that examine the specificity question under jury unanimity doctrines.

7. California courts have defined continuous course of conduct offenses as "aris[ing] in two contexts." People v. Thompson, 206 Cal. Rptr. 516, 518 (Cal. Ct. App. 1984). The first context "is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense"—for example, repeated acts of rape occurring within one hour. *Id.* The second context "is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time"—for example, "pimping, . . . pandering, . . . failure to provide for a minor child, contributing to the delinquency of a minor . . . and child abuse." *Id.* at 518–19.

8. *See, e.g.*, People v. Jones, 792 P.2d 643, 648 (Cal. 1990) (observing that criminal cases involving alleged child molestation "frequently involve difficult, even paradoxical, proof problems" since "[a] young victim . . . assertedly molested over a substantial period by a parent or other adult residing in his home, may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents").

9. *See, e.g.*, Dixon v. State, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring). In her concurrence, Judge Cochran explained:

> [Texas] criminal procedures are intended to protect a defendant from being tried for being a "bad" person who acts in conformity with a criminal character propensity. Our rules are intended to give the defendant advance notice of precisely what criminal act he is alleged to have committed and when it occurred. Our state constitution requires the jurors to make a unanimous decision on the occurrence of one specific criminal act. The law focuses the advocates, judge, and jurors on whether the person charged is guilty of this one, very specific criminal act that he is charged with having committed.

*Id.*

ability to convict child molesters,[10] yet to do this CSA statutes actually focus on proxies for this sort of continuous abuse, rather than having to prove the individual bad acts themselves.[11] Thus, CSA statutes allow a defendant to be convicted without jury agreement on particular specific acts committed, as long as the requisite number of acts can be agreed on, along with other requirements depending on the state.[12]

The two states that will receive the most focus in this Note are California and Texas. In California, the CSA statute states:

> (a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense . . . is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.
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> (b) To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number.[13]

Texas's CSA statute states:

> A person commits an offense if: . . . during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims . . . .
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> . . . .
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> . . . [M]embers of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.[14]

Current Supreme Court doctrine allows wide latitude for how states wish to construct their criminal offenses and define what level of specificity must be agreed upon by jurors.[15] States have added their own standards for what the level of specificity needs to be, but continuous course of conduct

10. Jeffrey A. Sandquist, *Continuous Child Sexual Abuse*, 26 ARIZ. ST. L.J. 317, 317–18 (1994).

11. *See infra* Part I.

12. *See infra* Part I.

13. CAL. PENAL CODE § 288.5(a)–(b) (West 2008).

14. TEX. PENAL CODE ANN. § 21.02(b)(1), (d) (West Supp. 2012).

15. *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOLUME 2: ADJUDICATION 291–93 (4th ed. 2006) (explaining that jury unanimity is constitutionally required as to "elements" but not as to "means").

offenses are typically an exception to these state requirements.[16] Whether an offense is to be regarded as a continuous course of conduct offense is usually a job for the state legislature as well, based on how the offense is worded.[17]

Allowing little to no restrictions on what level of specificity is required by jurors has a significant impact on the jury decision-making rule in general. For a unanimity or supermajority requirement to have any force, there must also be set limits on what the level of specificity should be. Allowing state legislatures almost plenary power to define this level of specificity can turn a decision-making requirement, whether unanimity or supermajority, into a shell of a requirement.

The difficulty in prosecuting child molestation cases is acknowledged.[18] But this attempt by states to solve this problem is too broad. This criticism will be applied to all CSA statutes, but the harshest criticism will be for states that have a CSA statute without the requirement that the victim be the same or the requirement that the defendant have the same residence or continuous access.[19] A certain level of specificity in jury agreement has been built into states' jury unanimity doctrines, as will be shown by looking at Texas and California in particular, and to allow this level of specificity to be ignored by simply terming an offense as a continuous course of conduct offense threatens to lead to a new wave in criminal statutes that work around specificity requirements. I will argue that the continuous course of conduct exception can be a needed one, but to continue to allow this exception to be stretched to whatever limit that is wished by legislatures will risk allowing this exception to swallow the rule.

The discussion in this Note proceeds in the following way: Part I provides a general overview of CSA statutes and their history. Part II briefly discusses the current constitutional doctrinal framework. In Part III, I focus on California and Texas to show what their respective case law says about jury unanimity, specificity requirements for unanimity, and the continuous course of conduct exception. Part IV provides an analysis of CSA statutes and will attempt to answer the questions of (1) whether these statutes are staying true to the purpose behind specificity in jury agreement and (2) whether these statutes may bump up against constitutional problems in the future. Part V discusses some of the possible ways to address current

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16. *See, e.g.*, People v. Gear, 23 Cal. Rptr. 2d 261, 265 (Cal. Ct. App. 1993) (noting that a continuous course of conduct exception exists in California regarding "the requirement of jury unanimity on which specific acts the defendant committed").

17. *See, e.g.*, *infra* note 67 and accompanying text.

18. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (acknowledging that child abuse cases are extremely difficult to prove because the child tends to be the only witness); Lloyd Leva Plaine, Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 GEO. L.J. 257, 258 (1974) (explaining that "[m]ost child abuse cases do not result in criminal prosecution" because the offenses usually occur in the home with no other witnesses besides the victim and the perpetrator).

19. Among the CSA statutes mentioned in Part I, Texas retains the sole honor of excluding both these requirements. TEX. PENAL CODE ANN. § 21.02 (West Supp. 2012); *see infra* Part I.

CSA statutes and then provides possible solutions for how to better address the problem of prosecuting child molesters. Part VI provides concluding remarks.

## I. A Brief History and Overview of CSA Statutes

California was the first state to adopt a CSA statute,[20] but other states have since followed suit.[21] All the state statutes examined in this Note include a clause—which I will refer to as the anti-unanimity clause—similar to California's CSA statute, which states: "To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number."[22] These statutes require proof that (1) a minimum number of sexual acts against a child occurred (usually two[23] or three[24]) and (2) these acts occurred over a certain time period.[25] Most states also require that the alleged victim be the

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20. CAL. PENAL CODE § 288.5 (West 2008).

21. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1417 (2010); DEL. CODE ANN. tit. 11, § 776 (Supp. 2010); N.Y. PENAL LAW § 130.75 (McKinney 2009); N.D. CENT. CODE § 12.1-20-03.1 (2012); TEX. PENAL CODE ANN. § 21.02 (West Supp. 2012); WIS. STAT. ANN. § 948.025 (West 2005 & Supp. 2011). It is important to note that many states have judicially constructed analogues to CSA statutes. *See, e.g.*, People v. Reynolds, 689 N.E.2d 335, 343 (Ill. App. Ct. 1997) (relying on the theory of a continuous course of conduct to conclude that only one transaction and not multiple transactions were at issue even though multiple counts were charged, and concluding that "a general verdict form is sufficient when the various counts state the same transaction"). A pattern can be seen with some of these states: a state's high court laments the clash between sexual abuse statutes written as specific, single offenses and how this clashes with jury unanimity, and then the court appeals to the state legislature to fix this problem. *See, e.g.*, State v. Arceo, 928 P.2d 843, 880 (Haw. 1996) (Nakayama, J., dissenting) (urging the state legislature to enact a CSA statute in order "to cure the problems inherent in the criminal prosecution of sexual abuse cases involving a minor of tender years who is unable to specifically recall dates, instances or circumstances surrounding the abuse"); Baker v. State, 948 N.E.2d 1169, 1174–75 (Ind. 2011) ("[T]he Indiana legislature has not adopted a statute criminalizing an ongoing pattern of sexual abuse when the victim is unable to reconstruct the specific circumstances of any one incident. We encourage the General Assembly to consider this issue."); Dixon v. State, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring) ("Perhaps the Texas Legislature can address this conundrum and consider enacting a new penal statute that focuses upon a continuing course of conduct crime—a sexually abusive relationship that is marked by a pattern or course of conduct of various sexual acts.").

22. CAL. PENAL CODE § 288.5(b) (West 2008). Though not the focus of this Note, there are states that have passed statutes that are very similar to the CSA statutes previously mentioned, but without an explicit anti-unanimity clause. *See, e.g.*, State v. Fortier, 780 A.2d 1243, 1251 (N.H. 2001) (interpreting New Hampshire's felonious sexual assault statute, which allows for conviction when a person engages in a pattern of sexual assault against a child, to not require jurors to "agree on the particular acts, provided that they find the requisite number of acts occurred during the statutory time period").

23. *E.g.*, N.Y. PENAL LAW § 130.75(1)(a) (McKinney 2009) (requiring "two or more acts"); TEX. PENAL CODE ANN. § 21.02(b)(1) (West Supp. 2012) (same).

24. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1417(a) (2010) (requiring "three or more" acts); CAL. PENAL CODE § 288.5(a) (West 2008) (same); DEL CODE ANN. tit. 11, § 776(a) (Supp. 2010) (same); N.D. CENT. CODE § 12.1-20-03.1(1) (2012) (same); WIS. STAT. ANN. § 948.025(1) (West 2005 & Supp. 2011) (same).

25. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1417(a) (2010) (describing the period of time as needing to be three months or more); CAL. PENAL CODE § 288.5(a) (West 2008) (same); DEL.

same for all claimed acts.[26] Additionally, in some states a shared residency or routine access is also required.[27] Since this is a continuous course of conduct offense, these requirements are what juries are required to agree about, and not the specific acts of abuse.[28]

In all the states that have passed a CSA statute, either the state supreme court or the lower courts have upheld these statutes as constitutional—under the state constitution and the United States Constitution[29]—with one notable exception. The Supreme Court of Hawaii struck down Hawaii's CSA statute as unconstitutional based on the state's constitutional requirements of due process and separation of powers.[30] The end result in Hawaii was still the same: a state constitutional amendment was passed after the court's decision that granted the legislature explicit authority in defining "[w]hat behavior constitutes a continuing course of conduct" and "[w]hat constitutes the jury unanimity that is required for a conviction."[31] Thus, in the one state that found a CSA statute unconstitutional on state constitutional grounds, the state's constitution was subsequently amended.

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CODE ANN. tit. 11, § 776(a) (Supp. 2010) (same); N.Y. PENAL LAW § 130.75(1) (McKinney 2009) (same); N.D. CENT. CODE § 12.1-20-03.1 (2012) (same); TEX. PENAL CODE ANN. § 21.02(b)(1) (West Supp. 2012) (describing the required time as "during a period that is 30 or more days in duration").

26. Some states are explicit that the victim must be the same for all acts. *See, e.g.*, WIS. STAT. ANN. § 948.025(1) (West 2005 & Supp. 2011) (providing that the acts must "involv[e] the same child"). Some states are more ambivalent. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1417(a) (2010) (providing that the perpetrator has to engage in the acts with "a child"). Texas is the only state that explicitly mentions that multiple victims may qualify. *See* TEX. PENAL CODE ANN. § 21.02 (b)(1) (West Supp. 2012) ("A person commits an offense if . . . the person commits two or more acts of sexual abuse, *regardless of whether the acts of sexual abuse are committed against one or more victims* . . . ." (emphasis added)).

27. *See, e.g.*, CAL. PENAL CODE § 288.5 (West 2008) (requiring that the perpetrator "reside[] in the same home with the minor child or ha[ve] recurring access to the child"); DEL. CODE ANN. tit. 11, § 776(a) (Supp. 2010) (same).

28. Also, like other continuous course of conduct offenses, CSA statutes include protection for the defendant: the defendant cannot be convicted of both the CSA offense and any of the offenses that constituted the underlying acts. *See, e.g.*, People v. Johnson, 47 P.3d 1064, 1069 (Cal. 2002) (describing various strategic options that prosecutors may pursue but noting that if prosecutors decide to "charge discrete sexual offenses and continuous sexual abuse in the alternative . . . they may not obtain multiple convictions").

29. *See, e.g.*, People v. Calloway, 672 N.Y.S.2d 638, 642–43 (N.Y. Cnty. Ct. 1998) (holding that "allowing jurors to convict upon unanimous agreement that two sexual assaults were committed during a certain time period, without requiring agreement as to which two" was not "an infringement on defendant's right to a unanimous verdict" given the rationale behind the New York CSA statute); *see also* Charles M. Jones II, Comment, *Guilty of What? Unanimous Verdicts in Texas: Developing a Test to Distinguish Between Acts Constituting One Offense and Acts Constituting Separate Offenses*, 40 TEX. TECH L. REV. 391, 412 (2008) (noting that Arizona, California, New York, and Wisconsin, among others, have all passed statutes that criminalize the ongoing sexual abuse of children, and all have withstood judicial scrutiny).

