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Jury Agreement and the General Verdict in Criminal Cases

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JURY AGREEMENT AND THE GENERAL VERDICT IN CRIMINAL CASES

The hypothetical defendant is on trial for stealing a car. He is charged with purloining the vehicle either by stealth or by force. He is accused of taking the automobile either with intent permanently to deprive the rightful owner or knowing the vehicle to be stolen. The 1957 Chevy van in question belongs to either Peter Wimsey or Death Bredon.

It is clear that in order to convict our defendant, the jury must reach agreement as to his guilt.[1] It is less clear just what else the jury must agree upon. Typcially, a jury returns a general verdict of guilty, which indicates that the jury found all the elements of the crime. In the hypothetical problem, the jury is presented with three sets of alternatives. Unless the jury is instructed that it must find at least one alternative in each set, it is possible that the jury might convict without agreement. The difficulty with such a result is obvious. The defendant might be charged simply: taking the vehicle by force, with intent to permanently deprive the rightful owner, Peter Wimsey. In such a case, the jury would be instructed that it can convict only if it finds that the prosecution has proved each item. If the jury failed to reach agreement on any of these, it could not convict. There is no justification for a different result when alternatives are injected into the process.

Whenever a jury is permitted to return a general verdict of guilty to a charge which contains alternatives, either one of which will suffice, it is possible that all the jury will not have found the same alternative. If all members of the jury have not agreed to find at least one of the alternatives necessary to convict, a unanimous verdict has not been returned.[2] Likewise, if a majority verdict is permitted and the requisite majority have not agreed on at least one alternative, a majority verdict has not been returned.[3]

Despite this startingly clear proposition, a great number of courts allow an uninstructed jury to return a general verdict where alternatives are alleged. A simple instruction, given whenever alternatives are charged, that in order to convict the jury must agree that at least one alternative has been proved would insure the jury agreement to which the defendant is entitled. It would also reduce the burden on the criminal justice system by eliminating needless new trials.

1. In serious criminal matters, a jury trial is regarded as a hallowed right, the proud boast of a free society and a national commitment against arbitrary law enforcement. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
2. Jury unanimity was not always considered essential, but by the eighteenth century was well established. 2 BLACKSTONE, COMMENTARIES 1139 (T. Cooley 4th ed. 1899). The origins of jury unanimity requirements are uncertain, but see Comment, *Jury Unanimity: Historical Accident or Safeguard of the Accused? Apodaca v. Oregon, 406 U.S. 404 (1972)*, 25 U. FLA. L. REV. 388, 388-389 (1973) for a collection of interesting hypotheses.
3. The sixth amendment to the United States Constitution has been held to guarantee the right to a unanimous jury verdict in federal criminal cases. Andres v. United States, 333 U.S. 740, 748 (1948). The requirement of the sixth amendment of unanimous jury verdicts in federal criminal cases does not apply to the states. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). Nonetheless, many states require unanimous jury verdicts in state criminal trials by virtue of state constitutional or statutory provisions.

The problem of general verdicts on alternatives arises in many different kinds of cases. Before moving to a discussion of these cases and a comparison of the proper approach with the approaches of the various courts, two background items need mention.

Jury Agreement v. Jury Unanimity

Most courts which have considered the question have agreed that some general verdicts on alternatives violate the defendant's right to a unanimous jury verdict. Many of these cases discuss the relationship of jury agreement to jury unanimity. Certainly this is an appropriate concern where jury unanimity is required. It is to be noted, however, that the problem is no less acute when a majority verdict is available. Even if a majority verdict is permitted, a certain number or percentage of jurors must agree. Under such circumstances, the possibility exists that less than the requisite majority will find one alternative. The concern here is not so much whether the jury must be unanimous, but on what the jury must agree before rendering its verdict.

General verdicts on alternatives are problematic even where jury unanimity is not required. Most jurisdictions which allow a majority verdict specify the number of jurors which must concur. In the same way that one cannot be certain all members of the jury agreed on at least one alternative where unanimity is required, one cannot be sure that the requisite number agreed upon one alternative to reach the majority verdict, unless the proper instruction is given. If, for example, a 10/12 majority is required, and no instruction warns that ten jurors must agree on at least one alternative, six may have found one alternative and six another. Thus the necessary agreement of ten for a majority verdict would not be met.

Sanctity of the Verdict

Some courts approve the general verdict on alternatives when logic dictates they ought not. Perhaps this reflects the long-held assumption that it is improper to look into or behind the jury verdict. The courts are hesitant to look behind the jury verdict and wish to avoid intermeddling with the jury of peers interposed between the citizen accused of crime and the machinery of the state.[4] The public has a strong interest in protecting the secrecy of the jury deliberation, in promoting the finality and stability of verdicts, and in protecting the jurors from harassment.[5] At common law, the jury verdict was not expected to be any more rational than the ordeals it replaced.[6] The Supreme Court has held that even though a unanimous verdict may be the result of compromise or leniency, it cannot be upset by "speculation or inquiry into such matters."[7] The judge's mere inquiry into the numerical division of a jury having difficulty reaching agreement is seen as coercive and as undermining the jury process. Thus in the federal and some state systems the practice is forbidden,[8]

4. *See* Kornstein, *Impeachment of Partial Verdicts*, 54 ST. JOHN'S L. REV. 663, 669 (1980).
5. *Id.* at 669-70.
6. United States v. Maybury, 274 F.2d 899, 902-903 (2d Cir. 1960).
7. Dunn v. United States, 284 U.S. 390, 394 (1932).
8. *See* Note, *Criminal Procedure—Ellis v. Reed: Constitutionality and Coerciveness of Judicial Inquiry into the Numerical Division of a Jury*, 58 N.C.L. REV. 379 (1980).

Overview

The courts which have considered the propriety of a general verdict on alternative charges have not reached consensus on just what the jury must agree about. At the one extreme, it is clear that the jury must all agree who the murder victim was.[9]

In some cases any of a number of acts would satisfy a particular criminal statute. In these cases, the courts generally agree that the jury must agree just what the defendant did. Even here, however, exceptions have been drawn not requiring unanimity as to the act of the acts alleged are not conceptually distinct.

