Alternative Means Jurisprudence in Kansas: Why *Wright* is Wrong

*William R. Mott**

I. INTRODUCTION

Untied from any mooring, alternative means jurisprudence in Kansas has drifted into a strange and confusing world where "secondary matters" infest every corner of the criminal code. Who knew the Kansas legislature intended to create a class system for criminal elements in this state? A breakdown in the application of Kansas's ordinary canons of statutory and constitutional construction is to blame.[1] This breakdown has led the state into a morass of artificial and unnecessary distinctions impossible to otherwise conceive. Any discussion about the breakdown now begins with what was meant as a clarifying point in Kansas law with the holding of *State v. Wright.*[2]

An "alternative means" case arises when the court's instructions give the jury the option of convicting a defendant of a single offense under two or more statutory means.[3] In such a case, "there must be jury unanimity as to *guilt* for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means."[4] This "super sufficiency" requirement emerged as the undisputed law of Kansas in 2010 with the Kansas Supreme Court's decision in *State v. Wright.*[5]

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*Kansas District Court Judge, 30th Judicial District. The author thanks the Honorable R. Scott McQuin and the Honorable Rick Biles for their constructive critiques of the early drafts of this article. The author also thanks the entire Kansas Law Review staff, especially George Sand and Joseph Schmisseur, for their insightful and invaluable critiques, ideas, and additions to the project.

1. "[C]anons are not mandatory rules. They are guides that 'need not be conclusive.'" Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (citation omitted). Nevertheless, their application "provides some degree of insulation against judicial arbitrariness [and render] statutory interpretation more predictable, regular, and coherent." William N. Eskridge, Jr. & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994).

2. 224 P.3d 1159 (Kan. 2010).

3. *Id.* at 1164.

4. *Id.* at 1165 (quoting State v. Timley, 875 P.2d 242, 246 (Kan. 1994)).

5. *Id.*

A. Visualizing the Concept: Alternative Means v. Secondary Matters

Because alternative means errors can only occur through the trial court's instructions to a jury, a sample instruction can illustrate the distinction the Kansas Supreme Court makes between "alternative means" and "secondary matters." Consider the example kidnapping instruction below in which the boldface type signifies "alternative means" and the italics represent what the court has dubbed "secondary matters," or "options within a means."[6]

> To establish this charge, each of the following claims must be proved:
>
> 1. The defendant **took or confined** John Doe *by force, threat, or deception.*
>
> 2. The defendant did so with the intent to hold John Doe *to facilitate flight or the commission of any crime*.
>
> 3. This act occurred on or about the 1st day of January, 2013, in Sumner County, Kansas.

Jurors given this instruction must, pursuant to element number one, determine if the state sufficiently proved the defendant "took or confined" the alleged victim. It matters not that half of the jurors might rely on the "taking" theory while the other half might rely on the "confining" theory, so long as sufficient evidence supports both the "taking" and the "confining" theories.[7]

What happens if the evidence does not sufficiently support the "taking" theory? The conviction will be overturned because *Wright* holds that when one of the means submitted to the jury is factually inadequate, harmless error analysis will not be applied.[8] According to *Wright*'s holding, this guarantees unanimity in verdicts "at the level of factual generality that matters most of all: guilt v. innocence."[9] Requiring both the "taking" and the "confining" theories to be sufficiently proved beyond a reasonable doubt is what the court means by the phrase super sufficiency.

While the Kansas Supreme Court requires super sufficiency for "taking or confining," the terms "by force, threat, or deception" were deemed

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6. *See* State v. Brown, 284 P.3d 977, 992 (Kan. 2012) (using terms "secondary matters" and "options within a means").

7. State v. Haberlein, 290 P.3d 640, 649 (Kan. 2012).

8. *Wright*, 224 P.3d at 1167.

9. *Id.* at 1167 (quoting Carol A. Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 WASHBURN L.J. 275, 299 (2005)).

"secondary matters" not requiring super sufficiency.[10] So, what happens if the evidence does not sufficiently support the "threat" and "deception" theories? The conviction stands as long as the evidence sufficiently supports one of the theories, which, in the example, is the "force" theory.[11] Currently, errors of this sort involving secondary matters—or options within means—do not merit application of any harmless error analysis. Instead, the conviction is summarily affirmed without exploration of potential harm involved. In simpler terms, the court spliced the "actus reus"[12] of kidnapping contained in element one of the instruction into two sections and applied a different rule for each section. If this result does not seem obvious to you, you are not alone.[13] The inspiration for this article began with sheer curiosity at how the exotic holdings in this area of Kansas law came to exist.

This article reviews the historical origins of alternative means law in Kansas, critiques the court's holdings, and proposes an alternative to the current state of the law through ordinary application of Kansas's canons of statutory and constitutional construction.

II. HISTORY OF ALTERNATIVE MEANS IN KANSAS

A. Jury Unanimity at the Common Law

Kansas adopted the common law at its inception by legislative enactment.[14] The centuries-old rule requiring verdicts to be unanimous is

10. *Haberlein*, 290 P.3d at 649.

11. *See id.* ("But the phrase 'force, threat, or deception' addresses secondary matter, merely describing ways in which the *actus reus* can be accomplished. In other words, under our *Brown* analysis, each is an option within the means of taking or confining.").

12. Actus reus means: "'guilty act' . . . [t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability; a forbidden act." BLACK'S LAW DICTIONARY 41 (Deluxe 9th ed. 2009).

13. Applying *Wright*'s rule, "[i]n its brief . . . the State conceded that force, threat, and deception were alternative means" of proving kidnapping in *Haberlein*. 290 P.3d at 648–49. Naturally, this was before *State v. Brown* opined that there existed "secondary matters" for which *Wright*'s rule does not apply. 284 P.3d 977, 990–91 (Kan. 2012).

14. *See* KAN. STAT. ANN. § 77-109 (2012) ("The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object."). *See also* Addington v. State, 431 P.2d 532, 539 (Kan. 1967) (quoting Kan. Pac. Ry. Co. v. Nichols, Kennedy & Co., 9 Kan. 235, 252 (1872)) ("We get our common law from England. It dates back to the fourth year of the reign of James the First, or 1607, when the first English settlement was founded in this country at Jamestown, Virginia. The body of laws of England as they then existed now constitute our common law. It is so fixed by statute in this state. . . ." (citation omitted)); Gonzales v. Atchison Topeka & Santa Fe Ry. Co., 371 P.2d 193, 198 (Kan. 1962) ("From the beginning of our history as a state the

deeply engrained in the common law[15] and has always been the law of Kansas in criminal cases. While the Kansas legislature has statutorily altered the common law unanimity rule in civil cases,[16] it has not done so in criminal cases.

Like the common law right to juror unanimity in verdicts,[17] the issue of juror unanimity in alternative means cases is far from new.[18] For centuries, the well-settled common law rule provided that, when a jury was given alternative means of finding a defendant guilty of a crime, and one of the means was not supported by the evidence, the conviction stood on the presumption that juries are well-equipped to analyze evidence; jury intelligence would save a defendant from conviction on a theory unsupported by the evidence.[19] This presumption remained "in the absence of anything in the record to show the contrary."[20] Using the parlance of current Kansas courts, the common law rule does not require "super sufficiency."

In 1926, *State v. Bryan* became the first Kansas case to deploy the common law alternative means rule—albeit in dicta—when it analyzed a complaint that the trial court held was "bad for duplicity."[21] That is, the trial court held the mistaken notion that the complaint alleged two separate

common law of England has been the basis of the law of this state, and except as modified by constitutional or statutory provisions, by judicial decisions, or by the wants and needs of the people, it has continued to remain the law of this state." (citations omitted)).

15. *See* Apodaca v. Oregon, 406 U.S. 404, 407–08 (1972) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 375–76 (1st ed. 1768)) ("[T]he requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century.").

16. KAN. STAT. ANN. § 60-248(g) (providing that the agreement of ten of twelve "jurors is sufficient to render a verdict" in civil cases).

17. It is often stated in Kansas Supreme Court opinions that "jury unanimity . . . in criminal cases is statutorily required." *See* State v. Wright, 224 P.3d 1159, 1164 (Kan. 2010) (citing K.S.A. 22-3421, the verdict procedure statute, as the statutory source for the criminal unanimity rule). Another statute, K.S.A. 77-109, adopts the common law as Kansas law, which would include the requirement of unanimity in verdicts.

18. *See* Griffin v. United States, 502 U.S. 46, 49 (1991) ("It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds-even [sic] though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action.").

19. *See id.* at 58 (finding petitioner's invitation to alter the common law rule to only apply "where one can be *sure* that the jury did not use the inadequately supported ground as the basis of conviction" to be "without foundation in the commonlaw [sic] presumption upon which [the old common law rule] is based").

20. *Id.* at 49–50 (quoting Claassen v. United States, 142 U.S. 140, 146–47 (1891)).

21. 245 P. 102, 103–04 (Kan. 1926). The main issue for review was whether the trial court improperly quashed a complaint; the actual case never made it to the jury. *Id.*

crimes in "one count."[22] In *Bryan*, the defendant was charged with robbery and extortion of money—covered by the same criminal statute at the time—by two means prohibited by Kansas law: (1) threatening to accuse another of a felony, or (2) threatening to do injury to a person.[23] The trial court quashed the State's complaint because it felt the "essential of unanimity" could be compromised if the jury was given the option of convicting the defendant under two means of committing the crime.[24] In reversing the trial court, the Kansas Supreme Court stated that it mattered not that the crime was committed by "one or more of the alleged means. 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."[25] One can clearly see the common law rule's influence in the Kansas Supreme Court's ruling.

1. The Historical Seeds of Common Law Abrogation

A half decade after *Bryan*, the United States Supreme Court issued its opinion in *Stromberg v. California*,[26] which became, as the Court would later state, the "fountainhead of decisions departing from the common law" in alternative means cases.[27] In *Stromberg*, the Court addressed the validity of a general verdict that rested on an instruction that the petitioner could be found guilty for displaying a red flag as "a sign, symbol, or emblem of opposition to organized government, or was an invitation or stimulus to anarchistic action, or was in aid to propaganda that is of a seditious character."[28] The Court held that the first clause of the instruction proscribed constitutionally protected conduct and concluded that Stromberg's conviction must be reversed because "it [wa]s impossible to say under which clause of the [instruction] the conviction was obtained."[29] In other words, because one portion of the jury instruction was constitutionally suspect and the jury failed to specify which portion of the instruction was used to find the verdict, the court found the conviction could not be upheld.[30]

22. *Id.*
23. *Id.* at 103.
24. *Id.*
25. *Id.* at 104.
26. 283 U.S. 359 (1931).
27. Griffin v. United States, 502 U.S. 46, 52 (1991).
28. 283 U.S. at 363 (quoting the trial court's instruction).
29. *Id.* at 368.
30. *Id.*

In *Yates v. United States*, the Supreme Court extended the reasoning used in *Stromberg*, holding that a jury cannot convict a defendant when relying on an instruction with a partial defect.[31] The jury in *Yates* was faced with an instruction that included both a charge of conspiracy with intent to overthrow the government and a charge of conspiracy to advocate the violent overthrow of government.[32] Because the former charge was barred by the statute of limitations, even though the latter charge was not, the Court reversed and remanded because the charge relied upon for conviction could not be determined.[33] Hence, *Yates* extended *Stromberg* and opened the doors to reversals based not only on convictions resting on multiple theories of guilt with constitutionally suspect clauses, but also on theories that, while not unconstitutional, are otherwise legally flawed.