30. State v. Rabago, 81 P.3d 1151, 1169 (Haw. 2003).

31. HAW. CONST. art. I, § 25.

## II. Current Supreme Court Doctrine

The most recent Supreme Court cases involving jury unanimity are *Schad v. Arizona*[32] and *Richardson v. United States*.[33] In *Schad*, a plurality found that charging first-degree murder disjunctively as "premeditated murder or felony murder" without a jury unanimity instruction was not unconstitutional.[34] First, the Court stated that a jury need not be unanimous about the mere means of committing an offense.[35] Then, the Court made clear which branch of government was typically responsible for deciding what are the means of committing an offense:

> Decisions about what facts are material and what are immaterial, or, in terms of [*In re Winship*], 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.[36]

How far can a state legislature go in defining criminal conduct in their statutes? That became the main issue before the Court—whether Arizona's legislature violated the Due Process Clause of the Fourteenth Amendment.[37]

The plurality in *Schad* relied on two tests for their conclusion that "the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality"[38]: (1) historical or contemporary practice[39] and (2) moral equivalence.[40] Justice Scalia joined with the plurality in their conclusion but not in much of their reasoning.[41] To Justice Scalia, the deciding factor was history alone.[42]

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32. 501 U.S. 624 (1991).

33. 526 U.S. 813 (1999). For an excellent in-depth analysis of these decisions that I cannot hope to replicate, see Westen & Ow, *supra* note 4, at 160–83.

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

35. *See id.* at 631 ("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.").

36. *Id.* at 638 (citation omitted).

37. *See id.* at 637 (characterizing the central issue in the case as whether Arizona's choice to allow a general verdict as to first-degree murder is constitutional and explaining that, in determining whether Arizona's choice meets the constitutional requirements for definitional and verdict specificity, the best measure is "a distillate of the concept of due process with its demands of fundamental fairness").

38. *Id.* at 645.

39. *See id.* at 643 ("[H]istory 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.").

40. *See id.* at 643–44 (explaining that "[t]he proper critical question is not whether premeditated murder is necessarily the moral equivalent of felony murder in all possible instances of the latter" but that "[t]he 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").

41. *Id.* at 649 (Scalia, J., concurring in part and concurring in the judgment).

42. *See id.* at 650. Justice Scalia stated,

In *Richardson*, a 5–4 majority settled a circuit split in deciding that the federal continuing criminal enterprise (CCE) statute's[43] language of a "series of violations" should be interpreted to require unanimity for the underlying offenses.[44] (While not explicitly defined, "series" in this statute had been previously considered by some circuits to be three or more violations.)[45] This decision was based on the Court's interpretation of the term "violations,"[46] as well as the breadth of the statute.[47] The Court interpreted the term "violations" in the statute to be defined as typically meaning more than simply an act or conduct—rather, the term carried with it a legal connotation that had to do with "an act or conduct that [was] contrary to [the] law."[48] And, for the Court, it was consistent with tradition to require agreement among jurors when the issue was whether conduct violated the law.[49]

The Court also viewed the breadth as an important consideration since the CCE statute applied to so many different kinds of behavior involving varying degrees of seriousness, which could "cover up wide disagreement among the jurors about just what the defendant did, or did not, do."[50] The Court viewed this as raising similar due process concerns as addressed in *Schad*, and chose the interpretation of the statute that avoided that risk.[51] The dissent was critical of this employment of constitutional avoidance. The dissent, written by Justice Kennedy and joined by Justice Ginsburg and Justice O'Connor, argued that interpreting the CCE as a continuous conduct

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> 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.

*Id.*

43. 21 U.S.C. § 848 (2006).

44. Richardson v. United States, 526 U.S. 813, 824 (1999).

45. *See* United States v. Young, 745 F.2d 733, 747 (2d Cir. 1984) ("[T]here is a consensus of authority that to establish a 'series' the government must prove at least three felony violations."). In *Richardson*, the Court "assume[d], but [did] not decide, that the necessary number is three." *Richardson*, 526 U.S. at 818.

46. *Richardson*, 526 U.S. at 818–19 ("To hold that each 'violation' here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law.").

47. *Id.* at 819.

48. *Id.* at 818 (citing BLACK'S LAW DICTIONARY 1570 (6th ed. 1990)).

49. *Richardson*, 526 U.S. at 818–19.

50. *Id.* at 819. This breadth, combined with treating violations as means, could also increase the amount of violations a defendant was charged with, "significantly aggravat[ing] the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." *Id.*

51. *Id.* at 820.

offense was what Congress intended and such an interpretation did not raise due process concerns.[52]

Thus, the Supreme Court has not provided clear guidance for how specificity should be addressed. There appears to be significant differences of opinions among the Justices when it comes to these sorts of questions, which do not trace any of the more typical political alignments. Instead, these scattered opinions might be the result of the difficulty of the questions being asked and the lack of an apparent solution.

## III. An Analysis of State Law

In terms of expansiveness, California and Texas might be the two best examples of the end of each pole, with California's CSA statute being the most limited and Texas's CSA statute being the most broad. California's CSA statute has a "shared residency or routine access" requirement, a same victim requirement, and the acts of abuse must happen over a period of time that is three months or longer;[53] Texas's CSA statute has no "shared residency or routine access" requirement, does not require the same victim, and the acts of abuse can happen over a shorter period of time (thirty days or more).[54] A look at the case law of these two states' respective CSA statutes is helpful to show how each state has constructed its own specificity requirements (through jury unanimity doctrines), how each state's CSA statute came about, and how each state's courts have protected its CSA statute against challenges of state and federal unconstitutionality.

### *A. An Overview of California*

*1. California and Jury Unanimity.*—The right to a unanimous jury in criminal cases in California originates in the California Constitution.[55] As stated by the court in *People v. Sutherland*,[56] "where the evidence proved several distinct episodes, any of which could have supported the defendant's conviction of a single count of bribery, a unanimity instruction was required."[57] The court provided the following example to illuminate this point: "[A] unanimity instruction was required where the defendant was charged in one count with passing 35 bad checks, because each check represented a potentially separate and independent offense, creating the

52. *See id.* at 829 (Kennedy, J., dissenting) ("The continuing series element reflects Congress' intent to punish those who organize or direct ongoing narcotics-related activity. . . . The continuing series element . . . is directed at identifying drug enterprises of the requisite size and dangerousness, not at punishing drug offenders for discrete drug violations.").

53. CAL. PENAL CODE § 288.5(a) (West 2008).

54. TEX. PENAL CODE ANN. § 21.02(b)(1) (West Supp. 2012).

55. People v. Jones, 792 P.2d 643, 658 (Cal. 1990) (citing CAL. CONST. art. I, § 16).

56. 21 Cal. Rptr. 2d 752 (Cal. Ct. App. 1993).