At the other extreme, the courts have generally said that the jury need not agree on means the defendant used. The primary problem here is one of classification—determining whether the thing in question is an act, a means, or something else. The courts have not been consistent in their characterizations. The knottier cases involve liability which is not necessarily predicated on a criminal act of the defendant (principal/accomplice; conspiracy). Another difficult area is where alternative mental states are alleged.

A return to the hypothetical may help demonstrate that the lines drawn by the courts which have considered what the jury must agree upon are not clear. An application of the results reached by most courts would reveal the following expected conclusion: the jury would have to agree from whom the vehicle was stolen, but need not agree whether it was taken by force or by stealth, nor whether the defendant intended permanently to deprive the owner or knew the vehicle was stolen. The result is anamolous. It is clear that if the defendant were accused only of using force, and the jury did not agree force was used, they could not convict.

In light of the difficulty the courts are having classifying the alternatives and in light of the expense and time of new trials where error has been committed, the prudent route is to instruct the jury in every case where alternatives are alleged that it can convict only if all (or the requisite majority) agree that at least one of the alternatives has been established.

ACTS

The consensus is that when the commission of more than one act will satisfy the statutory prohibition, the jury must agree which act the defen-

9. In fact, this proposition is so clear it appears never to have been drawn in question. A diligent search has turned up no case even addressing this type of alternative. An early Missouri case did, however, indicate that a general guilty verdict to charges of an illegal sale might be approved when it was unclear to whom the jury decided the sale was made. State v. Geist, 196 Mo.App. 393, 195 S.W. 1050, concurring opinion reported at 199 S.W. 1041 (1917).

dant did.[10] Most courts refuse to permit the general verdict when the defendant has been prosecuted under a statute which provides that any one of several acts is sufficient to constitute the offense. In such cases, the jury must agree that the defendant committed at least one act which the statute proscribes. "Where a criminal defendant is charged under a statute which can be violated by any one of several distinct acts, the possibility arises that the jurors will agree that the defendant has done something illegal and thus is guilty, without agreeing which act the defendant committed."[11] Unless the jury agreed what the defendant did, it would not be possible for them to convict. If some believed the defendant had done one act, some a second, some a third act, the defendant is not guilty of the crime charged. The jury must be unanimous that the defendant committed at least one act the statute proscribes.

A recent exception has been made to this rule by the fifth circuit in *United States v. Gipson.*[12] If the acts which would satisfy the statute are not conceptually distinct, then the jury need not agree. The fifth circuit conceded that the jury must agree on which act the defendant did before it could find the defendant guilty of the crime charged.[13] The statute in question provided six acts which could constitute the crime: receiving, concealing, storing, bartering, selling, or disposing of a stolen vehicle moving in interstate traffic.[14] The fifth circuit refused to accept the proposition that "since every juror was still required to find all elements of the charged offense present in order to convict the defendant, there was necessarily unanimous jury agreement as to his guilt."[15] The *Gipson* court rejected the argument that because all six acts could be found from the evidence, jury unanimity was satisfied. Rather, the court followed the general rule that the jury must agree on what act the defendant did, and said that the fact that all of the alternatives were supported by the evidence reinforced the conclusion that there may have been a jury rift.[16]

However, the court departed from the general rule which would require jury unanimity as to which of the six acts the defendant did in one significant respect. The court examined the six acts and discovered that there were two conceptual groupings of acts, either one of which would constitute the prohibited criminal conduct.[17] The first group consisted of receiving, concealing, and storing. The second group was composed of bartering, selling, and disposing. The court held that the jury must be unanimous as to which one of the two groups of acts the defendant did, but that the jury need not be unanimous as to the specific kind of act within

10. State v. Dixon, 127 Ariz. 554, 622 P.2d 501, 508 (1980); People v. Nichols, 112 Cal. App. 3d 249, 169 Cal. Rptr. 497, 511 (1980); State v. Bryan, 120 Kan. 763, 245 P. 102, 104 (1926); People v. Sullivan, 173 N.Y. 122, 65 N.E. 989, 989 (1903); State v. Hazelett, 8 Or. App. 44, 492 P.2d 501, 503 (1972); State v. Thompson, 110 Utah 113, 170 P.2d 153, 156 (1946); State v. Carothers, 84 Wash. 2d 256, 525 P.2d 731, 736 (1974); Holland v. State, 91 Wis. 2d 134, 280 N.W.2d 288, 293 (1979), *cert. denied,* 445 U.S. 931 (1979).
11. Note, *Right to Jury Unanimity on Material Fact Issues: United States v. Gipson,* 91 HARV. L. REV. 499, 499 (1977).
12. 553 F.2d 453 (5th Cir. 1977).
13. *Id.* at 458.
14. *Id.*
15. *Id.* at 457.
16. *Id.* at 459.
17. *Id.* at 458.

each group.[18] Within each group the prohibited acts were so closely related and indistinguishable that the jury need not agree to the particular characterization of an act, which they all agreed was done. Receiving, concealing and storing all might well describe a single act and the jury needn't agree on the label to be used. Nor need the jury agree whether the particular label bartering, selling, or disposing is most appropriate. On the other hand, the court said that the two conceptual groupings of acts were so distinct that the jury should be required to decide which group of acts was done.[19]

In addition, requiring unanimity as to which group of acts was done would ensure essential agreement on what the defendant did.[20] The court acknowledged there could be essential agreement on what act the defendant did without splitting hairs over the characterization within each group. Only when there was essential agreement on what the defendant did could the jury decide that the *actus reus* element of the crime had been proved beyond a reasonable doubt. The net result of the *Gipson* decision is to qualify the general rule that the jury must agree what act was done by requiring jury unanimity concerning conceptually distinct acts only. Thus, the area of necessary agreement is reduced.