B. Early Alternative Means Jurisprudence in Kansas

In *State v. Wilson*, the Kansas Supreme Court examined an alternative means issue for the first time in the context of a first-degree murder case with a confession and ample evidence to support both means of committing first degree murder: premeditated murder and felony murder.[34] In the parlance of the current Kansas Supreme Court, there was super sufficiency of the evidence. In essence, the defendant in *Wilson* asserted that the jury must be unanimous as to the means by which the crime was committed.[35] The defendant was concerned that some members of the jury could have found him guilty of premeditated murder while others may have found him guilty of felony murder, that is, "a killing in the perpetration or attempt to perpetrate a robbery."[36] Addressing the defendant's specific concern of the prospect of a jury split on the underlying theory of guilt threatening unanimity in a case when both means are supported by sufficient evidence, the court stated that "the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation of the evidence and part on another."[37]

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31. 354 U.S. 298, 311–12 (1957), *overruled on other grounds by* Burks v. U.S., 437 U.S. 1, 18 (1978).

32. *Id.* at 301, 311–12.

33. *Id.* at 311–13, 338.

34. 552 P.2d 931, 934–36, 938 (Kan. 1976).

35. *Id.* at 935.

36. *Id.* (quoting the trial court's instructions).

37. *Id.* at 936. The court in *Wright* suggests *Wilson*, as opposed to *Timley*, might well be considered the source of the super sufficiency rule in Kansas because the "holding from *Wilson* necessarily depended on the existence of sufficient evidence on each alternate theory." State v.

Noticeably, the court did not recite the common law single-means-is-good-enough rule in rejecting the defendant's position, instead relying on the fact there was super sufficiency of the evidence.[38] One could reasonably speculate this was an artful step taken to avoid resolving the perceived clash between *Stromberg*'s rule and the centuries-old common law rule. The Kansas Supreme Court would have over a decade before the clash between these two rules was squarely before it.

1. The Kansas Supreme Court Misconstrues *Stromberg* and Departs from the Common Law

Twelve years after *Wilson*, in *State v. Garcia*, the Kansas Supreme Court made a clear break from the old common law alternative means rule based upon its misinterpretation of *Stromberg*.[39] Garcia had been charged with killing his victim while burglarizing either a house or a pickup truck, and the court concluded the evidence did not support the burglary of the pickup.[40] Consequently, the court reversed Garcia's conviction for felony murder.[41] The Kansas Supreme Court held that, "[s]ince one of the two alternative burglary theories advanced by the State is not supported by sufficient evidence, the defendant's conviction for burglary and his conviction for felony murder based upon that burglary must be reversed."[42] In short, the court applied *Stromberg*'s rule, meant for the circumstance when one of the means was unconstitutional or legally flawed,[43] to the circumstance of a factually inadequate theory.

2. Kansas Returns to the Common Law Alternative Means Rule

In *State v. Grissom*,[44] the Kansas Supreme Court held it was "no longer bound by [its] earlier interpretation of *Stromberg*" in light of the United States Supreme Court's holding in *Griffin v. United States*.[45] In *Griffin*, the

Wright, 224 P.3d 1159, 1164 (Kan. 2010).

38. *Wilson*, 552 P.2d at 935–36.

39. State v. Garcia, 763 P.2d 585, 594 (Kan. 1988).

40. *Id.* at 588–89, 594.

41. *Id.* at 594.

42. *Id.*

43. *See* Griffin v. United States, 502 U.S. 46, 59 (1991) (stating that the *Stromberg* holding "do[es] not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground").

44. 840 P.2d 1142 (Kan. 1992).

45. 502 U.S. 46 (1991).

Court considered "whether, in a federal prosecution, a general guilty verdict on a multiple-object conspiracy charge must be set aside if the evidence is inadequate to support conviction as to one of the objects."[46] Griffin was charged with "conspiring to defraud an agency of the Federal Government," and the two alleged objects of the conspiracy were to impair the Internal Revenue Service's efforts "to ascertain income taxes," and to impair the Drug Enforcement Administration's efforts "to ascertain forfeitable assets."[47] The trial court instructed the jury that it could return a guilty verdict if it found Griffin had "participated in *either one* of the two objects of the conspiracy."[48] On appeal, the Court affirmed the convictions, holding that the Due Process Clause does not require a general guilty verdict on a multiple-object conspiracy to be set aside when the evidence is insufficient to support a conviction on one of the conspiracy's objects.[49]

Noting that *Griffin* clarified that *Stromberg* only applied when one of the theories of guilt which could have been relied on by the jury was unconstitutional or illegal, the Kansas Supreme Court held that "if there is sufficient evidence to convict [Grissom] of either premeditated or felony murder, the general verdict should be upheld."[50] In returning to the centuries-old common law rule set forth in detail in *Griffin*, the Kansas Supreme Court cited liberally from *Griffin*, which set forth the rationale surrounding the long-standing rule in alternative means cases when one of the means is merely unsupported by the evidence:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.[51]

However, the Kansas Supreme Court's re-adoption of the common law

46. *Id.* at 47.
47. *Id.*
48. *Id.*
49. *Id.* at 49–51, 60.
50. State v. Grissom, 840 P.2d 1142, 1171 (Kan. 1992).
51. *Id.* (quoting *Griffin*, 502 U.S. at 59).

alternative means rationale would be short-lived.[52]

C. Abandoning the Common Law for Washington's Alternative Means Rule

In *State v. Timley*, the Kansas Supreme Court broke away from the centuries-old common law rule it embraced just three years earlier in *Grissom*.[53] This time the court did so without the confusion caused by *Stromberg*. The only authority cited for this major sea-change in Kansas law was a Washington case finding a distinction between alternative means and "multiple acts" jury instructions.[54] The issue in *Timley*, as eventually framed by the court, was whether there was sufficient evidence to support a jury's guilty verdict for rape under both of the state's theories: rape accomplished by force, and rape accomplished by fear.[55] After determining there was sufficient evidence under either theory, the *Timley* court ruled that, if two alternative means of committing a crime find their way into the jury instructions, then there must be sufficient evidence to support both means—in other words, super sufficiency.[56]

Timley notably failed to directly confront and overrule *Grissom*'s tacit rejection of the so-called super sufficiency requirement. Indeed, *Timley* scarcely elucidated any rationale for its ruling,[57] setting up two opposing rules of law in Kansas, each potentially controlling. *Grissom*'s rule,

52. State v. Timley, 875 P.2d 242, 246 (Kan. 1994). The court abandoned the common law alternative means rationale, ruling that there must be sufficient evidence to support each alternative means of committing a crime when two alternative means are contained in the jury instructions. *Id*. Unfortunately, the clearest statement of this rule, and the only statement that directly conflicts with *Grissom*, only appears in the syllabus of the case. *Id*. at syl. ¶ 1.

53. *Id.* at 246.

54. *Id.* (citing State v. Kitchen, 756 P.2d 105, 109 (Wash. 1988)).

55. *Timley*, 875 P.2d at 246.

56. *Id.* Again, it should be noted here that, more recently in *State v. Brooks*, the Kansas Court of Appeals held that "'force or fear' is a single, unified means of committing rape," calling *Timley*'s conclusion otherwise "unstudied dicta." State v. Brooks, 265 P.3d 1175, 1184 (Kan. Ct. App. 2011), *rev. granted* No. 102,452 (Kan. June 13, 2012). In *Wright v. State*, a case that is the prisoner-in-custody review from the defendant in *State v. Wright*, a different panel of the Kansas Court of Appeals reached the same conclusion as *Brooks*. State v. Wright, 224 P.3d 1159 (Kan. 2010); Wright v. State, 294 P.3d 1201, 1209–10 (Kan. Ct. App. 2013) (using the definition of "alternative means" as set forth in *State v. Brown*, 284 P.3d 977, 983 (Kan. 2012)). In other words, the very factual circumstance that ushered in super sufficiency in Kansas is no longer governed by the rule, assuming the court of appeals has applied *Brown*'s definition of alternative means correctly.

57. *Timley*, 875 P.2d. at 245–46. *See also* State v. Shaw, 281 P.3d 576, 586 (Kan. Ct. App. 2012) (Malone, J., concurring) ("*Timley* actually contains very little analysis of the alternative means issue. In fact, the opinion only refers to the issue in order to explain the difference between an alternative means case and a multiple acts case.").

generally speaking, works to affirm guilty verdicts when the evidence supports one statutory means of guilt, but not another.[58] *Timley*'s super sufficiency rule, found in the syllabus but not the text of the opinion, requires sufficient evidence supporting each and every means.[59] While most Kansas courts followed *Timley*,[60] all of the cases following *Timley*'s analytical pattern had super sufficiency of the evidence, save one, *State v. Crane*, which is plausible to read as ultimately holding that none of the means of kidnapping were sufficiently proven.[61] When super sufficiency exists, the distinction between the *Grissom*/*Griffin* rule and the *Timley* rule is irrelevant to the outcome, and the court is not pressed to pick between the two rules, or expound upon or distinguish one or both rules. In the era of *Grissom*'s and *Timley*'s coexistence, three cases in the Kansas Court of Appeals in which there was not super sufficiency highlight the different approaches that were possible while applying the court's contradictory

58. State v. Grissom, 840 P.2d 1142, 1171 (Kan. 1992). However, the court did state that "if the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration. The refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction." *Id.* (quoting Griffin v. United States, 502 U.S. 46, 60 (1991)).

59. *Timley*, 875 P.2d at syl. ¶ 1. "[A]lthough the text of the *Timley* opinion did not say so explicitly, the language and logic of the opinion and the court syllabus set up a condition for application of the alternative means rule to future cases: To avoid reversal, the evidence of each means had to be sufficient to support the conviction." Beier, *supra* note 9, at 283 (quoting *Timley*, 875 P.2d at 246).