57. *Id.* at 757.

possibility the jury might not have unanimously agreed that the defendant committed any single offense."[58]

In contrast, difficulties may arise like those raised by CSA statutes when a single offense is defined as being able to be committed in alternative ways.[59] California courts have established a two-step analysis for these types of situations: (1) "whether under established principles announced in California cases a unanimity instruction was required in this case" and then (2) "whether due process nonetheless required one."[60]

*2. The History and Constitutionality of California's CSA Statute.*—In the 1980s, California had a line of cases that held "purely generic testimony outlining repeated and continuous molestations without distinguishing between time, place or circumstance" was insufficient to sustain a conviction because, in part, "the jury cannot unanimously agree beyond a reasonable doubt that any such act occurred."[61] The leading decision in this line of cases was *People v. Van Hoek*,[62] which was decided in 1988. In 1989, as a response to these decisions, California was the first state to pass a CSA statute, California Penal Code § 288.5.[63]

The constitutionality of § 288.5 was addressed in *People v. Higgins*[64] and *People v. Gear*.[65] *Higgins* held that § 288.5 did not violate California's specificity requirements because it was a course of conduct offense: "So-called continuous-course-of-conduct crimes, generally committed against the same victim who sustains cumulative injury, require neither allegations nor unanimous findings of specific acts."[66]

So how does an offense become classified as a continuous course of conduct offense? According to the court in *Gear*, "The continuous-course-of-conduct exception 'arises . . . when, as here, the statute contemplates a continuous course of conduct of a series of acts over a period of time.'"[67]

Thus, the answer to California's first question of jury unanimity analysis is that a unanimity instruction is not required when the legislature makes clear that the offense is to be considered a continuous course of

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58. *Id.*
59. *Id.*
60. *Id.* at 761.
61. People v. Jones, 792 P.2d 643, 650 (Cal. 1990).
62. 246 Cal. Rptr. 352 (Cal. Ct. App. 1988).
63. *Jones*, 792 P.2d at 652.
64. 11 Cal. Rptr. 2d 694 (Cal. Ct. App. 1992).
65. 23 Cal. Rptr. 2d 261 (Cal. Ct. App. 1993).
66. *Higgins*, 11 Cal. Rptr. 2d at 698; *see also id.* ("[W]hen the issue presented to the jury is whether a defendant committed a course of conduct and not whether he committed a specific act on a specific day, the prosecutor does not have to elect a specific act and the jury need not unanimously agree on a specific act.").
67. *Gear*, 23 Cal. Rptr. 2d at 265 (citation omitted).

conduct offense.[68] The second question of whether the Due Process Clause of the Fourteenth Amendment is violated by the legislature defining the criminal conduct in this way has largely been ignored by California courts. The court in *People v. Cissna*[69] provided a cursory due process analysis of § 288.5:

> [C]iting and distinguishing the *Gear* decision, the *Richardson* court recognized that this constitutional concern did not necessarily apply to state statutes that involved difficult problems of proof. *Richardson* noted that state statutes that permit conviction for sexual abuse of a minor based on a continuous course of conduct "may well respond to special difficulties of proving underlying criminal acts, which difficulties are absent here." Thus, *Richardson* supports the constitutionally [sic] of the continuous-course-of-conduct exception applied by the Legislature in section 288.5, subdivision (b).[70]

California courts had mostly decided their view of the issues in the California CSA statute before *Richardson* was decided by the Supreme Court. While dicta in *Richardson* may provide some basis for concluding that CSA statutes do not violate due process, a full analysis of California's CSA statute has not been done by California courts. This dicta from *Richardson* is one paragraph offering distinguishing features between the federal statute being analyzed (the CCE) and California's CSA statute[71]—the Supreme Court did not and was not intending to provide an in-depth analysis of the constitutionality of CSA statutes under the Fourteenth Amendment's Due Process Clause.[72] Further analysis is needed on this particular issue, but unfortunately California courts have avoided doing so.

### B. *An Overview of Texas*

*1. Texas and Jury Unanimity.*—In Texas's seminal case on jury unanimity, *Ngo v. State*,[73] the court described jury unanimity as a requirement in felony cases under the state constitution and as a requirement in all criminal cases under state statutes.[74] Texas courts have described one of the main purposes of jury unanimity as complementing and helping to effectuate the "beyond a reasonable doubt" standard of proof.[75] As said by the court in

68. *See Higgins*, 11 Cal. Rptr. 2d at 700 ("The Legislature has the prerogative to proscribe a course of conduct, rather than specific acts, a prerogative exercised by adoption of Penal Code section 288.5.").

69. 106 Cal. Rptr. 3d 54 (Cal. Ct. App. 2010).

70. *Id.* at 70 (citations omitted).

71. Richardson v. United States, 526 U.S. 813, 821 (1999).

72. *See infra* subpart IV(B).

73. 175 S.W.3d 738 (Tex. Crim. App. 2005).

74. *Id.* at 745 & n.23 (citing Francis v. State, 36 S.W.3d 121, 126 (Tex. Crim. App. 2000) (Womack, J., concurring), which in turn cites TEX. CONST. art. V, § 13; TEX. CODE CRIM. PROC. ANN. arts. 36.29(a), 37.02, 37.03, 45.034–.036 (West 1997)).

75. *Id.* at 745 n.23 (citing United States v. Gipson, 553 F.2d 453, 457 n.7 (5th Cir. 1977)).

*Ngo*, "Unanimity in this context means that each and every juror agrees that the defendant committed the same, single, specific criminal act."[76] As for the level of specificity that jurors are required to agree about, the court in *Ngo* stated: "Stealing a credit card on Monday is not the same specific criminal offense as receiving a stolen credit card on Tuesday or presenting a stolen credit card to a bartender on Wednesday."[77]

*2. The History and Constitutionality of Texas's CSA Statute.*—As mentioned earlier, this formulation of jury unanimity presents problems for child molestation cases.[78] Judge Cochran of the Texas Court of Criminal Appeals (CCA) acknowledged as much in her concurrence in *Dixon*, which included a plea to the state legislature to solve this problem.[79] Judge Cochran's opinion was that "[w]e are headed for a train wreck in Texas law because our bedrock procedural protections cannot adapt to the common factual scenario of an ongoing crime involving an abusive sexual relationship of a child under current penal provisions."[80]

Judge Cochran felt that the Texas Legislature could address this problem by enacting a penal statute with this issue (a pattern of a sexually abusive relationship with a child) that was a continuous course of conduct offense.[81] She felt that a statute like this would "have advantages and disadvantages for both the prosecution and defense, but it might well assist in preserving our bedrock criminal-procedure principles of double jeopardy, jury unanimity, due-process notice, grand-jury indictments, and election law."[82]

Less than a year later, Texas Penal Code § 21.02 was enacted.[83] This CSA statute is notably more far-reaching than prior states' CSA statutes. A reason for this might be political in nature—the statute was originally called Jessica's Law, which was based on a Florida statute originally called by the same name in honor of a child who was raped and murdered by a previously convicted child molester.[84] After this incident in 2005, various states passed their own version of Jessica's Law, and these laws were notable for harsh

76. *Id.* at 745.