Within the fifth circuit itself, *Gipson* has been used to further reduce the acts a jury must agree upon.[21] Even with the *Gipson* exception the general rule remains: where one or more separate and distinct acts will satisfy a criminal statute the jury must agree on which act was done. The rationale appears to lie in the requirement of jury unanimity and the right of the defendant to have every element proved against him beyond a reasonable doubt.[22]

Some states have adopted the *Gipson* test for when the jury must agree on what the defendant did.[23] One state has given *Gipson* a very narrow reading. The New Mexico Supreme Court, in *State v. Utter,* limited *Gipson* to the *Gipson* facts: the trial court had specifically authorized a non-unanimous verdict after the jury requested additional instructions.[24] The *Gipson* standard utilizing conceptually distinct groupings has also been criticized as being difficult to apply:

18. *Id.*
19. *Id.*
20. *Id.* at 457.
21. United States v. Sutherland, 656 F.2d 1181, 1202, *reh'g denied* (5th Cir. 1981), *cert. denied,* 455 U.S. 949, *cert. denied sub nom.* Maynard v. United States, 455 U.S. 991 (1982) (RICO conviction on general verdict upheld ebcause the acts charged were not distinguished in any significant respect, because the evidence as to each was remarkably similar and thus the acts comprised one conceptual group); United States v. Freeman, 619 F.2d 1112, 1119 (5th Cir. 1980), *cert. denied,* 450 U.S. 910 (1981) (mail fraud and interstate transportation of fraudulently taken property not two conceptual groupings); United States v. Bolts, 558 F.2d 316, 326, n.4 (5th Cir. 1977) (in prosecution on one count of conspiracy to violate two separate statutes, general verdict upheld; there was no dispute over what acts Bolts did).
22. Many of the cases discuss the requirement of proof beyond a reasonable doubt and relate the necessity for agreement to it. Of course, the relationship between proof beyond a reasonable doubt and jury unanimity has long been debated. The principal point here is that it matters not what the standard of proof is. The jury is required to reach agreement and it must agree regardless of whether the standard of proof is beyond a reasonable doubt, clear and convincing, or a preponderance. The question is what the jury must agree about.
23. Holland v. State, 91 Wis. 2d 134, 280 N.W.2d 288, 293, *recon. denied* (1979), *cert. denied,* 445 U.S. 931 (1980).
24. 92 N.M. 83, 582 P.2d 1296, 1299 (1978).

> Other jurisdictions are also having difficulty in explaining the application of *Gipson* to the particular case. All agree that jury unanimity is required, but substantial doubt exists as to what the jury has to be unanimous about. . . . Conceptual groupings, while dependent to an extent on the statutory language, are also dependent upon the facts in evidence. This makes the *Gipson* analysis difficult to apply. . . . And when the evidence is insufficient to warrant an instruction on one of the alternative ways of committing a crime, the instruction should not refer to that alternative.[25]

MEANS

Some statutes provide that a single offense may be committed in more than one way. In such cases, the courts tend to decide that jury agreement is not necessary. The courts which have adopted this view have variously described the alternatives such statutes present as "ways,"[26] "methods,"[27] "means,"[28] "elements,"[29] "modes,"[30] "theories of the participation,"[31] of "views of the transaction."[32] The terminology is unimportant. The judgment the terminology expresses is important, for it removes these alternatives from the realm of necessary jury agreement. This posture is rationalized in several ways.

Not Essential Elements

One justification for the position that the jury need not agree is that the means are not essential elements of the crime. In *State v. Baldwin,*[33] The Wisconsin Supreme Court was confronted with a case in which compulsion (use of force) was an element of the crime of sexual assault. The jury was instructed it could find that element if it found use or threat of force and violence.[34] The court explained that the nature of the compulsion does not change because it results from a raised fist, rather than a blow.[35] The court concluded that the two methods of satisfying the force component were of sufficient conceptual similarity to comprise but one element of the crime.[36] The court found support for its position in the legislative attempt to express a notion of generalized force, rather than to require a specialized finding of use or threat of force.[37] Thus, the use of force is an element of the crime which the jury must find. So long as there is agreement that force was used, the jury need not agree on how the force was employed, because only its use, not how it was used, is an element of the crime charged. This

25. Manson v. State, 101 Wis. 2d 413, 304 N.W.2d 729, 738-42 (1981) (Abrahamson, J., concurring).
26. State v. Dixon, 127 Ariz. 554, 622 P.2d 501, 508 (1980).
27. State v. Baldwin, 101 Wis. 2d 441, 304 N.W.2d 742, 747 (1981).
28. State v. Bryan, 120 Kan. 763, 245 P. 102, 104 (1926); State v. Wixon, 30 Wash. App. 63, 631 P.2d 1033, 1042 (1981); Holland v. State, 91 Wis. 2d 134, 280 N.W. 288, 291 (1979), *cert. denied,* 445 U.S. 931 (1980).
29. Wells v. Commonwealth, 561 S.W.2d 85, 87 (Ky. 1978).
30. State v. Green, 91 Wash. 2d 431, 588 P.2d 1370, 1377 (1979).
31. Holland v. State, 280 N.W.2d at 293.
32. People v. Sullivan, 173 N.Y. 122, 65 N.E. 989, 989 (1903).
33. 101 Wis. 2d 441, 304 N.W.2d 742 (1981).
34. 304 N.W.2d at 745.
35. *Id.* at 748.
36. *Id.* Note the apparent application of the *Gipson* rationale.
37. *Id.*

explanation is quite unsatisfactory. If the jury has not agreed on what the defendant did, it is not possible for them to find even the element of generalized force. To require the jury to agree that the defendant either threatened or used force, or both, would "not require it to split hairs over nomenclature."[38]

The Kansas Supreme Court, in an early case, also failed to recognize that a finding of an element of a crime must rest on basic agreement as to what the defendant did. In *State v. Bryan,*[39] the defendant had been charged with extortion. The statute defined a single offense, but listed several ways in which the element of intimidation might be accomplished. In ruling on a motion to quash, the trial court indicated it would feel compelled to instruct the jury that it must be unanimous on how the intimidation was committed or else the verdict would not be unanimous.[40] The supreme court disagreed, and decided that a crime would have been committed regardless of how the intimidation was effected. "There must be unanimity that extortion was committed or attempted through intimidation, and that is as far as the court is required to go in the instructions as to unanimity in the mental operations of the jurors in reaching a verdict."[41] The Kansas court failed to grasp the point that unless the jurors agree what the defendant did, they are not in a position to evaluate whether that conduct satisfies the requisite element of intimidation.