60. *See, e.g.*, State v. Morton, 86 P.3d 535, 539–40 (Kan. 2004)*;* State v. Hoge, 80 P.3d 52, 62 (Kan. 2003); State v. Beach, 67 P.3d 121, 135 (Kan. 2003); State v. Davis, 998 P.2d 1127, 1139–40 (Kan. 2000); State v. Carr, 963 P.2d 421, 429–30 (Kan. 1998)*;* State v. Kelly, 942 P.2d 579, 583 (Kan. 1997); State v. Crane, 918 P.2d 1256, 1271 (Kan. 1996); State v. Alford, 896 P.2d 1059, 1068 (Kan. 1995).

61. 918 P.2d 1256, 1271–74. (Kan. 1996). In *Crane*, the defendant's contention was that "there was insufficient evidence to support the charge of kidnapping to facilitate the commission of crime under 21-3420(b)." *Id.* at 1271. The state had also alleged kidnapping with the intent "to inflict bodily injury or to terrorize the victim" under subsection (c) of K.S.A. 21-3420. *Id.* It is clear the court found there was insufficient evidence to support kidnapping under subsection (b). *Id.* at 1271–73. What is curious is that the court simply reversed the kidnapping conviction and did not state whether or not retrial was appropriate with regard to subsection (c). *Id.* at 1274. The author of the *Wright* opinion, Justice Carol Beier, addressed the alternative means retrial issue in a law review article as follows: "In a *Timley* alternative means case, any reversal would be grounded on a failure of proof, a violation of the super-sufficiency condition. Thus retrial on that theory could not be permitted. It, like retrial on any theory held unsupported by sufficient evidence on appeal, would result in double jeopardy. The defendant can only be retried on the theory for which evidence was sufficient the first time, without the pollution of evidence or argument supporting the alternative theory."

Beier, *supra* note 9, at 294 (citations omitted). Perhaps the fact that the court did not take up the issue of retrial under subsection (c) at all, combined with its statement that the "evidence which might support the kidnapping conviction is very thin," means the court regarded both means of proving kidnapping insufficiently proved. *Crane*, 918 P.2d at 1273. Or perhaps this is just an anomaly.

precedents.[62]

D. The Era of Grissom*'s and* Timley*'s Contradictory Precedents in the Kansas Court of Appeals*

In *State v. Ice*, the Kansas Court of Appeals applied the *Grissom*/*Griffin* rule in overturning the defendant's conviction because the court "[had] no idea whether the jury found Ice guilty of rape due to force and fear being used, or due to a lack of capacity of the victim to consent, or a combination of the two."[63] The court distinguished *Griffin*, pointing out that *Griffin* involved a situation in which there was strong evidence of one theory and no evidence on another.[64] In that context, the court noted, the presumption that jurors will not "behave capriciously" is a reasonable one.[65] In the case of *Ice*, however, much testimony and prosecutorial effort were invested in the "no capacity theory," for which there was insufficient evidence.[66] The court ultimately overturned the conviction because "there [was] no real possibility that the verdict here was based only on the force and fear theory."[67]

On the one hand, one could argue *Ice*'s holding is squarely contemplated by the holding of *Griffin*. The common law presumption that the jury convicted on the good theory could reasonably be contradicted by the record in *Ice*—and there is a scant portion in the *Griffin* opinion which seems to make provision for this circumstance.[68] However, another portion of *Griffin* more forcefully rejects this approach as one setting up two categories of failure: "*sufficiently* insufficient," and "*insufficiently* insufficient," rewarding the "greater failure of proof."[69]

In simpler terms, *Ice* did not follow the common law rule as set forth in *Griffin*. But why? Two reasons: compelling facts for the defendant, and application of a Kansas statute. *Ice*'s chosen language that "there [was] no real possibility that the verdict here was based only on the force or fear

62. State v. Ice, 997 P.2d 737 (Kan. Ct. App. 2000); State v. Money, No. 83,209, 2000 Kan. App. Unpub. LEXIS 457 (Kan. Ct. App. Nov. 3, 2000); State v. Johnson, 11 P.3d 67 (Kan. Ct. App. 2000).

63. *Ice*, 997 P.2d at 741.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* Griffin v. United States, 502 U.S. 46, 49–50 (1991) (noting that the presumption will stand "in the absence of anything in the record to show the contrary" (quoting Claassen v. United States, 142 U.S. 140, 146 (1891))).

69. *Id.* at 58. *See also* State v. Jones, 29 P.3d 351, 370–71 (Haw. 2001) (describing *Ice*'s holding as adopting a rule that was rejected by *Griffin*'s application of the common law rule).

theory"[70] indicates the court was applying K.S.A. 22-3414(3)[71] because there was no objection to the instruction.[72] In other words, the *Ice* court applied a statute that has long been held to apply to the circumstance of clearly erroneous unchallenged instructions.

In the other two alternative means cases in 2000 without super sufficiency, the Kansas Court of Appeals paid lip service to the *Grissom*/*Griffin* rule but used it to justify application of a harmless error analysis.[73] In *State v. Johnson* and *State v. Money*, the court cited approvingly the *Grissom*/*Griffin* rule, except that the courts substituted harmless error rationale for the *Grissom*/*Griffin* regime,[74] which starts from the presumption the jury convicted the defendant on the sufficient theory—a presumption which favors the state and requires evidence in the record indicating the jury did not convict based on the sufficient theory.[75] These cases were as much a foreshadowing of the Kansas Supreme Court's holding in *State v. Dixon* as they were cases choosing to follow *Grissom*'s common law presumptions over *Timley*.[76]

70. *Ice*, 997 P.2d at 741.

71. KAN. STAT. ANN. § 22-3414(3) (2012) ("No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or failure to give an instruction is clearly erroneous.").

72. *See* State v. Cook, 191 P.3d 294, 303 (Kan. 2008) (stating that under the clearly erroneous standard, before an appellate court can overturn a conviction it must be firmly convinced that "a real possibility exists that the jury would have rendered a different verdict if the instruction error had not occurred").

73. *See* State v. Money, No. 83,209, 2000 Kan. App. Unpub. LEXIS 457 (Kan. Ct. App. Nov. 3, 2000); State v. Johnson, 11 P.3d 67 (Kan. Ct. App. 2000).

74. *Money*, No. 83,209, 2000 Kan. App. Unpub. LEXIS 457, at *7–8; *Johnson*, 11 P.3d at 69–70.

75. *See* Griffin v. United States, 502 U.S. 46, 49–50 (1991) (noting that the presumption the jury convicted on the theory supported by the evidence will stand "in the absence of anything in the record to show the contrary" (quoting *Claassen v. United States*, 142 U.S. 140, 146 (1891))).

76. These cases chose to apply harmless error analysis which is not in *Grissom*/*Griffin*'s DNA. Neither *Griffin* nor *Grissom* applied harmless error analysis—their rule eschews the application of harmless error analysis. Basically, the cases harvested *Grissom/Griffin*'s rationale at the heart of the common law presumption: applying harmless error analysis as opposed to following *Timley*'s strict super sufficiency rule, which would automatically overturn the conviction.

E. The Clash of Concepts Reaches the Kansas Supreme Court: Timley*'s Super Sufficiency Rule v. Harmless Error Statutes*

1. *Dixon*'s Shift to the Harmless Error Analysis

In *State* v. *Dixon*,[77] the *Grissom* rule emerged again at the Kansas Supreme Court for a cameo of sorts. In essence, the court in *Dixon* co-opted the presumption at the heart of the old common law—that jurors are well equipped to analyze the evidence when they have been left the option of relying upon a factually inadequate theory.[78] *Dixon* did not stand for the proposition that the law return to a pure version of the centuries-old rule, but rather adopted the proposition that harmless error could be applied when the jury instructions contained insufficiently proved means.[79] The *Dixon* court ultimately found that, because there was strong evidence supporting at least one theory of the burglaries and no evidence of the unsupported theory, the verdict would stand, classifying the error in instruction as harmless.[80] *Dixon*, in essence, analyzed the facts for super sufficiency, and, after determining there was not super sufficiency, applied the harmless error analysis.[81] Of course, the trend of citing *Timley*'s rule when there was super sufficiency continued after *Dixon*.[82]

Dixon, *Johnson*, and *Money* applied the harmless error rule because federal and state harmless error review had been the standard in American jurisprudence since the early 1900s. It was a reaction to the then "widespread and deep conviction over the general course of appellate review in American criminal causes."[83] Prior to harmless error reform, courts of review were said to "tower above the trials of criminal cases as impregnable citadels of technicality."[84] With the threat of reversal so great, the criminal

77. 112 P.3d 883 (Kan. 2005).

78. *Id.* at 912–13.

79. *Id.*

80. *Id.* at 913.

81. *Id. See also* State v. Shaw, 281 P.3d 576, 586 (Kan. Ct. App. 2012) (Malone, J., concurring) ("*Timley* stated the rule of law to determine whether an alternative means error has been committed, but the opinion never stated that the error could not be harmless. The [Kansas] Supreme Court later explained in *Dixon* that an alternative means error can be harmless.").

82. *See, e.g.*, State v. Stevens, 172 P.3d 570, 578–81 (Kan. 2007), *abrogated by* State v. Ahrens, 290 P.3d 629 (Kan. 2012) (citing State v. Timley, 875 P.2d 242, 246 (1994)) (ruling that sufficient evidence existed to support both means of committing the single crime of operating or attempting to operate a vehicle while under the influence of alcohol).

83. Kotteakos v. United States, 328 U.S. 750, 759 (1946).

84. *Id.* at 759 (quoting Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)).

trial "became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained."[85] As the United States Supreme Court in *Kotteakos* explained, the object of developing the doctrine of harmless error was to "substitute judgment for automatic application of rules . . . to preserve review as a check . . . [on] essential unfairness in trials . . . without giving men fairly convicted the multiplicity of loopholes" to escape conviction.[86]

2. *Cook*'s Application of the Clear Error Statute for Un-objected to Instructions

The trend of applying harmless error analysis when super sufficiency was not present was tweaked in *State v. Cook*, when the Kansas Supreme Court applied K.S.A. 22-3414(3) to the district court's unchallenged instruction, which included a factually unsupported theory of guilt.[87] By applying this statute, the *Cook* court took a similar analytical tact as the Kansas Court of Appeals in *Ice*. In relevant part, K.S.A. 22-3414(3) states:

> No party may assign as error the giving . . . [of] an instruction . . . unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction . . . is clearly erroneous.[88]

In *Cook*, an occupant of a residence invited the defendant inside.[89] The defendant felt one of the other occupants owed him money, so the defendant proceeded directly to the other occupant's bedroom door and knocked.[90] The other occupant told the defendant to leave, ultimately emerging from the bedroom while yelling for the defendant to leave the house.[91] The defendant shot and killed the victim.[92]

The trial court's instruction for aggravated burglary included the

85. *Id.* at 759. *See also* Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 422 (1980) (noting that attorneys, knowing that any error, no matter how inconsequential, would result in a new trial "placed error in the record as a hedge against losing the verdict").