77. *Id.*

78. *See supra* note 8 and accompanying text.

79. Dixon v. State, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring).

80. *Id.*

81. *See id.* (writing that "[p]erhaps the Texas Legislature can address this conundrum and consider enacting a new penal statute that focuses upon a continuing course of conduct crime—a sexually abusive relationship that is marked by a pattern or course of conduct of various sexual acts").

82. *Id.*

83. TEX. PENAL CODE ANN. § 21.02 (West Supp. 2012).

84. FLA. STAT. ANN. § 800.04 (West 2007); *see also* Sarah Shekhter, Note, *Every Step You Take, They'll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders*, 38 HASTINGS CONST. L.Q. 1085, 1086 (2011) (noting that Jessica's Law refers to Jessica Lunsford, a 9-year-old girl who was abducted, raped, and murdered by a 47-year-old man).

penalties, along with varied punishments (e.g., GPS tracking devices for released sex offenders and harsher zoning restrictions).[85] Thus, Texas passed a bill that contained within it a CSA statute as well as changes to the Texas Code of Criminal Procedure as influenced by other states' versions of Jessica's Law.

The statute has yet to come before the CCA, but lower courts have ruled on its constitutionality under both the Texas Constitution and the U.S. Constitution. Texas lower courts have been handling this question in two parts: (1) What did the legislature intend the jury be unanimous about?[86] (2) Does defining § 21.02 in this way violate the Due Process Clause of the Fourteenth Amendment?[87]

The first question has been answered in a similar fashion as California courts have answered it. In *Jacobsen v. State*,[88] the court found that the "statute is clear"—"it is the commission of two or more acts of sexual abuse over the specified time period—that is, the pattern of behavior or the series of acts—that is the *actus reus* element of the offense as to which the jurors must be unanimous in order to convict."[89]

As for the second question regarding due process, the court in *Jacobsen* held that § 21.02 did not violate due process by not requiring jury unanimity as to the individual acts that made up the course of conduct in § 21.02.[90] The court did not provide much rationale for this conclusion, besides citing that other courts in other states have ruled in favor of upholding CSA statutes.[91]

Thus, Texas courts have reasoned that the Texas legislature has the power to define what is a course of conduct offense, and no due process violation occurs if an offense is a course of conduct offense. This reasoning seems quite circular. It effectively claims that there are no due process concerns under the United States Constitution because the Texas legislature has decided that this offense should be a continuous course of conduct offense. Like California, Texas spends little time analyzing due process issues—as discussed in *Schad* and *Richardson*—that could possibly arise given how CSA statutes are defined.

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85. *See generally* Shekhter, *supra* note 84 (discussing the various state laws patterned after Florida's Jessica's Law). Texas's version of Jessica's Law originally called for real-time GPS tracking of sex offenders and capital punishment for those whose victims were younger than fourteen years old. H.B. 8, 80th Leg., Reg. Sess. (Tex. 2007). The version that was enacted, though, did not include these harsher provisions. TEX. PENAL CODE ANN. § 21.02 (West Supp. 2012).

86. Jacobsen v. State, 325 S.W.3d 733, 736 (Tex. App.—Austin 2010, no pet.).

87. *Id.* at 737.

88. 325 S.W.3d 733 (Tex. App.—Austin 2010, no pet.).

89. *Id.* at 737.

90. *Id.* at 739.

91. *Id.* (citing People v. Cissna, 106 Cal. Rptr. 3d 54, 68–70 (Cal. Ct. App. 2010); State v. Sleeper, 846 A.2d 545, 550–51 (N.H. 2004); State v. Johnson, 627 N.W.2d 455, 460–64 (Wis. 2001)).

## IV. The Problem with a Lack of Specificity in Jury Agreement

As discussed in Part III, Texas and California justify the potential jury unanimity issues with their CSA statutes on the basis that the offense is written to be a continuing course of conduct offense. This allows an exception for jury unanimity regarding the underlying acts/offenses. The Texas and California legislatures were clear that these offenses were written to be continuous course of conduct offenses, which has helped these state courts to easily answer the first question of their analyses.[92]

Describing an offense as not a single specific act but rather as a series of acts that constitute a continuous conduct offense is not a new invention. And treating these generic evidence cases as such an offense fits very cleanly with what is occurring in one type of these cases—cases that involve ongoing harm over a period of time. Thus, what a jury should agree on in these cases is that an ongoing abusive relationship has occurred.

These statutes were constructed imperfectly though. Instead of simply addressing the situation of an ongoing abusive relationship that only has generic evidence, these CSA statutes can be applied much more expansively. There are three variations of CSA statutes I will examine that have the following explicit requirements, to varying degrees: (1) a set number of acts, (2) a time component, (3) the victim be the same child in all acts, and (4) same residence or recurring access. The most expansive CSA statutes only have requirements 1 and 2.[93] Average expansiveness CSA statutes have requirements 1, 2, and 3.[94] The least expansive CSA statutes contain requirements 1, 2, 3, and 4.[95]

The problem, even in the least expansive variety of CSA statutes, is that these requirements are simply not appropriate enough proxies for the original problem sought to be solved, and the end result makes it possible that applications of CSA statutes will stretch far beyond what solving the original

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92. *See supra* text accompanying notes 66–68 & 88–89.

93. *E.g.*, TEX. PENAL CODE ANN. § 21.02 (West Supp. 2012) (defining the offense of continuous sexual abuse as two or more acts of sexual abuse during a period of thirty days or more, "regardless of whether the acts of sexual abuse are committed against one or more victims").

94. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1417 (2010) (defining continuous sexual abuse of a child as requiring three or more acts over the period of three months or more against a child); N.Y. PENAL LAW § 130.75 (McKinney 2009) (defining the "[c]ourse of sexual conduct against a child" offense as two or more acts of sexual conduct with a child over a period of three months or more); N.D. CENT. CODE § 12.1-20-03.1 (2012) (requiring three or more sexual acts "with a minor under the age of fifteen . . . during a period of three or more months"); WIS. STAT. ANN. § 948.025 (West 2005 & Supp. 2011) (requiring three or more violations within a specified period of time "involving the same child").