Equal Liability

Another theory supporting the conclusion that agreement need not be reached on alternatives is based on the fact that both alternatives result in equal criminal liability. The first degree murder cases where the alternatives alleged are premeditated murder and felony murder typify this theory. One of the earliest and most often cited cases is *People v. Sullivan.*[42] The New York court held that it was not improper to submit the alternatives of premeditated and deliberate design or felony murder to the jury, because only one crime was committed. The two theories were not inconsistent and there was sufficient evidence supporting each to justify submitting both to the jury. Thus the court concluded, "[i]t is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence."[43]

Numerous courts follow *Sullivan* in the premeditated/felony murder situation.[44] The courts tend to state that it is enough that all members of the jury found the defendant guilty of first degree murder, regardless of which theory they relied upon, for both premeditated and felony murder

38. *Id.* (citing Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288, 288 (1979), *cert. denied,* 445 U.S. 931 (1980)).
39. 120 Kan. 763, 245 P. 102 (1926).
40. 245 P. at 103.
41. *Id.* at 104.
42. 173 N.Y. 122, 65 N.E. 989 (1903).
43. 65 N.E. at 989.
44. State v. Reyes, 209 Or. 595 (1956), *remanded on reh'g for record correction,* 304 P.2d 446 (1956), 308 P.2d 182, 189-90 (1957); People v. Olsson, 56 Mich. App. 500, 224 N.W.2d 691, 694 (1974); State v. Wilson, 220 Kan. 341, 552 P.2d 931, 936 (1976); People v. Milan, 9 Cal. 3d 185, 107 Cal. Rptr. 68, 507 P.2d 956, 961-62 (1973); State v. Carothers, 84 Wash. 2d 256, 525 P.2d731, 737 (1974).

result in the same criminal liability—that prescribed for first degree murder. If the courts actually apply this principle, they are in error. The jury is in no position to determine whether the liability imposed for first degree murder attaches unless they first determine what the defendant did. Perhaps the true rationale lies in the explanation of the Washington Court of Appeals in *State v. Carothers.*[45] As in many of the cases, the defendant was also charged with the underlying felony. The court indicated that when the jury returns a guilty verdict on the underlying felony charge, it indicates agreement that the felony was committed. A guilty verdict on first degree murder may not represent a finding of premeditation. It does, however, represent a finding of felony murder, for even those jurors who would find premeditation must necessarily agree the murder was committed in the course of the felony which they agree the defendant committed. On review, the Washington Supreme Court merely assumed, without deciding, that this might be the case.[46] The courts generally have not, however, explicitly embraced this rationale. Rather, they erroneously rely on the proposition that since the liability is the same, agreement is not necessary.

The same liability rationale is also relied upon in cases involving the question of whether the defendant acted as a principal or an accomplice.[47] The courts have determined that aiding and abetting is not a means or mode of committing the crime,[48] nor is the defendant charged with two crimes.[49] The elements of the crime are the same for principal and accomplice.[50] The problem remains that the jury cannot find guilt unless it determines what the defendant did and then whether that meets the statutory requirement.

In some states, party to a crime statutes treat conspiracy the same as accomplice liability. Thus, the same result is reached on the jury agreement question.[51] In the federal system, the circuits are split.[52] One conspiracy count can charge conspiracy to commit more than one crime. This is a single violation of the conspiracy statute.[53] Ordinarily, the jury may convict if it finds a conspiracy to commit any one of the enumerated crimes.[54] The same reasoning applies where more than one overt act in furtherance of the conspiracy is alleged.[55]

Mens Rea

The cases involving alternative states of mind and intent demonstrate similar attempts to rationalize the result that the jury need not agree. As a

45. 9 Wash. App. 691, 514 P.2d 170 (1973), *aff'd* 84 Wash. 2d 256, 525 P.2d 731 (1974).
46. State v. Carothers, 84 Wash. 2d 256, 525 P.2d at 737.
47. Holland v. State, 280 N.W.2d at 292.
48. State v. Carothers, 525 P.2d at 738.
49. State v. Wixon, 631 P.2d at 1042.
50. State v. Wixon, 631 P.2d at 1042; State v. Carothers, 525 P.2d at 736.
51. Manson v. State, 304 N.W.2d 729; Holland v. State, 280 N.W.2d 288.
52. *See generally,* Comment, *General Verdicts and Multiple-Objective Conspiracy Counts: Complications on Review,* 39 WASH. & LEE L. REV. 593 (1982).
53. Braverman v. United States, 317 U.S. 49, 54 (1942).
54. United States v. Murray, 618 F.2d 892, 898 (2d Cir. 1980); United States v. Wilkinson, 601 F.2d 791, 796 (5th Cir. 1979); United States v. O'Looney, 544 F.2d 385, 391 (9th Cir. 1976), *cert. denied,* 429 U.S. 1023 (1976).
55. United States v. Yates, 354 U.S. 298, 311-12 (1957).

clear proposition, *mens rea* is as much an element of the crime as *actus reus*. The widely adopted rule is that when more than one act will satisfy the statute, the jury needs to agree on what act the defendant did. The logical corollary of that rule is that when more than one state of mind will satisfy the statute, the jury must agree on which state of mind the defendant had. The California Court of Appeals has held squarely to the contrary, that there is no merit to the argument that the jury must reach agreement on which of the alternative *mens rea* requirements is present—maliciously or recklessly.[56]

Other courts have sidestepped the issue by concluding that a general felonious or bad intent is all that is necessary to satisfy the *mens rea* element. These courts then decide that agreement need not be reached as to the particular manifestation of bad intent.[57] In *State v. Flathers*,[58] the South Dakota Supreme Court affirmed a murder conviction. The defendant was charged with the killing of Frahm with intent to kill Rounds or intent to kill Frahm.[59] On appeal, the defendant claimed that part of the jury might have found intent to kill one and part another. Thus he argued that the instructions given permitted the jury to return a guilty verdict without a unanimous finding as to a necessary element of the crime.[60] The court emphasized that there was only one offense and noted there was ample evidence to support the conclusion he intended to kill Rounds, as well as ample evidence to support the conclusion that he intended to kill Frahm, and therefore ample evidence to support the conclusion he intended to kill both.[61] The court relied primarily on felonious, deadly intent to satisfy the intent element and declined to require unanimity as to whom that intent was directed.[62]