86. *Kotteakos*, 328 U.S. at 760.

87. 191 P.3d 294, 301, 303 (Kan. 2008).

88. KAN. STAT. ANN. § 22-3414(3) (2012).

89. 191 P.3d at 299.

90. *Id.* at 298–99.

91. *Id.* at 299.

92. *Id.*

elements: "1. That the defendant knowingly *entered into or remained in* a home; 2. That the defendant did so without authority."[93] The *Cook* court held that "entering into" without authority, and "remaining within" without authority constituted alternative means of committing aggravated burglary.[94]

The court in *Cook* noted that there was no evidence supporting the "entering into without authority" theory, and the record indicated the State "relied exclusively on the 'remained in' means," as the "prosecutor's arguments to the jury clearly established that the State's theory was that Cook's presence in the [victim's] residence became unauthorized when the victim told him to go away."[95] There being no objection to the instruction from the defendant, the court applied the clearly erroneous standard for instructional errors per K.S.A. 22-3414(3).[96] Under that standard, before an appellate court can overturn a conviction, it "must be firmly convinced that there was a real possibility that the jury would have rendered a different verdict" if the instructional error had not occurred.[97] After a review of the record, the court found that had "entering into" been excluded from the instructions, as should have happened, the verdict would have been the same, so there was no clear error.[98]

While the *Cook* court cited *Dixon*, it chose not to apply the harmless error statute, citing K.S.A. 22-3414(3).[99] Instead, *Cook* seemed to comply with the canon of statutory construction that statutes which relate "to a specific thing, take precedence over general statutes."[100] In other words, K.S.A. 22-3414(3), at least as construed by Kansas courts, was the more specific statute to address a situation involving an unchallenged jury instruction than the more general harmless error statute.[101]

93. *Id.* at 303.

94. *Id.* (citing State v. Smith, 142 P.3d 739, 746 (Kan. Ct. App. 2006)).

95. *Id.* at 303.

96. *Id.* at 301.

97. *Id.*

98. *Id.* at 303.

99. *Id.* at 301.

100. Chelsea Plaza Homes, Inc. v. Moore, 601 P.2d 1100, 1102 (Kan. 1979) (holding that when "there is a conflict between a statute dealing generally with a subject, and another dealing specifically with a certain phase of it, the specific legislation controls"). *See also* State v. Turner, 272 P.3d 19, 22 (Kan. 2012) (citing State v. Chavez, 254 P.3d 539, 542 (Kan. 2011)) ("When statutes overlap and produce inconsistent results, we may turn to the canon of construction providing that a specific statute controls over a more general statute.").

101. *See* State v. Williams, 286 P.3d 195, 200–02 (Kan. 2012) (acknowledging that there is no textual support for equating "clearly erroneous" with "clearly prejudicial," but refusing to alter the judicially created additions to the statute because the statute has been construed that way for decades).

F. The Smorgasbord Of Contradictory Precedents Available in 2008: A Summary

After *Cook*, a buffet of precedent lay before appellate courts wrestling with alternative means instruction errors. *Cook*'s application of K.S.A. 22-3414(3) was only available for cases when a defendant did not object to the faulty instruction. There was the *Grissom*/*Griffin* rule which worked to affirm convictions where any means was supported by the evidence. There was *Timley*'s rule requiring super sufficiency. Finally, there was *Dixon*'s rule, which applied harmless error analysis if super sufficiency was lacking.

1. The United States Supreme Court Holds Harmless Error Analysis Can Be Applied to All Alternative Means Error

In 2008 in *Hedgpeth v. Pulido*,[102] the United States Supreme Court revisited its holdings in *Stromberg* and *Yates* and held that alternative means error, even when a jury is given the option of convicting on a legally flawed or unconstitutional theory, can be analyzed for harmlessness. In distinguishing *Stromberg* and *Yates*, the *Hedgpeth* Court noted that both of these cases were decided before it had concluded in *Chapman v. California*[103] that constitutional errors can be harmless.[104]

The Court then cited a series of cases where the Court had previously found instructional error to be subject to harmless-error review.[105] The Court pointed out that it had, years earlier, emphasized that "while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule."[106] The exception, called "structural error," would occur if the instructional error categorically vitiated all of the jury's findings, as would happen if the Court failed to give a reasonable doubt instruction in a criminal case.[107] Ultimately, the *Hedgpeth* Court held that "[a]n instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of

102. 555 U.S. 57 (2008).

103. 386 U.S. 18 (1967).

104. *Hedgpeth*, 555 U.S. at 60.

105. *Id.* at 60–61 (citing Neder v. United States, 527 U.S. 1 (1999) (omission of an element of an offense); California v. Roy, 519 U.S. 2 (1996) (per curiam) (erroneous aider and abettor instruction); Pope v. Illinois, 481 U.S. 497 (1987) (misstatement of an element of an offense); Rose v. Clark, 478 U.S. 570 (1986) (erroneous burden-shifting as to an element of an offense).

106. *Hedgpeth*, 555 U.S. at 61 (quoting *Rose*, 478 U.S. at 578).

107. *See* Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993).

an element of the offense when only one theory is submitted."[108]

The Court went further, calling the distinction between "alternative-theory" errors and those instructional errors omitting or misstating an entire element "patently illogical."[109] The Court found that such a distinction results in alternative theory instruction errors being treated as more harmful than when an entire element is omitted from the instructions.[110] The Kansas Supreme Court makes this distinction, holding in *Wright* that alternative means errors cannot be subject to harmless error analysis,[111] while holding in *State v. Reyna* that harmless error analysis will be applied when the instructions fail to inform the jury of the element's existence.[112]

III. THE ADVENT OF *STATE V. WRIGHT*

Two years after *Hedgpeth*, the Kansas Supreme Court in *State v. Wright* once again found itself choosing from a buffet of contradictory precedents in an alternative means case.

In *Wright*, the defendant was in the business of providing massages out of her home.[113] The victim went to the defendant's house for a massage, got out of her clothes, and covered herself with a beach towel.[114] The massage began, and eventually the victim fell asleep.[115] The victim awoke only to find the defendant's fingers moving in and out of her vagina.[116] The victim was startled at first, then became scared.[117] The victim wanted to get up and hit the defendant, but was too afraid.[118] The victim became tense, and the defendant quit.[119] The defendant asserted that she only accidentally penetrated the victim's vagina with her fingers while performing the massage.[120]

The trial court instructed the jury on two means of committing rape: 1)

108. *Hedgpeth*, 555 U.S. at 61.
109. *Id.*
110. *Id.*
111. State v. Wright, 224 P.3d 1159, 1166–67 (Kan. 2010).
112. 234 P.3d 761, 771–73 (Kan. 2010) These two holdings could just as easily be held up to show how patently illogical it is to allow appellate court fact finding to replace jury fact finding in cases where elements are wholly omitted from the instructions.
113. 224 P.3d at 1160.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 1161.

under circumstances when she was overcome by force or fear; or 2) under circumstances when she was unconscious or physically powerless.[121] The defendant effectively conceded there was enough evidence to support the conviction under the "unconscious" theory, but contended that the State's proof of rape by force or fear was insufficient.[122] The defendant's contention was that initial penetration and fear must occur simultaneously to satisfy the "by force or fear" means.[123] According to the defendant's contentions, since one of the instructed upon means was not proved, *State v. Timley*'s super sufficiency rule required a reversal of her conviction.[124] The State's position was that *Dixon*'s application of the harmless error rule should apply if the court determined the "force or fear" theory was not sufficiently proved.[125]

Ultimately, the *Wright* court disagreed with the defendant's contention that fear and initial penetration must be simultaneous, stating "it is enough that the penetration and fear were eventually contemporaneous."[126] In short, the court held the defendant's convictions were affirmed because there was sufficient evidence supporting both means. In what must have seemed like a hollow victory for the defendant in *Wright*, the court considered its contradictory precedents and clarified that *Timley*'s rule requiring super sufficiency was the law of Kansas, disapproving *Dixon*'s application of harmless error analysis.[127]

A. Attempts to Justify Timley

1. The Roadblocks

Wright articulated a justification for the *Timley* rule that did not appear in *Timley* itself. However, before exploring *Wright*'s chosen justification, it is instructive to understand what viable options were really out there to justify *Timley*'s rule. If you understand where *Wright* could not feasibly go to justify *Timley*, you might better understand why *Wright* went where it did. Some legal avenues one might at first consider in justifying *Timley* had effectively been shut down.

121. *Id.* at 1163.
122. *Id.* at 1164.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1167.
127. *Id.*

For instance, *Griffin* held that the U.S. Constitution's Fifth Amendment Due Process Clause did not, and never has, required super sufficiency of the evidence.[128] *Griffin* eliminated an obvious avenue for those inclined to believe fundamental due process required super sufficiency of the evidence in alternative means cases.[129] The United States Supreme Court always has the final say on the U.S. Constitution, but we are in a federal system; the states can follow their own paths to a substantial degree. So, what keeps the Kansas Supreme Court from saying the Kansas constitution requires super-sufficiency consistent with *Timley*'s rule?

While the Kansas Supreme Court has "the right to interpret [the] Kansas constitution in a manner different than the United States Constitution has been construed," it has "not traditionally done so."[130] Generally, the Kansas Supreme Court has only interpreted provisions of the Kansas constitution differently than similar provisions of the U.S. Constitution when the United States Supreme Court had receded from a protected position.[131] The U.S. Constitution's Due Process Clause has never been interpreted to require super sufficiency in verdicts as a hedge against the possibility of conviction based on a factually inadequate theory.[132]

Furthermore, because, in the criminal law context, there is no Kansas State constitutional counterpart to the U.S. Constitution's Fifth Amendment Due Process Clause,[133] any finding that the Kansas constitution's due process protections are more expansive than the U.S. Constitution's due process protections would necessarily involve comparing an imagined due process clause to an enumerated Due Process Clause in existence.[134]

Another problem one would encounter in justifying *Timley*'s evolution is Kansas's historical reliance on the common law in construing the Kansas constitution. The common law reliance would presumably lead the Kansas

128. 502 U.S. 46, 48–60 (1991).

129. *Id.*

130. State v. Crow, 974 P.2d 100, 107 (Kan. 1999) (citing Murphy v. Nelson, 921 P.2d 1225 (Kan. 1996)); State v. Schultz, 850 P.2d 818 (Kan. 1993) *overruled on other grounds by* State v. Laturner, 218 P.3d 23 (Kan. 2009).

131. *See* State v. Lawson, 297 P.3d 1164, 1170 (Kan. 2013) ("In other words, having followed the United States Supreme Court into the clearing, [in *State v. McDaniel*, 612 P.2d 1231 (Kan. 1980)] the Kansas Supreme Court refused to follow the higher Court's dive back into the forest.").