95. *E.g.*, CAL. PENAL CODE § 288.5 (West 2008) (requiring three or more acts with a child over a period of three or more months by a person who "either resides in the same home with the minor child or has recurring access to the child"); DEL. CODE ANN. tit. 11, § 776 (Supp. 2010) (stating that a person commits an offense by engaging in three or more acts of sexual conduct with a minor over a period of three or more months while "either residing in the same home with the minor child or having recurring access to the child").

problem called for. I will discuss these various issues by using the following broad categories: general problems and constitutional problems.

### A. *General Problems*

*1. Patchwork Verdicts.*—What level of specificity is needed when it comes to jury unanimity? Different courts and commentators have different answers to this question.[96] As previously noted, continuous course of conduct offenses change the specificity level from requiring unanimity on the underlying acts to only requiring unanimity on a much more broadly defined criminal offense.[97] This introduces the problem of patchwork verdicts.[98] Patchwork verdicts exist when there is agreement "on the general verdict but disagree[ment] on the particulars behind the verdict."[99] Patchwork verdicts are not necessarily a problem. Justice Scalia provides such an example in his concurrence in *Schad*:

> 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.[100]

But patchwork verdicts can also be problematic. In Justice Scalia's example, there is no doubt among the jury that murder was committed by the defendant, just how the murder actually occurred. Not too many people would feel uneasy about this result. But can the same be said about jurors disagreeing about the underlying acts that comprise a broader (more amorphous) offense? I will examine patchwork verdicts in the context of the types of CSA statutes, and readers can decide for themselves.[101]

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96. *See, e.g.*, Morris, *supra* note 4, at 51–57 (reviewing state and federal court decisions requiring a specific unanimity jury instruction but noting that defining the precise circumstances in which such instruction is required "remains an elusive exercise"); Westen & Ow, *supra* note 4, at 153 (explaining that Supreme Court Justices have, in two cases addressing the issue, agreed that the Constitution sometimes requires unanimity on how offenses are committed but disagreed "about nearly everything else"); Miller, *supra* note 4, at 2279 (proposing a framework that would require unanimity as to the elements of a crime but permit divergence as to "mere alternate means of fulfilling the elements").

97. *See supra* note 7 and accompanying text.

98. *See generally* Hayden J. Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues*, 36 OKLA. L. REV. 473 (1983).

99. Elizabeth A. Larsen, Comment, *Specificity and Juror Agreement in Civil Cases*, 69 U. CHI. L. REV. 379, 381 n.10 (2002).

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

101. For the sake of brevity (and to avoid repetitiveness), I will only look at the most expansive and the least expansive CSA statutes. This follows along with my focus on Texas and California.

*a. Most Expansive.*—Take the following example: Adam is alleged to have sexually assaulted child A in December 2010, sexually assaulted child B in June 2011, and sexually assaulted child C in December 2011. In Texas, Adam can now be charged with violating Texas's CSA statute. Assuming that each alleged sexual assault occurred once as one specific event (and the evidence being presented only pertains to one event occurring and not to all three events occurring), it is hard to see how this situation is like the original problem intended to be solved by CSA statutes. There is no problem with generic evidence since it involves three distinct events with specific evidence only relating to each event.

This results in the burden of proof being effectively lowered for each specific assault since patchwork verdicts are now possible. It is possible Adam can be found guilty if only six jurors believe Adam is guilty of sexually assaulting Child A and Child B (but not Child C) and the other six jurors believe Adam is guilty of sexually assaulting Child B and Child C (but not Child A). Note that the jury was only unanimous about Adam sexually assaulting Child B and there was not even a simple majority on whether Adam sexually assaulted Child A or Child C. Thus, if the prosecutor had been forced to try and convict Adam under three charges of sexual assault, only one successful conviction would have resulted. Instead, under the CSA statute, Adam can be convicted of a crime that carries with it a much greater punishment than sexual assault.[102]

This hypothetical can be made even more extreme. Imagine if Adam was charged with sexually assaulting four different children in four different, specific events. Now, it is possible that there is not even a majority of jurors who believe Adam is guilty of committing one of the four specific acts of abuse.[103] Or at its most extreme: if Adam is charged with sexually assaulting twenty-four different children, it is possible that a patchwork verdict could be reached when Adam is guilty under the CSA statute but only a single juror believes he is guilty under each individual alleged sexual assault.

*b. Least Expansive.*—While less egregious, patchwork verdicts are still possible under the least expansive CSA statutes. The requirement of "shared residence or recurring access" can do a significant amount of work in capturing only the fact patterns that are like the problem originally intended to be addressed by CSA statutes—generic evidence cases of an ongoing abusive relationship. In application though, this has not occurred in

102. In Texas, sexual assault can be a felony of the second degree while continuous sexual abuse of a young child or children is a felony of the first degree with a minimum sentence of twenty-five years. *Compare* TEX. PENAL CODE ANN. § 22.011 (West 2011) (providing the punishment for sexual assault), *with* TEX. PENAL CODE ANN. § 21.02 (West Supp. 2012) (providing the punishment for continuous sexual abuse of a child).

103. This could occur if Jurors 1–6 believe Adam is guilty of sexually assaulting only Child A and Child B and Jurors 7–12 believe Adam is guilty of sexually assaulting only Child C and Child D.

California. Instead, "recurring access" has been given a very broad meaning by California's courts with the very intent of making sure that California's statute is as expansive as possible: instead of California's CSA statute acting as a limited offense aimed at addressing the problem of generic evidence, California courts see this statute as an expansion of power for prosecutors going after alleged child molesters.[104]

Thus, with a broader meaning given to "recurring access," it is not hard to come up with hypotheticals similar to the ones seen in the previous subsection. For example, imagine a coach accused of sexually assaulting one of the boys on his team four times over a span of six months. Each event could be a discrete occurrence with different facts involved (and thus specific evidence related to each event), and a jury could mix and match verdicts on each event to satisfy the requirement of three acts within the time period.

While the patchwork verdicts that are possible under California's CSA statute are significantly less dramatic than ones that are possible in Texas, the following needs to be reiterated: this hypothetical does not represent the original problem of generic evidence that CSA statutes were meant to address, and the situation does not seem like a typical continuous course of conduct offense.

*2. A Strategic Advantage for Prosecutors.*—Along with patchwork verdicts, another problem arises with CSA statutes, no matter which version is considered: an inequity is produced by CSA statutes granting prosecutors the ability to strategically choose between charging someone with a continuing course of conduct offense or the specific, underlying offenses. Allowing the prosecutor the opportunity to choose what to charge the defendant with allows the prosecutor to avoid the disadvantages of working with a continuous course of conduct statute (which only allows one conviction for all acts) and to maximize the advantages (by making a conviction easier by allowing patchwork verdicts).