In *State v. Utter*,[63] the defendant claimed the trial court had sanctioned a non-unanimous verdict because the jury was not instructed it must agree on which of the six possible ways he might have abused the child (2 acts x 3 states of mind). The New Mexico Supreme Court rejected that contention, concluding that an alternative instruction, justified by the evidence, did not mean the verdict was not unanimous.[64] The court may have been led astray by the fact that "defendant's sole authority . . . is United States v. Gipson. . . . ,"[65] which case the court construed narrowly and promptly distinguished it from the case at bar.[66] The question in such cases is not whether the jury was unanimous in finding guilt, but whether that finding rests on substantial agreement that all the elements of the crime have been proved. In *Utter*, the *actus reus* element, as well as the *mens rea* element, was stated in the alternative. The jury surely cannot agree on guilt without

56. People v. Heideman, 58 Cal. App. 3d 321, 130 Cal. Rptr. 349, 355 (1976).
57. Territory v. Rowand, 8 Mont. 110, 19 P. 595 (1888) (felonious deadly intent is material point in homicide case).
58. 57 S.D. 320, 232 N.W.51 (1930).
59. 232 N.W. at 52.
60. *Id.*
61. *Id.*
62. *Id.*
63. 92 N.M. 83, 582 P.2d 1296, 1298 (1978).
64. 582 P.2d at 1299.
65. *Id.*
66. *Id.*

first deciding what the defendant did and then determining whether one of the requisite states of mind existed.

In the burglary cases, for example *People v. Failla,* California has followed the bad intent is enough rationale.[67] Stating that, "[t]he gravamen of a charge of burglary is the act of entry itself,"[68] the court concluded the jury need not be instructed that they must all agree on what felony was intended, provided they are instructed they must all find that a felonious entry occurred.[69] Clearly the California court does not consider particularized felonious intent to be a necessary element of burglary. "[T]he crime is complete when the one accused has entered the house of another with intent to commit *any* felony."[70] The decision rested in part on the notion that if the entry were made with intent to commit several felonies, only one burglary would be committed.[71] The court emphasized that the statute prohibited only one act which might be presented on different theories.[72] Thus, the court classified the intent the defendant had when he entered as only a theory of the case, on which the jury need not agree, so long as the jury agreed the entry was felonious.[73]

The express question raised in *Failla* was whether the jury need be instructed on what a felony is before they can find that the defendant intended "to commit theft or any felony."[74] The court found prejudicial error in the trial court's failure to instruct the jury on the definition of felony. The state had argued that the guilty verdict should be upheld because it was amply supported by the evidence of intent to steal. The court rejected the opportunity to uphold the verdict on the ground that one of the alternative intent charges was supported by the evidence. The court said it could not uphold the verdict because it was not convinced the jury found intent to steal, rather than intent to commit a felony, and because the evidence of intent to steal was weak.[75] Evidence of intent to commit a number of felonies was apparently ample. The question of whether the general verdict on the alternative intent to commit theft or any felony could be sustained in the absence of sufficient evidence to support one alternative was not addressed. The court's language indicates that any intent will suffice, but the court did not decide, as it might have, that because one alternative intent was supported, defects in the other alternative were irrelevant.

The *Failla* court remanded for a new trial because the jury had not been instructed what a felony was.[76] Thus the court acknowledged that the finding of general felonious intent must be based on some sound ground, but refused to acknowledge that it should be based on a totally sound ground. The jury should be instructed that it must agree on at least one of the alternatives proposed. If the jury agreed on more than one alternative

67. 64 Cal. 2d 560, 51 Cal. Rptr. 103, 414 P.2d 39 (1966).
68. 414 P.2d at 44.
69. *Id.* at 45.
70. *Id.* at 44 (citing People v. Morlock, 46 Cal. 2d 141, 146, 292 P.2d 897, 901 (1956)) (emphasis added).
71. 414 P.2d at 44-45 (citing People v. Hall, 94 Cal. 595, 597, 30 P. 7, 9 (1892)).
72. 414 P.2d at 44-45.
73. *Id.* at 45.
74. *Id.* at 41.
75. *Id.* at 43.
76. *Id.* at 43.

intent, the defendant would not be guilty of more than one crime. California's approach has been criticized as failing to recognize that the *mens rea* element must be proved beyond a reasonable doubt.[77]

While the California court hinted that the identity of the intended felony was not an element of burglary, the Washington Court of Appeals has squarely so held.[78] The Washington court tended to agree with California that so long as the jury finds felonious entry, the general verdict is good.[79] The rationale for this was that the identity of the underlying felony is not an element of burglary. Thus a finding of mere criminal intent will suffice to satisfy the *mens rea* element.

Regardless of whether the state classifies the identity of the intended felony as an element of burglary which must be alleged and proved (and many states do) the question remains how a jury can find general felonious intent without first determining what the defendant intended. The courts which determine that general felonious intent meets the intent requirement of the statute permit the jury to convict without substantial agreement as to what the defendant did. In those states where particularized intent is an essential element of burglary, the defendant is clearly entitled to jury agreement in the particularized intent.

The Arizona court upheld a general verdict of guilty of theft based on the alternative mental states with intent to deprive or knowing or having reason to know the property was stolen.[80] The court classified the case as one involving a single offense committable in more than one way.[81] The court relied on the fact that the two states of mind have a readily perceived connection, are consistent and not repugnant, and may inhere in the same transaction.[82] It appears the Arizona court has adopted a *Gipson*-type test for the state of mind element and concluded that agreement as to which state of mind existed is not necessary when the two states of mind alleged are not conceptually distinct.