132. *See Griffin*, 502 U.S. at 49–52, 60.

133. Section 10 of the Kansas Constitution lists a mixture of clauses concerning due process from both the Fifth and Sixth Amendments of the U.S. Constitution, but does not specifically contain a due process clause per se. KAN. CONST. § 10.

134. The language, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law" from the U.S. Constitution's Fifth Amendment, does not appear in the Kansas Constitution. U.S. CONST. amend. V; KAN. CONST.

Supreme Court to the same conclusion reached by the United States Supreme Court in *Griffin*: that due process does not require super sufficiency because the historical practice in England well before the Declaration of Independence never required it.[135] Consider the following passage regarding section 10 of the Kansas bill of rights from *State v. Criqui*:

> It is elementary that the Constitution is to be interpreted in the light of the common law.
>
> It is also a very reasonable rule that a state Constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the Constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for its definitions we are to draw from that great fountain, and that in judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes.
>
> Section 10 of the Bill of Rights is virtually a transcript from authenticated English guaranties of personal liberty and security, and cannot be understood without understanding the common law.[136]

A similar statement has been made of the federal Due Process Clause: "[i]t is precisely the historical practices that *define* what is 'due.'"[137]

Finally, justifying *Timley* is problematic because the Kansas Supreme Court "has consistently held that Section 5 [of the Kansas constitution's bill of rights] preserves the jury trial right as it historically existed at common law when [the] state's constitution came into existence."[138] When interpreting the Kansas constitution, Kansas courts have traditionally employed a fixed-meaning canon, described by the United States Supreme Court as requiring that "[w]ords must be read with the gloss of the experience of those who framed them . . . ."[139] So, where did the court in *Wright* turn in articulating a justification for *Timley*'s unexplained

135. *Griffin*, 502 U.S. at 49–52.

136. 185 P. 1063, 1065 (Kan. 1919) (citations omitted).

137. Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., concurring).

138. Miller v. Johnson, 289 P.3d 1098, 1108 (Kan. 2012) (citing State *ex rel.* Curtis, Co. v. City of Topeka, 12 P. 310, 316 (Kan. 1886)).

139. United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting), *overruled by* Chimel v. California, 395 U.S. 752 (1969).

abandonment of the *Grissom* precedent?

2. The Verdict Procedure Statute

The *Wright* court held the requirement of super sufficiency in alternative means cases represented the "only choice to ensure a criminal defendant's *statutory entitlement* to jury unanimity."[140] Because, at common law, there was no entitlement to super sufficiency, "ensur[ing] a criminal defendant's statutory entitlement to jury unanimity" must mean that the common law in alternative means cases was modified by a statute which requires super sufficiency.[141] The statute the *Wright* court was referring to is K.S.A. 22-3421,[142] which states:

> The verdict shall be written, signed by the presiding juror and read by the clerk to the jury, and the inquiry made whether it is the jury's verdict. If *any* juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. If the verdict is defective in form only, it may be corrected by the court, with the assent of the jury, before it is discharged.[143]

Typically, statutes in Kansas have not been interpreted as changing the common law unless explicitly provided.[144] The assertion that the change must be explicit seems too strong, given the language of K.S.A. 77-109—the common law adopting statute.

Nevertheless, the alteration of the prior law ought to be clear.[145] K.S.A.

140. State v. Wright, 224 P.3d 1159, 1167 (Kan. 2010) (emphasis added).

141. *Id.*

142. *Id.* at 1164.

143. KAN. STAT. ANN. § 22-3421 (2012) (emphasis added).

144. *See* Am. Gen. Fin. Servs., Inc. v. Carter, 184 P.3d 273, 277 (Kan. Ct. App. 2008) (citing *In re* Estate of Mettee, 694 P.2d 1325, 1328 (Kan. Ct. App. 1985), *aff'd*, 702 P.2d 1381 (Kan. 1985); *In re* Estate of Roloff, 143 P.3d 406, 410 (Kan. Ct. App. 2006)) ("[W]hen the legislature has intended to abolish a common-law rule, it has done so in an explicit manner. In the absence of such an expression of legislative intent, the common law remains part of our law.").

145. *See* KAN. STAT. ANN. § 77-109 (2012) ("The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012) ("It has often been said that statutes in derogation of the common law are to be strictly construed. That is a relic of the courts' historical hostility to the emergence of statutory law. The better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity. There is no more reason to reject a fair reading that changes the common law than there is to

22-3421 incorporates within its text an additional common law rule that existed in harmony with the common law right to juror unanimity in verdicts and the centuries-old common law rule followed in *Grissom*.[146] K.S.A. 22-3421 codifies "the common-law rule that a verdict is of no force or validity until it is affirmed by the jury in open court."[147] Unanimity is required regardless of whether or not the trial court follows the verdict procedures set forth in K.S.A. 22-3421, and it does not necessarily follow that failing to follow K.S.A. 22-3421 results in a failure of the verdict for lack of unanimity.[148]

The use of the word "any" in K.S.A. 22-3421 is a clear signal from the Kansas legislature that unanimity in Kansas criminal verdicts is still required. Those in favor of a return to the *Grissom* precedent, however, might fairly argue that there are no textual clues to indicate that the legislature meant unanimity to mean anything other than it meant at common law.

Those in favor of a return to the *Grissom* precedent would argue that the use of the word "any" in K.S.A. 22-3421 cannot be fairly read to tote with it a sea change in the law requiring super sufficiency in verdicts. The Kansas Supreme Court recently echoed this staple of statutory construction by saying that "[a]n appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there."[149] Having plunked *Timley*'s super sufficiency rule atop this wobbly perch, where would the court turn in an attempt to stabilize its

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reject a fair reading that repeals a prior statute . . . . For both, the alteration of prior law must be clear—but it need not be express, nor should its clear implication be distorted." (citations omitted)). Clearly *Timley*, on its face, modifies the common law rule through judicial decision, albeit without overruling *Grissom*, but the issue here is the verdict procedure statute's role in justifying *Timley*'s departure from the centuries-old common law rule followed in *Grissom*.

146. § 22-3421.

147. State v. Johnson, 198 P.3d 769, 781 (Kan. Ct. App. 2008) (citing Rigg v. Bias, 24 P. 56 (Kan. 1890); Young v. Seymour, 4 Neb. 86 (1875)).

148. *See* State v. Cheffen, 303 P.3d 1261, 1267 (Kan. 2013) (holding that "a party wishing to challenge the trial court's compliance with the procedures set out in K.S.A. 22-3421 for inquiring about a jury's verdict [must] have raised that issue first with the district court either in the form of a contemporaneous objection or posttrial [sic] motion"); State v. Womelsdorf, 274 P.3d 662, 674 (Kan. Ct. App. 2012) ("Under the facts of this case, any error by the district court in not following the procedure set forth in K.S.A. 22-3420(3) was harmless."); State v. Dunlap, 266 P.3d 1242, 1250 (Kan. Ct. App. 2011) (holding that the issue of the district court's failure to comply with the verdict procedure statute is waived if the defendant declines the district court's offer to poll the jury).

149. State v. Hopkins, 285 P.3d 1021, 1023 (Kan. 2012) (quoting Zimmerman v. Bd. of Wabaunsee Cnty. Comm'rs, 218 P.3d 400, 403 (Kan. 2009)). *See also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. [The judge] must not read in by way of creation.").

holding that the verdict procedure statute required super sufficiency?

3. The Due Process Justification Emerges in a Supporting Role

Wright further holds that applying harmless error to sufficiency of the evidence errors would violate the "most basic guarantee of due process in criminal cases."[150] *Wright* reached this conclusion by re-categorizing instances when one of the means upon which an instruction was given was not supported by the evidence; this was now a sufficiency of the evidence issue as opposed to an instructional error.[151] The court in *Wright* evokes due process in overturning *Dixon*'s application of harmless error in alternative means cases, but cites no particular federal or state constitutional provision in doing so.[152] Perhaps the court means to imply the verdict procedure statute also contains within its spirit a due process clause to go with its super sufficiency requirement. However this turn of phrase is meant to be taken, it is clear the Kansas Supreme Court's concern with alternative means cases does not begin and end with the requirement for unanimity in verdicts.

a. Non-unanimous Verdicts and Alternate Means

If the Kansas legislature made a clear break from the common law, repealed the criminal verdict procedure statute, and passed a statute requiring the agreement of only ten out of twelve jurors for a criminal verdict in Kansas, what would become of the super sufficiency rule in Kansas?[153] The super sufficiency rule might be in jeopardy because the *Wright* court uses the criminal procedure statute as an integral part of its justification for choosing the *Timley* rule over the *Grissom/Griffin* rule.[154] But the theoretical threat that a jury, by a verdict of ten out of twelve, might convict a defendant of a crime via a means not supported by the evidence

150. State v. Wright, 224 P.3d 1159, 1166 (Kan. 2010) (quoting Beier, *supra* note 9, at 299).

151. *Id.* at 1163–67.

152. *Id.* at 1166–67.

153. *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (holding that state statute allowing non-unanimous state verdicts in criminal cases does not violate Sixth Amendment, and both ten-to-one and eleven-to-one votes are permissible); Johnson v. Louisiana, 406 U.S. 356, 362–63 (1972) (holding that state statute allowing non-unanimous state verdict does not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution, and a nine-to-three vote is permissible).

154. The court in *Wright* does not distinguish between the holdings of *Dixon* and *Grissom*, portraying *Dixon* as representative of the rule of law in conflict with *Timley*'s rule of law. As indicated above, *Wright* does not explicitly overrule *Grissom* as pointed out by Justice Moritz's concurring opinion in *State v. Brown*. 284 P.3d 977, 1002 (Kan. 2012) (Moritz, J., concurring).

remains just the same as when unanimity is required. The point is that, at its core, the problem *Wright* wants to solve is more a due process issue than a juror unanimity issue because the issue persists unaltered, even if unanimity were not required by our law. But remember, as a primary justification for the super sufficiency rule, due process is problematic. Relegating the due process justification to a supporting role tends to obscure the fatal flaws associated with utilizing due process as the primary justification for the super sufficiency rule.

4. The "Guilt v. Innocence" Justification

Wright's broadest justification for choosing the super sufficiency rule, sans harmless error analysis, is a generalized appeal to justice itself. The *Wright* court asserts that its rule guarantees unanimity in verdicts "at the level of factual generality that matters most of all: guilt v. innocence."[155] What the court means by this turn of phrase may be crucial to appellate counsel. If the court means guilt v. innocence in fact, then the rule is meant to hold a special utility in separating actual guilty people from actual innocent people. If the court means guilt v. innocence in law, then the statement can be taken as a restatement of the due process justification—the defendant is presumed innocent until proven guilty legitimately by evidence sufficient to convict the defendant of each means submitted to the jury.