To provide an example: if a prosecutor feels like he has very strong evidence of a person sexually assaulting a child on five separate occasions, the prosecutor could simply pursue five separate charges of sexual assault. Alternatively, if the prosecutor feels like he has strong evidence for one of the offenses, but for the other occasions the evidence is more conflicted, the prosecutor could try to maximize his chances of a conviction by taking the lower burden of the CSA statute and allowing the jurors to mix and match verdicts (i.e., produce patchwork verdicts).

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104. *See* People v. Rodriguez, 49 P.3d 1085, 1089 (Cal. 2002) ("[A]s made clear by the legislative declarations accompanying it, section 288.5 was enacted to broaden, not narrow, the reach of this state's child molestation laws.").

### B. Constitutional Problems

It is unlikely that the Supreme Court will address CSA statutes any time soon. While the Court indicated there could be due process problems with the CCE federal statute if interpreted in a way that would match how CSA statutes are used, the Supreme Court decided to dodge the issue by choosing an alternative interpretation that faced no due process dangers.[105] Dicta in *Richardson* also indicated that the Supreme Court may view the CCE statute and California's CSA statute as different, since "[t]he state practice may well respond to special difficulties of proving individual underlying criminal acts, which difficulties are absent here."[106]

But these difficulties only exist with generic evidence in situations of ongoing sexual abuse of a young child. In the situations outlined in the patchwork verdicts section, no such special difficulties existed. The patchwork verdicts possible under an expansive CSA statute also look very similar to a situation described by Justice Scalia in his concurrence (and cited approvingly by the *Richardson* majority),[107] in which Justice Scalia believes due process would be violated: "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."[108] Yet, expansive CSA statutes allow just that, with the extra window dressing that the acts must have occurred "during a period that is 30 or more days in duration."[109]

After mentioning California's CSA statute, the Court also mentions a difference between federal law, which requires jury unanimity under the Sixth Amendment, as compared to states, which are allowed supermajority verdicts under the Fourteenth Amendment.[110] I submit that this is a misstep in analysis on the part of the Court in *Richardson*—the issue with the CCE statute and CSA statutes is the level of specificity required by jury agreement

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105. *See* Richardson v. United States, 526 U.S. 813, 820 (1999) ("We have no reason to believe that Congress intended to come close to, or to test, those constitutional limits [imposed by the Due Process Clause] when it wrote [the CCE] statute.").

106. *Id.* at 821 (citation omitted). Another distinction not mentioned by the Court that might be important is the difference in breadth. CSA statutes normally contain less than a dozen qualifying predicate acts. *See, e.g.*, TEX. PENAL CODE ANN. § 21.02 (West Supp. 2012) (listing eight different underlying offenses that qualify for purposes of satisfying the two act requirement). The CCE statute, on the other hand, is drawn from "[t]he two chapters of the Federal Criminal Code setting forth drug crimes contain[ing] approximately 90 numbered sections, many of which proscribe various acts that may be alleged as 'violations' for purposes of the series requirement in the statute." *Richardson*, 526 U.S. at 819.

107. *Richardson*, 526 U.S. at 820.

108. Schad v. Arizona, 501 U.S. 624, 651 (1991) (Scalia, J., concurring in part and concurring in the judgment).

109. *E.g.*, TEX. PENAL CODE ANN. § 21.02(b)(1) (West Supp. 2012).

110. *See Richardson*, 526 U.S. at 821 (recognizing that states are not bound by the federal jury unanimity standard); *see also supra* note 1.

(regardless of whether that agreement must be unanimous or a supermajority).

## V. Where Do We Go from Here?

### A. *How to Handle Current CSA Statutes*

CSA statutes have raised unnecessary problems in trying to address the problems of prosecuting child molesters. The problems caused by current CSA statutes could be addressed in one of three ways: (1) by a challenge under the U.S. Constitution; (2) by state constitutional challenges; or (3) by the state legislatures amending these statutes to closer resemble the original problem trying to be addressed—the problem of generic evidence when prosecuting child molesters.

A successful challenge under the U.S. Constitution is unlikely in the near future.[111] Six Supreme Court Justices were concerned enough by similar issues with the federal CCE statute to employ statutory construction as a means of constitutional avoidance in *Richardson*.[112] But no such option would be present with these state statutes; the Supreme Court would be asked to rule a state statute unconstitutional. The Supreme Court generally does not like to do this, especially with criminal statutes.[113] Further complications would be that *Schad* and *Richardson* have shown this area of the law to be a doctrinal mess, with a lack of agreement among Justices on what the actual rules should be.[114]

Striking down these statutes through state courts is also unlikely to be effective. As previously mentioned, only one state court has tried this approach: Hawaii.[115] Other states' highest courts either have already found the respective state's CSA statute to be constitutional (under both the state

111. Such a challenge would be an as-applied constitutional challenge, since CSA statutes do not always trigger constitutional concerns in their application. For a discussion of how such a challenge would proceed, see generally Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994). "Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face, or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances." *Id.* at 236.

112. *Richardson*, 526 U.S. at 820.

113. *See* Patterson v. New York, 432 U.S. 197, 201 (1977) ("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, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." (citation omitted)). For a list of the 935 state statutes ruled unconstitutional between 1809 and 2002, see CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2163–323 (Johnny H. Killian et al. eds., 2004), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002.pdf.

114. *See* Westen & Ow, *supra* note 4, at 167 ("The twelve Justices in *Schad* and *Richardson* together advance five constitutional tests, four of which come from *Schad*, and one of which inheres in Justice Kennedy's dissent in *Richardson*.").

115. *See supra* notes 30–31 and accompanying text.

constitution and U.S. Constitution) or have decided not to review lower courts' decisions upholding these statutes.[116] And even in Hawaii, where the Supreme Court of Hawaii ruled that their state's CSA statute violated the state constitution, the end result was a state constitutional amendment to allow the return of Hawaii's CSA statute.[117] Such a result is not surprising, due to the highly charged topic of these statutes: it is much easier to garner public support for protecting children from child molesters than it is to garner support for protecting alleged child molesters from overly aggressive state statutes.