In *State v. Souhrada,*[83] the Montana Supreme Court affirmed a manslaughter conviction. The bill of particulars alleged driving under the influence of intoxicating liquor or negligent driving or driving in a grossly reckless manner or speeding.[84] The trial court had denied several instructions which would have required unanimity on the specific acts or omissions which constituted the criminal negligence.[85] The supreme court relied on the *Sullivan* case, among others, for the proposition that the jury need not concur in a single view of the transaction.[86] Thus the Montana court refused to categorize the state of mind as an essential element, but rather

77. Note, *Jury Instructions and the Unanimous Jury Verdict—United States v. Gipson, 553 F.2d 453 (5th Cir. 1977),* 1978 WIS. L. REV. 339, 348.
78. State v. Chelly, 32 Wash. App. 916, 651 P.2d 759, 761 (1982), *reh'g denied,* 651 P.2d 759 (1982).
79. 651 P.2d at 761.
80. State v. Dixon, 622 P.2d at 508.
81. *Id.*
82. *Id.* at 509.
83. 122 Mont. 377, 204 P.2d 792 (1949).
84. 204 P.2d at 793-94.
85. *Id.* at 796.
86. *Id.*

classified the defendant's state of mind as a mere view of the transaction or interpretation of the evidence. Criminal negligence can thus be proved without agreement concerning the defendant's state of mind, even without agreement as to what the defendant did. This runs counter to the notion that each element of the offense must be proved. It allows mere hunches of individual jurors to combine to reach a valid guilty verdict where there is no agreement as to what the defendant did or with what mental state he did it.

JUDICIAL REVIEW AND DEFECTIVE ALTERNATIVES

When alternatives of any kind are alleged, an instruction that the jury cannot convict unless they agree that at least one alternative exists, will insure jury agreement. Complications beyond the matter of mere agreement arise where one of the alternatives is defective in some way. A reviewing court has no way of determining which alternative the jury found. Several cases acknowledge that when a general verdict is returned on alternatives, the court cannot know which alternative the jury found.[87] Thus the court cannot be sure the jury unanimously agreed on the defective non-alternative agreement, even if the jury was properly cautioned that it must agree on at least one alternative.

A defective alternative may be discovered only after the jury has been dismissed. This can happen when one of the alternatives is not supported by the evidence. It can also happen if one of the alternatives is defective in some other way. One alternative state of mind can be erroneously submitted to the jury, because the defendant admitted a culpable state of mind higher than that alternative.[88] One alternative may be an unconstitutional presumption supporting an inference of fact.[89] One of the objective substantive offenses of a conspiracy conviction may be held unconstitutional.[90] The statute of limitations may bar one alternative.[91] In all these situations, one alternative is defective.

Insufficiency of the Evidence

Some courts have expressly made sufficiency of the evidence to support both alternatives a condition of their approval of the general verdict where alternative means are involved.[92] A number of other courts which have not expressly stated that both alternatives must be supported by substantial evidence have approved the general verdict only where there was, in fact, substantial evidence to support both alternatives. In many of these cases, the sufficiency of the evidence to support the alternative means was not even questioned. The courts may indicate, however, that there was sufficient evidence to support the alternatives.[93] Other courts imply that

87. People v. Nicholas, 112 Cal. App. 3d 249, 169 Cal. Rptr. 497 (1980); People v. Olsson, 224 N.W.2d 691 (1974).
88. People v. Heideman, 58 Cal. App. 3d 321, 130 Cal. Rptr. 349, 355 (1976).
89. Sandstrom v. Montana, 442 U.S. 510, 526 (1979).
90. Stromberg v. California, 283 U.S. 359, 368 (1931).
91. United States v. Yates, 354 U.S. at 304.
92. State v. Dixon, 622 P.2d at 508; Boulder v. Commonwealth, 610 S.W.2d 610, 617 (1980); People v. Olsson, 224 N.W.2d at 694; People v. Sullivan, 65 N.E. at 989; State v. Hazzelett, 492 P.2d at 503.
93. People v. Nicholas, 169 Cal. Rptr. at 510 (there was "abundant proof of defendant's specific intent to commit the robbery and murders."); State v. Flathers, 232 N.W. at 52 (ample evidence to support the conclusion that defendant intended to kill Frahm, or that defendant intended to kill Rounds, or that defendant intended to kill both).

approval of the patchwork verdict is bottomed on the assumption that the alternatives are supported by the evidence.[94]

It is a recognized principle that where alternative theories of guilt are submitted to a jury and a general verdict of guilt is returned which does not specify which theory the jury agreed upon, insufficiency of any alternative submitted will be fatal to the verdict. The reason is that it is not possible to know that the jury did not rely upon the insufficient theory in reaching its verdict.

The Kentucky court originally endorsed the logic of *People v. Sullivan* that the general verdict on alternative means would be upheld where there was substantial evidence to support all alternatives.[95] A few years later, in *Boulder v. Commonwealth,*[96] a general verdict was returned on the alternative *mens rea* elements intentionally or recklessly. Only one alternative, intentional injury, was supported by the evidence. The Kentucky court set aside the conviction based on alternative *mens rea* elements, one of which was not supported by the evidence:

> The instructions submitting count one (first degree assault) to the jury were improper. They provided alternative grounds for a finding of guilt—either that John intended to cause serious physical injury to 'Cynthia' or that he was wantonly engaging in conduct which created a risk of death to 'Cynthia.' The state of the evidence, however, is such that it would be clearly unreasonable for a juror to believe that John's conduct was other than intentional. Because we cannot ascertain that all the jurors based their decision on the first theory, which is the only one supported by the evidence, we cannot say the verdict was unanimous as required by RCr 9.82(1) and *Wells v. Commonwealth,* Ky., 561 S.W.2d 85 (1978).[97]

In *State v. Green,* the Washington Supreme Court changed its position. Originally, over a dissent stressing that the means involved were in themselves separate crimes,[98] the court held that the alternatives of aggravated first degree murder in the course of a kidnapping or in the course of a rape were means of committing the single crime of aggravated murder.[99] The court noted the murder could be committed in one or more ways which were not repugnant to each other and which were supported by substantial evidence.[100] Thus it was not error to instruct in the

94. "If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon another." State v. Souhrada, 204 P.2d at 796. *See also* State v. Wilson, 552 P.2d at 935. Implicit in these statements is the recognition that each interpretation the jury may have relied upon is supported by the evidence. *See also* Manson v. State, 304 N.W.2d at 737 (the jury needn't be instructed concerning unanimity about "ways of committing the crime if the two ways are practically indistinguishable.") The implication is apparent that if the methods are practically indistinguishable, evidence supporting one would also support the other.