So, what level of factual generality matters most of all when determining if a particular defendant in an alternative means case is guilty or innocent? *Wright* answers that it is when all the alternative means of committing the crime that the jury was given the option to consider were proven by the state.[156]

B. Finding a Definition of Alternative Means

Wright did not provide a nuanced definition for alternative means crimes, and, by requiring super sufficiency in verdicts immune from harmless error analysis, the judiciary would soon be much in want of one. Defendants convicted of crimes have scoured the penal code, definitional sections, and the principles of criminal liability, scrutinizing each "comma" and every "or" in search of an instructed upon means that may have gone

155. *Wright*, 224 P.3d at 1167 (quoting Beier, *supra* note 9, at 299).

156. *See id.* ("There is no error under the *Timley* alternative means rule here, because the evidence of each means of committing rape—by force or fear or by unconsciousness—was sufficient to uphold a guilty verdict on the rape charge.").

unproved by the state. Rightfully so. "Or" is a conjunction used to indicate an alternative.[157] An attorney representing a criminal defendant on appeal would be remiss to not seize upon such a universal definition of this well-known conjunction in the English language, applying it on a client's behalf to the holding of *Wright*. When interpreting statutes, "ordinary words [are to be given] their ordinary meaning[s]."[158]

For a time, the Kansas Court of Appeals engaged in the enterprise of determining whether or not a case was an alternative means case without an enhanced definition from the Kansas Supreme Court. The original working definition of an "alternative means case" as recognized by the Kansas Supreme Court merely amounts to an acknowledgement that a "single offense may be committed in more than one way."[159] The court noted, though, that while this definition is "straightforward on its face[, it is] mind-bending in its application, [and] has led to confusion and disagreement among panels of the Court of Appeals."[160] The problem Kansas courts were encountering is that, in searching for the legislature's objectively manifested expression of distinction between statutory theories, some requiring super sufficiency and some not, the Kansas Court of Appeals encountered no statutory guideposts; the idea there existed two classes of elements was simply not covered by the legislature.[161]

As aptly put by an English jurist, "[e]ffect cannot be given to an unenacted intention. So, judges are not supposed to give effect to an intention which Parliament would have had if it had thought about it, which it did not."[162] Different panels of the Kansas Court of Appeals reached inconsistent outcomes on exactly the same issues,[163] not because of

157. THE AMERICAN HERITAGE DICTIONARY 873 (2d Coll. ed. 1982); BLACK'S LAW DICTIONARY 1205 (6th ed. 1990).

158. State v. Coman, 273 P.3d 701, 707 (Kan. 2012) (citing State v. Urban, 239 P.3d 837, 839 (Kan. 2010)).

159. State v. Timley, 875 P.2d 242, 246 (Kan. 1994).

160. State v. Brown, 284 P.3d 977, 987 (Kan. 2012) (citations omitted).

161. *See id.* at 991-92 (describing the process for determining legislative intent but making no mention of direct expression of legislative intent in statute).

162. Lord Millet, *Construing Statutes*, 20 STATUTE LAW REV. 107, 110 (1999).

163. *Compare* State v. Foster, 264 P.3d 116, 122–23 (Kan. Ct. App. 2011) (concluding use of terms "made," "altered," or "endorsed" in the forgery statute, K.S.A. 21-3710(a), did not create alternative means), *rev. granted in part*, No. 104,083 (Kan. Feb. 17, 2012), *with* State v. Owen, 251 P.3d 673, 2011 WL 2039738, at *4–5 (Kan. Ct. App. 2011) (unpublished table decision) (concluding those terms *did* create alternative means of committing forgery), *rev. granted*, No. 102,814 (Kan. Feb. 17, 2012). *Compare* State v. Perkins, 257 P.3d 1283, 1288–89 (Kan. Ct. App. 2011) (concluding driving while cancelled, suspended, or revoked are alternative ways of violating K.S.A. 8-262), *aff'd in part, rev'd in part*, 290 P.3d 636 (2012), *with* State v. Suter, 2011 WL 2039739, at *13 (Kan. Ct. App. 2011) (unpublished table decision) (concluding that there is only one means of

wrestling with an ambiguity, but because the courts were wrestling with policy-making choices about which elements require super sufficiency and which do not—a mind-bending endeavor for any court.[164] When the Kansas courts encounter mere ambiguities in statutes, courts sometimes resort to legislative history.[165] But it is hard to imagine any legislature creating a trail of legislative evidence of its intent to create two classes of elements within the Kansas penal code, those requiring super sufficiency and those which do not. Not surprisingly, none exists.

In *State v. Brown*, the Kansas Supreme Court constructed a definition of alternative means to help courts discern which elements require super sufficiency and which elements do not.[166] The court in *Brown* explained that "[i]dentifying an alternative means statute is more complicated than spotting the word 'or'" within a statutory provision.[167] The court stated:

> The listing of alternative distinct, material elements, when incorporated into an elements instruction, creates an alternative means issue demanding super-sufficiency of the evidence. But merely describing a material element or a factual circumstance that would prove the crime does not create alternative means, even if the description is included in a jury instruction.[168]

The court noted that the "legislature will signal its intent to state alternative means through structure, separating alternatives into distinct subsections of the same statute."[169] But there are no hard and fast rules:

> Regardless of such subsection design, however, a legislature may list additional alternatives or options within one alternative means of

violating K.S.A. 8-262), *aff'd in part, rev'd in part*, 290 P.3d 620 (Kan. 2012). *Compare* State v. Boyd, 268 P.3d 1210, 1215–16 (Kan. Ct. App. 2011) (aiding and abetting creates an alternative means) *with* State v. Snover, 287 P.3d 943, 947–48 (Kan. Ct. App. 2012) (aiding and abetting does not create alternative means). *See also* State v. Clary, 270 P.3d 1206, 1210 (Kan. Ct. App. 2012) (quoting KAN. STAT. ANN. § 21-3420(c) (repealed 2010)) (resulting in a two-to-one decision regarding whether K.S.A. 21-3420(c) created an alternative means of kidnapping through use of phrase "to inflict bodily injury or to terrorize the victim or another").

164. *See* PATRICK DEVLIN, THE JUDGE 15–16 (1979) ("Five judges are no more likely to agree than five philosophers upon the philosophy behind an Act of Parliament and five different judges are likely to have five different ideas about the right escape route from the prison of the text.").

165. State v. Trautloff, 217 P.3d 15, 18–19 (Kan. 2009) ("It is only if the statutory language or text is unclear or ambiguous that the court moves to the next analytical step . . . relying on legislative history to construe the statute to give effect to the legislature's intent.").

166. *Brown*, 284 P.3d at 991–92.

167. *Id.* at 988.

168. *Id.* (citing State v. Wright, 224 P.3d 1159, 1164 (Kan. 2010); State v. Peterson, 230 P.3d 588, 591 (Wash. 2010) (en banc)).

169. *Id.* at 990 (citing State v. Smith, 154 P.3d 873, 876–77 (Wash. 2007) (en banc)).

> committing the crime. But these options within an alternative do not constitute further alternative means themselves if they do not state additional and distinct ways of committing the crime, that is, if they do not require proof of at least one additional and distinct material element.[170]

The court used the phrase "options within a means" to describe such a scenario, and declared that a super sufficiency issue will not arise in such a circumstance.[171]

In other words, "or" connects "alternatives" and "options."[172] The outcome of an alternative means case in which the language after an "or" in a jury instruction was not proven by the state will depend upon the court's distinction between an alternative and a mere option within an alternative.

C. The Renewed Struggle of Applying the Alternative Means Definition

With a criminal code full of potential options or alternatives, the court has begun the post-*Brown* process of settling into a different level of generality in verdicts. The Kansas Supreme Court has proceeded on a statute by statute basis, using *Brown*'s definition as the tool of discernment between the two different classes of elements in Kansas. Remember, different means require super sufficiency while options within a means simply describe how that means could come about and do not require super sufficiency.

- Regarding aggravated battery, the court held that "great bodily harm to another person *or* disfigurement of another person" does not create an alternative means case, despite its pre-*Brown* holding to the contrary.[173] The court also held that "recklessly causing bodily harm to [another person]" (1) "with a deadly weapon, or" (2) "in any manner whereby great bodily harm, disfigurement, or death can be inflicted," were not

170. *Id.*

171. *Id.* at 990 (citing Schad v. Arizona, 501 U.S. 624, 636 n.6 (1991); McKoy v. North Carolina, 494 U.S. 433, 449 n.5 (1990) (Blackmun, J., concurring); *Peterson*, 230 P.3d at 590–92; Beier, *supra* note 9, at 290 n.84).

172. The Washington Supreme Court engages in a similar analysis, though it does not bother with using the synonym "options," calling scenarios when super sufficiency is not required a "means within a means." *Brown*, 284 P.3d at 990 (citing *Smith*, 154 P.3d at 787).

173. State v. Ultreras, 295 P.3d 1020, 1034 (Kan. 2013) (discussing K.S.A. § 21-3414(a)(2)(A) (repealed 2010)); State v. Kelly, 942 P.2d 579, 583–84 (Kan. 1997) (discussing K.S.A. § 21-3414(a)(2)(A)).

alternative means of committing aggravated battery.[174]

- The phrase "operate or attempt to operate" does not constitute "alternative means of committing" the offense of driving under the influence (DUI), even though just five years earlier the court held that "operate or attempt to operate" did create an "alternative means of committing" a DUI.[175]
- The language "canceled, suspended or revoked" does not "create three means" of driving while suspended.[176] In so finding, the court summarized the "actus reus" of driving while suspended—K.S.A. 8-262—as "driving without a privilege to do so,"[177] blurring the distinction between the separate crimes of driving while suspended and driving without a valid license—K.S.A. 8-235—previously recognized by the court.[178]
- Regarding aggravated intimidation of a witness, the language, "preventing or dissuading, or attempting to prevent or dissuade" was found to "not contain . . . alternative means."[179]
- Under the rape statute, "'force or fear' is a single, unified means of committing rape," despite *Timley*'s pre-*Brown* holding to the contrary.[180]
- Regarding sodomy: "oral contact of genitalia," "anal penetration," and "sexual intercourse with an animal" are alternative means.[181] However, the "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia" language constitutes mere options within a means.[182]
- Under the felony murder statute, the phrase, "in the commission

174. *Ultreras*, 295 P.3d at 1036.

175. *Compare* State v. Ahrens, 290 P.3d 629, 636 (Kan. 2012), *with* State v. Stevens, 172 P.3d 570, 577–79 (Kan. 2007), *abrogated by Brown*, 284 P.3d 977.