The last approach—state legislatures amending their respective CSA statutes—has the best chance of succeeding, though garnering support in state legislatures would be a difficult task, especially for such an unpopular cause. Such an amendment could replace the anti-unanimity provision in these CSA statutes with a more narrowly constructed provision,[118] or legislatures could choose to remove the anti-unanimity provision entirely.[119]

*B. How CSA Statutes Can Be Changed to Better Address the Problems with Prosecuting Child Molesters*

*1. A Return (in Part) to the Status Quo.*—One possible solution is for state legislators to either just remove the anti-unanimity provision in their CSA statute or get rid of the CSA statute completely. This could allow state judges to rule as a matter of law, based on the particular facts of the case, whether the CSA (or a more traditional sexual abuse statute, if there is no CSA statute) should be applied as a continuous course of conduct offense.

There is some irony to that fact that California has judicially created a continuous course of conduct exception in its traditional sexual abuse statute (California Penal Code § 288), which has been the case since *People v. Jones*,[120] California's seminal decision on jury unanimity. *Jones* was decided shortly after California's CSA statute, California Penal Code § 288.5, was enacted.[121] The court in *Jones* could have treated § 288 just like *Van Hoek*, which did not allow a conviction based on generic evidence,[122] since a CSA statute now existed in California to handle the problems of child molesters and generic evidence. Instead, the court in *Jones* decided to overrule the *Van Hoek* line of cases.[123] Thus, while the legislature relied on a CSA statute, § 288.5, to provide a statute to fill in the gap created by the *Van Hoek* line of

116. *See supra* notes 29, 64–66, 90–91 and accompanying text.
117. *See supra* note 31 and accompanying text.
118. *See infra* section V(B)(2).
119. *See infra* section V(B)(1).
120. 792 P.2d 643 (Cal. 1990).
121. *Id.* at 652.
122. *See supra* notes 61–62 and accompanying text.
123. *Id.* at 659.

cases, the California Supreme Court felt that they could just overturn *Van Hoek*, making § 288.5 unnecessary.

In retrospect, the California Supreme Court's solution may have been the better one. As said by the court in *Jones*,

> [W]e reject the contention that jury unanimity is necessarily unattainable where testimony regarding repeated identical offenses is presented in child molestation cases. In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described.[124]

The court provided the following example:

> [I]f an information charged *two* counts of lewd conduct during a particular time period, the child victim testified that such conduct took place *three times* during that same period, and the jury believed that testimony in toto, its difficulty in differentiating between the various acts should not preclude a conviction of the two counts charged, so long as there is no possibility of jury disagreement regarding the defendant's commission of any of these acts.[125]

Thus, in *Jones* the California Supreme Court set forth a way of treating generic evidence as an all-or-nothing argument: either the jury believed beyond a reasonable doubt that the abuse occurred because of the generic evidence or the jury did not believe beyond a reasonable doubt that the abuse occurred.[126] This represents an exception to California's jury unanimity doctrine, but it is a narrow one. Since it is dependent on generic-evidence-type situations, the reach for this exception is less broad than California's CSA statute.

California's approach to § 288 could be applied to § 288.5 as well if the anti-unanimity provision was removed. A problem with this approach is that many states turned to CSA statutes precisely to avoid this approach: allowing criminal offenses to become continuous course of conduct offenses, based on the facts, raised concerns about principles of separation of powers and traditional concepts of criminal law.[127] While this approach might be better than the supposed cure (CSA statutes), it does not represent the most comforting solution.

2. *Replacing the Anti-Unanimity Provision.*—The best possible solution might be for state legislatures to fix CSA statutes themselves. There is a way to craft a CSA-type offense in a narrower way that more accurately represents the original problem with prosecuting child molesters. It could be

124. *Id.* at 658.
125. *Id.*
126. *Id.* at 658–59.
127. *See supra* notes 9, 30 and accompanying text.

done in most cases by replacing the anti-unanimity clause in CSA statutes with the following clause in each of these statutes:

> If there is generic evidence for multiple acts occurring, a jury should receive a jury instruction that they may rely on this generic evidence to conclude that the requisite number of acts were committed.
>
> For purposes of this section, generic evidence is defined as evidence that is not particular to one event that is relied upon to attempt to prove the occurrence of more than three [or "three or more"] events occurring.

Such a provision would help resolve issues that some courts have in allowing generic evidence to prove the state's more traditional sexual abuse statute, while being narrowly tailored to resolve the specific problem at hand (and not reaching far beyond the original problem, like current CSA statutes do).

A drawback to CSA statutes constructed in this way is that there is no clear solution on how to address situations where there is both generic evidence of abuse and specific evidence relating to a particular event where abuse occurred. An argument can be made that letting in generic evidence, when there is specific evidence for each event of abuse trying to be proved, allows prosecutors to pile on the generic evidence, even if the generic evidence is too weak for a jury to conclude that the defendant is guilty on the basis of the generic evidence alone. Allowing generic evidence into a trial triggers concerns that some courts have had about traditional principles of criminal law based around proving a discrete act or conduct.[128] Opening up the gates to generic evidence, even in this more limited way, can allow prosecutors to present generic evidence, even when they realize that the generic evidence, by itself, will not be strong enough for a conviction.[129] A rebuttal to this argument is that the very nature of these crimes is the reason for greater latitude in allowing in evidence, and thus there really is no problem with allowing prosecutors to do such a thing. Alternatively, this provision could be even narrowly constructed to state that judges should make a determination whether the generic evidence is adequate to convince a jury beyond a reasonable doubt that the defendant committed the requisite number of acts in the statute: if it is, then it should be allowed in as evidence; if it is not, then it should be excluded.

Ultimately, I believe the sample provision I have provided in this section represents the best solution in constructing a CSA statute that is not dangerously broad but is still able to remedy the original problem meant to be addressed in prosecuting child molesters.

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128. *See, e.g.*, Dixon v. State, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring) (stating that jurors must agree on whether the defendant committed one very specific criminal act and that a purpose of criminal procedure is to provide a defendant with "advance[d] notice of precisely what criminal act he is alleged to have committed and when it occurred").

129. *See supra* section IV(A)(2).

## Conclusion

In this Note I argue that legislatures in certain states have gone too far in adopting CSA statutes. These statutes attempt to solve very real problems in our criminal justice system, but the end result is an approach that is much too broad and far-reaching. If states wish to better honor their respective case law doctrine on jury unanimity and the level of specificity required, they need to rethink their devotion to these types of statutes. The problem attempted to be solved by CSA statutes can be addressed in more narrow ways that pay more respect to jury unanimity, due process, and separation of powers. I believe the best solution would be for state legislators to amend their current CSA statutes and replace the anti-unanimity provision in these statutes with a more narrowly constructed provision that directly addresses the original problem intended to be solved by these statutes.

*—Brian Bah*