95. Wells v. Commonwealth, 561 S.W.2d at 88.

96. 610 S.W.2d 615 (Ky. 1980).

97. *Id.* at 617.

98. 588 P.2d at 1388 (Utter, J., dissenting).

99. 588 P.2d at 1376.

100. *Id.*

alternative.[101] On rehearing,[102] the court decided there was not sufficient evidence to support a finding of kidnapping.[103] The court might simply have held, as other courts have done, that in such a circumstance, the court cannot say the jury unanimously found the supported alternative, and remanded for a new trial. Instead the court retrenched on its previous position and agreed with Justice Utter that because rape and kidnapping are separate and distinct major crimes, as well as elements of aggravated murder, the specific elements of rape or kidnapping must also be proved beyond a reasonable doubt:

> [T]he charge of aggravated murder in the first degree must be established by proving beyond a reasonable doubt that appellant caused the victim's death in the course of or in the furtherance of rape, . . . , or kidnapping, ... While rape and kidnapping are elements of aggravated murder in the first degree, each is a separate and distinct major crime having specific elements which also must be proved beyond a reasonable doubt.[104]

A subissue in that case was that kidnapping could be proved by any of four means. The court held that the four means of kidnapping (restraint by 1) secreting, 2) by threat of deadly force, 3) by use of deadly force other than killing, 4) by killing itself) were not interchangeable, that each must be independently proved and that none could combine to fill a void.[105] Because the court found insufficient evidence of three of the alternatives and determined that restraint by killing was beyond the ken of the aggravated murder statute, it held that kidnapping had not been proved in that case.[106] The court did not say whether the jury must agree on the method of restraint, which is an element of kidnapping. It appears that even if the jury had reached agreement on the method of restraint, the verdict would fall because restraint by killing was an improper alternative.

In conspiracy cases, as in all others, a reviewing court cannot tell which of the alternatives the jury found. Where one conspiracy alternative is defective, the federal courts generally reverse on the grounds they are unable to determine whether the jury found the proper alternative(s).[107] Contrary results have been reached by courts which hold that sufficient evidence of one alternative will support the conviction.[108] The general proposition seems well established: the jury must reach agreement on at least one alternative before they can convict.

101. *Id.* at 1377.
102. 94 Wash. 2d 216, 616 P.2d 628 (1980).
103. 616 P.2d at 631.
104. *Id.*
105. *Id.* at 634.
106. *Id.* at 636.
107. United States v. Head, 641 F.2d 174, 178-179 (4th Cir. 1981); United States v. Tarnopol, 561 F.2d 466, 475 (3rd Cir. 1977); United States v. Carman, 577 F.2d 556, 568 (9th Cir. 1973).
108. United States v. Dixon, 536 F.2d 1388, 1402 (2d Cir. 1976); United States v. Tanner, 471 F.2d 128, 143 (7th Cir. 1972), *cert. denied*, 409 U.S. 949 (1972) (although defendants did not commit the crime because they were outside territorial waters, they could nonetheless conspire to commit the defective alternative act).

Other Defects

Other defects in one alternative are similarly fatal to a general verdict. Thus in *Sandstrom v. Montana,*[109] it was possible for the jury to have reached its verdict of guilt by two alternative approaches: either by following a presumption as to intent, or by relying upon the evidence. On review, the presumption was held unconstitutional. The state argued that the jury could have found defendant guilty upon the evidence, rather than by relying upon the presumption, and therefore the verdict of guilt should be upheld. The Supreme Court unanimously rejected this argument:

> But, more significantly, even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do. As the jury's verdict was a general one, . . . , we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, *e.g., Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)." *Leary v. United States,* 395 U.S. at 31-32. See *Ulster County Court v. Allen,* 442 U.S. at 159-160; 175-176 (Powell, J., dissenting); *Brotherhood of Carpenters v. United States,* 330 U.S. at 408-409; *Bollenbach v. United States,* 326 U.S. at 611-614.[110]

Earlier Supreme Court cases also indicated that where the verdict is based on two alternatives, one of which is defective, the general verdict cannot stand.[111] It is clear that the simple instruction that the requisite number must agree that at least one alternative exists will not solve these types of problems.

SOLUTIONS

The threat to jury agreement posed by general verdicts on alternatives is not without solution. Responsibility for removing the threat rests on every participant in the process of defining and trying criminal charges. The duty of each participant varies with his specific role in the process.

In the first instance, the solution rests with the legislature. Two approaches are available. The first approach is to draft criminal statutes without alternatives. The difficulty arises only because the legislature has made a practice of grouping multiple means of committing a crime in a single statute.[112] The jury instructions merely convey the statutory requirements to the jury. If the statutes did not list alternative requirements, neither would the jury instructions. In addition, some criminal statutes are

109. 442 U.S. 510 (1979).
110. *Id.* at 526.
111. Yates v. United States, 354 U.S. at 311-12; Stromberg v. California, 283 U.S. at 367-68.
112. Note, *Application of Gipson's Unanimous Verdict Rational to the Wisconsin Party to a Crime Statute—Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979),* 1980 WIS. L. REV. 597, 614.

overly specific and this tends to complicate the situation.[113] The statute involved in the *Gipson* case, declaring six acts unlawful, is an example. Simple, straightforward statutes could eliminate most of the problem.

A second legislative solution is to authorize the use of special verdicts in criminal cases. A special verdict would permit the jury to indicate which of the presented alternatives it agreed upon. The special verdict at once assures that the jury will reach agreement and indicates to a reviewing court which alternative(s) the jury found. This is important when one of the alternatives is later found to be defective in some way. By way of the special verdict, the reviewing court will know whether the jury based its decision on a valid or a defective alternative. If the jury based its decision on a valid alternative, a new trial need not be ordered.