176. State v. Suter, 290 P.3d 620, 628 (Kan. 2012).

177. *Id.*

178. *See* State v. Bowie, 999 P.2d 947, 952 (Kan. 2000) (stating that "a person who never had a driver's license cannot be charged with driving while suspended pursuant to [§] 8-262 but can be charged with driving without a license in violation of [§] 8-235(a)"). It should be noted that since *Bowie*, the statute was amended to cover persons whose "privilege to obtain a driver's license is suspended or revoked." KAN. STAT. ANN. § 8-262(a)(1) (2013). This, however, does not eliminate the primary distinction between the two crimes.

179. State v. Aguirre, 290 P.3d 612, 614 (Kan. 2012).

180. *Compare* State v. Brooks, 265 P.3d 1175, 1184 (Kan. Ct. App. 2011), *rev. granted*, No. 102,452 (Kan. June 13, 2012), *with* State v. Timley, 875 P.2d 242, 246 (Kan. 1994).

181. State v. Burns, 287 P.3d 261, 272–73 (Kan. 2012) (discussing K.S.A. § 21-3501(2) (repealed 2010)), *overruled on other grounds by* State v. King, 305 P.3d 641 (Kan. 2013).

182. State v. Wells, 290 P.3d 590, 604–05 (Kan. 2012) (discussing K.S.A. § 21-3501(2)).

of, attempting to commit, or in flight from . . . an inherently dangerous felony" merely creates options within a means, and super sufficiency is not required.[183]

- For aggravated robbery, the phrase "taking property from the 'person or presence'" of another in a jury instruction merely creates "two options used to describe different factual circumstances in which aggravated robbery (or robbery) can occur."[184] Consequently, the state need only prove "property was taken from the presence of the victims," super sufficiency of the evidence is not required; that is, the state is not required to prove the property was taken from the body of the person, when both options are left in the instructions.[185] However, when the facts only support the presence option, a conviction obtained exclusively under the more restrictive person option will likely be reversed for insufficient evidence because of the "fundamental" difference between these two ways of committing robbery.[186]
- Under the kidnapping statute, the "[f]acilitation of flight and facilitation of the commission of a crime are mere options within a means."[187] The terms "taking or confining" do constitute alternative means of kidnapping, but the terms "by force, threat, or deception" are mere options within a means,[188] despite a pre-*Brown* appellate determination that the phrase created alternative means.[189]

183. State v. Harris, 306 P.3d 282, 292 (Kan. 2013) (discussing K.S.A. § 21-3401(b) (repealed 2010)). *See also* State v. Cheffen, 303 P.3d 1261, 1269 (Kan. 2013) (same finding, also discussing K.S.A. § 21-3401(b)).

184. State v. Jackson, 305 P.3d 685, 697–98 (Kan. Ct. App. 2013).

185. *Id.* at 699.

186. *See* State v. Robinson, 8 P.3d 51, 54–55 (Kan. Ct. App. 2000) (citing State v. Little, 994 P.2d 645, 650–51 (Kan. Ct. App. 1999)) (holding there is a fundamental difference between the "presence" language and the "person" language in reversing robbery conviction for taking property from a person when the only evidence supported the "presence" language). It should be noted that the "presence" language subsumes the "person" language because taking property from the "person" will always involve taking the property from the victim's presence. Prosecutors keen on this point might consider guarding against being caught off guard here by either always including the "presence" language, or only using the presence language in their complaints. Generally speaking, however, the shotgun approach to charging—assuming some of the means are not relevant to the facts—causes more alternative means problems than it solves.

187. State v. Haberlein, 290 P.3d 640, 649 (Kan. 2012) (discussing K.S.A. § 21-3420(b) (repealed 2010)).

188. *Id.*

189. State v. Johnson, 11 P.3d 67, 69 (Kan. Ct. App. 2000), *abrogated by* State v. Clary, 270 P.3d 1206, 1211 (Kan. Ct. App. 2012).

Thus, criminal defense attorneys should note, even if there actually was potential for some jurors to convict a defendant on a factually inadequate theory that their client accomplished a kidnapping by deception, it would not necessarily matter because that element is an option, and does not require super sufficiency.[190] Just like the old common law *Grissom*/*Griffin* rule, it is enough if the evidence is sufficient to support either of the other two options, force or threat.[191]

Contrast the scenario in the previous paragraph with what the appellate court held when it applied *Wright* to determine there was an alternative means error in *State v. Shaw*.[192] The *Shaw* court overturned a DUI manslaughter conviction because a stray means of committing DUI manslaughter—causing death while "in flight from" a DUI—made its way into the instructions.[193] In *Shaw*, the only evidence presented was that the defendant, over the legal limit of .08, turned into a motorcyclist, killing him.[194] The defendant did not flee the scene of the collision and was required to provide a blood sample for blood-alcohol level testing.[195] Because there was no evidence the defendant was "in flight from" a DUI when he killed the victim, the conviction was overturned for lack of super sufficiency of the evidence.[196] In following *Wright*, the court did not apply harmless error analysis.[197]

A short time after denying review in *Shaw*, the Kansas Supreme Court held that the phrase, "in . . . flight from an inherently dangerous felony" was a mere option within a means of committing felony murder, and, thus, does

190. *See Haberlein*, 290 P.3d at 649 ("But the phrase 'force, threat, or deception' addresses secondary matter, merely describing ways in which the *actus reus* can be accomplished. In other words, under our *Brown* analysis, each is an option within the means of taking or confining.").

191. *See id.* (citing State v. Brown, 284 P.3d 977 (Kan. 2012); State v. Wright, 224 P.3d 1159 (Kan. 2010); State v. Timley, 875 P.2d 242 (Kan. 1994)) ("Force, threat, and deception are not alternative means of committing a kidnapping or aggravated kidnapping, and we need not reach the question of whether sufficient proof of each was presented to Haberlein's jury.").

192. 281 P.3d 576, 582–84 (Kan. Ct. App. 2012), *rev. denied*, No. 11-106015-A, 2013 Kan. LEXIS 478 (May 20, 2013). *Shaw* was decided about a month before *Brown* was published. However, the Kansas Supreme Court denied review in *Shaw* well after *Brown*.

193. *Id.* at 583–84. The reader might logically ask: how is it possible to be in flight from a DUI without continuing to drive while under the influence of alcohol or drugs? Flight on foot, or even horseback, spring to mind.

194. *Id.* at 578–80.

195. *Id.*

196. *Id*. at 585–86.

197. *Id.* However, in a concurring opinion, Judge Malone expressed his view that "alternative means error, like almost every other kind of trial error, should be subject to harmless error analysis." *Id*. at 586 (Malone, J., concurring).

not require super sufficiency.[198] If there is a distinction between "in flight from a DUI" and "in flight from an inherently dangerous felony" when it comes to labeling these comparable phrases "options" or "alternatives" under *Brown*'s paradigm, the author is incapable of conjuring one with a scintilla of merit.

D. Brown*'s Appellate Consequences*

Brown's analytical framework presents unique challenges for appellate counsel. When the legislature describes an element or a factual circumstance that would prove a crime, words that add anything to what is prohibited could result in being labeled a distinct and additional way of committing the crime.[199] If the words are redundant and already mean the same thing, the actual facts of any given case would prove both ways of committing the crime, or neither.[200] When this is the situation, should the case not be resolved on the basis that there is either super sufficiency or insufficient evidence? And if there is a strange case in which one of the options or means or ways does not fit the facts and cannot be sufficiently proved, is this not the identical evil *Wright* was aiming to prevent?

The *Brown* court addresses this concern by quoting the United States Supreme Court in *Schad v. Arizona*: "Decisions about what facts are material and what are immaterial, or . . . 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." [201]

But the issue in *Schad* was whether or not states should be allowed to define the single crime of first degree murder as provable by either of two alternatives: premeditated murder or felony murder.[202] The defendant in *Schad* argued premeditated murder and felony murder are inherently separate crimes, and should not be allowed to exist as alternative ways of

198. State v. Harris, 306 P.3d 282, 292 (Kan. 2013); State v. Cheffen, 303 P.3d 1261, 1269 (Kan. 2013).

199. *See* State v. Sedillos, 112 P.3d 854, 859–60 (Kan. 2005) (stating that the rules of statutory construction attempt to avoid rendering statutory language meaningless or superfluous).

200. Except, of course, when the language of one part of a statute subsumes the other. For example, in a robbery case, when property is taken from the "person" of another, that property will necessarily always be taken from the persons "presence." The "presence" language subsumes the "person" language.

201. State v. Brown, 284 P.3d 977, 988 (Kan. 2012) (alteration in original) (citations omitted) (quoting Schad v. Arizona, 501 U.S. 624, 638 (1991)).

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

proving the one crime of first degree murder.[203]

Indeed, the *Schad* court prefaced the quotation above with this assertion: "Judicial restraint necessarily follows from a recognition of the impossibility of determining, as an *a priori* matter, whether a given combination of facts is consistent with there being only one offense."[204] In context, the quote first and foremost stands for the proposition that the legislature is free to construct alternative means crimes as it sees fit, provided the legislature does not define crimes in a way that "risks serious unfairness and lacks support in history or tradition."[205] Second, *Schad* has to be read in light of the centuries-old alternative means common law rule followed in *Griffin* that same year. If a legislature made felony murder a "mere means" of committing first degree murder, it would not necessarily have to be proven individually so long as there was sufficient evidence supporting the other alternative, premeditated murder.[206]

Brown was an aggravated indecent liberties case involving a grown man sleeping naked with an eight-year-old girl, touching her privates, rubbing lotion all over her body, and kissing her on her breasts.[207] *Brown* focused on K.S.A. 21-3504(a)(3)(A), which prohibits lewd touching of a child under fourteen "done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both."[208] The court rejected the defendant's argument that the state was required to prove he intended to arouse the sexual desires of both himself and the child, stating, "it is unlikely that the legislature intended for options within a means to constitute alternative means subject to the super-sufficiency requirement."[209] Yes, that is unlikely. Without belaboring the point, it is unlikely because Kansas adopted the common law by legislative enactment, which would have

203. *Id.* at 630–31.

204. *Id.* at 638.

205. Richardson v. United States, 526 U.S. 813, 820 (1999) (citing *Schad*, 501 U.S. at 632–33).

206. Many states have adopted the rule from *Schad* regarding jury unanimity for alternative means crimes. *See* State v. Jones, 29 P.3d 351, 376 (Haw. 2001) (Ramil, J., concurring) ("*Schad* is widely understood to stand . . . for the proposition that the Due Process Clause of the United States Constitution does not require jury unanimity on alternative means of proving a single offense."). *See also* State v. Derango, 613 N.W.2d 833, 841 (Wis. 2000); State v. Nunez, 981 P.2d 738, 744 (Idaho 1999) (misuse of public monies); *Ex parte* Madison, 718 So. 2d 104, 106–07 (Ala. 1998) (capital murder); People v. Rand, 683 N.E.2d 1243, 1249 (Ill. App. Ct. 1997) (stalking); State v. St. Pierre, 693 A.2d 1137, 1139 (Me. 1997) (unlawful sexual conduct); State v. Salazar, 945 P.2d 996, 1006 (N.M. 1997) (first degree murder); Richardson v. State, 673 A.2d 144, 146–47 (Del. 1996) (kidnapping and robbery).