The special verdict is available in federal criminal cases.[114] These special verdicts are especially appropriate in criminal cases where the jury must determine the amount of interest or identify the property subject to forfeiture.[115] However, the use of the special verdict in other contexts has been questioned.[116] The courts are hesitant to endorse the use of special verdicts. One basis for this is that the criminal jury's function goes beyond factfinding. It includes the application of the law to the facts. Thus the use of special verdicts, which focus on the factfinding element, is thought to encroach on the jury's function.[117] The courts expect the jury to function as the conscience of the community, and to temper the rules of law with common sense.[118] In contrast, special verdicts focus the jury's attention on the legal requirements. They tend to force the jury to be more logical and less humane.[119]

Despite the criticism of the use of special verdicts in criminal cases, it is clear that the special verdict form, allowing the jury to indicate all alternatives it found, would solve all the problems general verdicts entail. The jury would be forced to agree on the alternatives. New trials would be avoided where the special verdict indicates a basis for upholding the conviction even though one alternative is defective.

Even in the absence of legislative reform, the prosecutor can prevent the jury agreement problem from arising. The prosecutor's interest in avoiding needless new trials is clear. The prosecutor who wishes to protect his verdict has several avenues available to him. He can exercise his rightful discretion on matters of charging so as to eliminate the problem. He can bring different counts for each alternative. This will ensure a verdict on each alternative.[120] It is also within the prosecutor's discretion to

113. Note, *supra* note 77, at 343.
114. FED. R. CRIM. P. 31(e).
115. Notes of Advisory Committee on Rules, FED. R. CRIM P. 31(e).
116. *See* United States v. James, 432 F.2d 303, 307-308 (5th Cir. 1970), *cert. denied,* 403 U.S. 906 (1971); United States v. Spock, 416 F.2d 165, 183 (1st Cir. 1969); Gray v. United States, 174 F.2d 919, 923-924 (8th Cir. 1949), *cert. denied,* 338 U.S. 848 (1949).
117. 2 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, § 512 (1969 & Supp. 1981).
118. United States v. Spock, 416 F.2d at 181-82.
119. *Id.* at 181.
120. He is sure to meet with defense objections of double jeopardy and duplicitous charges. These are serious matters to be dealt with. However, the objective here is not to solve all problems, but to suggest ways to avoid the general verdict difficulties.

charge only one of the alternatives in the first place. Where charges are lodged before the prosecutor has fully investigated his case, he might originally charge all alternatives. Later he could strike all alternatives save that one which is best supported. Where special verdicts are available, the prosecutor can request special verdicts on the alternatives. These special verdicts would operate to safeguard the verdict where one alternative is defective. Where special verdicts are not available, the prosecutor can propose jury instructions which would require jury agrement on at least one alternative. This will suffice to ensure jury agreement.

If neither the legislature nor the prosecutor acts to eliminate the problem, defense counsel should act. Defense counsel can move to strike an alternative from the information at an early stage. He can also move to amend the information to charge the alternatives in separate counts. He can move for a directed verdict of acquittal on one alternative at the end of the state's case. Lastly, defense counsel should propose jury instructions requiring the jury to agree on at least one of the alternatives presented.

The trial court's duty is to help eliminate the difficulties by looking favorably on motions to amend the information and to withdraw some alternatives from jury consideration. These changes can prevent the question of agreement on alternatives from arising. When all else fails, the trial court must take responsibility for insuring that the jury reaches agreement on the alternatives presented. The trial court should instruct *sua sponte* on such a basic matter as jury agreement.

The heaviest burden of all falls on the reviewing court. Some courts have tended to avoid the issue by relegating the alternatives presented to a status which does not require jury agreement. Perhaps this reflects a hesitancy to look into the verdict; perhaps a reluctance to order a new trial when one alternative may be defective or where a proper "agreement on alternatives" instruction was not given, perhaps a fear of special verdicts and any instructions which approach them. The reviewing court has the solemn duty to acknowledge and confront the problems, not to avoid them. The courts must recognize that where one alternative is defective and special verdicts have not been used, a new trial is essential. The courts must also encourage a proper instruction in all cases which present the jury alternatives. In many states, the highest court has direct responsibility for pattern jury instructions and can ensure that proper instructions are made available. In other situations, the reviewing court is given great indirect power over jury instructions. The source of that power is the authority to reverse every case where a proper instruction was not given.

Jury instruction recommendations have covered a broad range. One proposal is to amend the jury instructions to reflect the *Gipson* approach.[121] Another is to instruct the jury that they must agree on at least one alternative only when there is a risk of non-unanimity or when the alternatives are substantially different.[122] The better solution is to instruct the jury

121. Note, *supra* note 77, at 340. But this is based on the erroneous notion that *Gipson* extends the area of agreement the jury must reach. In fact, it does not, but has been used to reduce the area of necessary agreement. *See supra* text accompanying note 21 .

122. Note, *supra* note 112, at 611.

whenever alternatives are presented, regardless of how those alternatives are classified. This simple expedient will assure jury agreement in every case.

CONCLUSION

A basic requirement of criminal jury trials is that the jury must reach agreement. The practice of submitting alternatives to a jury not instructed they must reach agreement on at least one alternative, allows a jury to return a special verdict of guilty without the necessary agreement. Broad reforms are available to insure jury agreement in such cases. Until these reforms are accomplished, better use of the available tools will go far toward assuring jury agreement. The currently available tools include the prosecutor's charging discretion, judgment of acquittal, jury instructions, and, in limited situations, special verdicts. These tools should be utilized to mould verdicts based on jury agreement, in accord with the basic requirements of criminal jury trials.

BARBARA L. LAUER[123]

123. The author first became interested in this topic while briefing a criminal appeal for the Wyoming Defender Aid Program. That case has since been decided. Fife v. State, Wyo. Sp. Ct. No. 83-132, decided February 2, 1984 held that when one alternative submitted to the jury is not supported by the evidence, the general verdict cannot stand.