207. *Brown*, 284 P.3d at 984.

208. *Id.* at 992 (quoting KAN. STAT. ANN. § 21-3504(a)(3)(A) (Repealed 2010)).

209. *Id.*

included the *Grissom*/*Griffin* rule, not to mention that the super sufficiency requirement sprung from the verdict procedure statute through language not readily evident.

But that is not the *Brown* court's rationale which, in keeping with *Wright*'s precedent, now necessarily assumes a legislative intent to create a super sufficiency requirement. Having created the super sufficiency rule, *Brown* switches gears and points to legislative intent to avoid application of its rule to all the statutory ways crimes can be proven in Kansas. The court held the language "'either the child or the offender, or both' merely describes a secondary matter, the potential yet incidental objects of the offender's required intent,"[210] which for murder would be the intent to kill *a human being*, but for this crime is the intent to arouse the sexual desires *of the defendant or the child*. While the court calls the statutory language completing this intent element secondary, make no mistake, the crime is not complete until the state has proved the touching was done with the intent to arouse the sexual desires of one of two people in the world, the victim or the defendant.[211] The language that completes the intent element is secondary in the sense it does not require super sufficiency, not in the sense that facts supporting one or the other of the options are immaterial and unnecessary to constitute the crime.

Brown's class-system-for-elements holding seems born of the need for a tool to save fairly-achieved convictions from harmless errors, not from any principled or foreseeable construction of Kansas statutes. In her concurrence in *Brown*, Justice Moritz stated her concern this way: "I am concerned that [the current] approach will needlessly result in inconsistent and result-oriented decisions."[212]

If *Wright* were overturned, *Brown*'s class-system-for-elements holding would be more than just textually unsupported; it would be obsolete. Ordinary adherence to Kansas's canons of construction in this area of the law simplifies and clarifies this unnecessarily complicated area of the state's jurisprudence.

210. *Id.* at 993.

211. *Brown* could quite easily have been resolved on the basis that there was super sufficiency. A jury with common knowledge about human sexuality would understand that the defendant's primary purpose in fondling a child's privates is to arouse his own sexual desires. But the jury could also reasonably infer that the defendant intended to arouse the child by fondling her privates for the principal purpose of further enhancing his own arousal.

212. *Brown*, 284 P.3d at 1001 (Mortiz, J., concurring).

IV. REPLACING *WRIGHT*'S MISBEGOTTEN RULE USING KANSAS'S CANONS OF TEXTUAL CONSTRUCTION

If ordinary application of Kansas's canons of statutory and constitutional construction can show *Wright* and *Brown* were wrongly decided, continued fidelity to these established conventions of statutory and constitutional interpretation should prove useful in leading to their replacement. Admittedly, application of these conventions will not always inoculate us from being perplexed by all legal knots, but their application keeps us tethered to a stable framework.

Here, we have three ways of resolving our issue of replacing *Wright* and *Brown*: *Cook*'s application of the clearly erroneous exception for instructions which have not been objected to from 2008;[213] *Grissom*'s application of the centuries-old common law rule that evidentiary support for a single means is sufficient from 1992;[214] and *Dixon*'s application of the harmless error rule in 2005.[215] Each rule comes from a statute: *Cook*'s rule for un-objected to instructions comes from K.S.A. 22-3414(3); *Grissom*'s rule comes to us through K.S.A. 77-109's adoption of the common law; and *Dixon*'s harmless error rule comes from K.S.A. 60-2105.

A. Cook*'s Application of the Clear Error Statute for Un-objected to Instructions*

If any advocate gets the Kansas Supreme Court interested in overruling *Wright*, they should be leery of asking the court to apply K.S.A. 22-3414(3)'s clearly erroneous exception for instructions which have not been objected to in its place. The reason: to maintain consistency. Courts have construed K.S.A. 22-3414(3) to contain rules not readily found there in the same way that they have construed the verdict procedure statute's use of the word "any" to protect super sufficiency.[216] In relevant part, K.S.A. 22-3414(3) states: "[n]o party may assign as error the giving . . . [of] an instruction . . . unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction . . . is clearly

213. State v. Cook, 191 P.3d 294, 301 (Kan. 2008).

214. State v. Grissom, 840 P.2d 1142, 1171 (Kan. 1992).

215. State v. Dixon, 112 P.3d 883 (Kan. 2005).

216. *See, e.g.*, State v. Carter, 160 P.3d 457, 467 (Kan. 2007) (quoting State v. Bell, 121 P.3d 972, 977 (Kan. 2005)) (un-objected to instructions will only be considered "clearly erroneous" under K.S.A. 22-3414(3) if the "reviewing court is firmly convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred").

erroneous."[217]

The case that originally and inexplicably construed K.S.A. 22-3414(3)'s "clearly erroneous exception from a certainty-of-error concept to a certainty-of-prejudice concept" was *State v. Stafford*.[218] Advocates asking the court to apply the clearly erroneous statute in an attempt to overrule *Wright* run the unnecessary risk of appearing patently inconsistent—applying a textual approach to debunk *Wright*, then utilizing *Stafford*'s inventive construction of another statute to replace it.

The risk of appearing patently inconsistent under these circumstances is unnecessary. First, advocates have a harmless error statute on the books which is very similar to *Stafford*'s clearly prejudicial invention. If your case depends on whatever advantage can be gained by the court retaining *Stafford*'s decades-old inventive construction of the clear error exception despite the more general harmless error statute, you have already lost. Second, advocates can argue a return to the *Grissom* precedent, which eschews application of either statute.

This is not to say the *Stafford* precedent should not be dealt with one way or the other—after all, it is precedent that must be dealt with in some way by the court if *Wright* is overturned. K.S.A. 22-3414(3), *at least as construed by courts*, is the more specific statute for the situation of an un-objected to jury instruction than the more general harmless error statute. But the canon of statutory construction stating that statutes "relating to a specific thing[] take precedence over general statutes" can logically only apply after giving the plain words of a statute their fair meaning.[219] From looking at the text, the legislature did not create a mini-harmless error statute within K.S.A. 22-3414(3).[220] The Kansas Supreme Court knows this well, having recently stated: "[T]here is nothing in the statutory language which would naturally lead one to the conclusion that 'clearly erroneous' was meant to be determined by a reversibility standard, i.e., by the error's perceived effect on the trial outcome."[221]

It's not just the sentence-level text of K.S.A. 22-3414(3) that militates against reading a "clearly-prejudicial" requirement into the statute. The context of this statute's codification militates against such an inventive

217. KAN. STAT. ANN. § 22-3414(3) (2012) (emphasis added).

218. State v. Williams, 286 P.3d 195, 201 (Kan. 2012) (analyzing the origin of the judicially-created, clearly-prejudicial construction of the statute and finding it to have started in *State v. Stafford*, 573 P.2d 970, 972–73 (Kan. 1977)).

219. Chelsea Plaza Homes, Inc. v. Moore, 601 P.2d 1100, 1102 (Kan. 1979).

220. § 22-3414(3).

221. *Williams*, 286 P.3d at 201.

reading as well. The clearly erroneous rule predates the statute codifying it. Prior to the codification of the rule, the Kansas Supreme Court had consistently held that the clear error rule did not estop appellants from challenging erroneous instructions by failing to object at the time they were given.[222] Since K.S.A. 22-3414(3) does not define "clearly erroneous," and that phrase had already received authoritative construction by the Kansas Supreme Court, K.S.A. 22-3414(3)'s "clearly erroneous" rule should have been understood according to its prior construction.[223] The Kansas Supreme Court, at least once, has instinctively applied this principle to another area of the law.[224]

What is perplexing about the way K.S.A. 22-3414(3) has been construed since *Stafford*, is that there is not even a need for the inventive construction; that is, there is nothing compelling on the surface one could point to as the motivation for a court to look for an escape route from the text of the statute, or the context of its codification. The text of the legislature's harmless error statute accomplishes the task performed by the *Stafford* invention nicely.[225] Just as real complex knots in your Christmas lights sometimes resolve all at once, perhaps the court can correct *Wright* and *Stafford* simultaneously.

B. Grissom*'s Application of the Centuries-Old Common Law Rule*

It may seem reasonable to conclude that the rule adopted by the Kansas Supreme Court in *Grissom*, which follows the common law rule adopted through K.S.A. 77-109, is the only textually supportable alternative to replace *Wright*. The rule that statutes have not been interpreted as changing

222. *See* Sams v. Commercial Standard Ins. Co, 139 P.2d 859, 866 (Kan. 1943). *See also* Richardson v. Bus. Men's Protective Ass'n., 284 P. 599, 602 (Kan. 1930) (stating that when an instruction includes statements of law which are "clearly erroneous," it is not necessary, in order for a party to predicate error upon the giving of the instruction, to make objection); State v. Ragland, 246 P.2d 276, 279–80 (Kan. 1952) ("[I]t is not necessary in order to predicate error thereon, that a defendant in a criminal action object to the giving of an instruction to the jury, if the instruction is clearly erroneous."); Collet v. Estate of Schnell, 397 P.2d 402, 405 (Kan. 1964) ("This court adheres to the rule that where the instructions or directions of the trial court are in themselves erroneous, an appellant is not estopped of complaining of them as error by not having objected at the time they were given.").

223. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 322 (2012) ("If a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction, or has been given a uniform interpretation by inferior courts . . . a later version of that act perpetuating the wording is presumed to carry forward that interpretation.").

224. *See* State v. Johnson, 522 P.2d 330, 334 (Kan. 1974) (finding when parental "unfitness" is not defined by statute, the court construes "unfit" pursuant to its prior construction).

225. KAN. STAT. ANN. § 60-2105 (2012).

the common law unless explicitly provided[226] might, at first blush, debunk *Dixon*'s ruling as easily as *Wright*'s ruling because *Dixon*'s starting point is the same as *Wright*'s—*Timley*'s super sufficiency rule—and this starting point is in clear derogation of the common law.[227] *Grissom*'s centuries-old common law rule neither requires super sufficiency nor contemplates a harmless error analysis because harmless error reform in this country did not occur until early in the twentieth century.[228]

It appears that common law courts felt so strongly about the innocuous nature of alternative means error in general that they crafted a common law presumption against the general idea that any error, no matter how inconsequential, was presumed to be prejudicial.[229] The presumption was that an alternative means "error" when one means is not factually supported is not an error at all, and that the jury always convicted on the factually supported means. This inference seems reasonable given the nature of some of the alternative means errors found harmless by Kansas appellate courts. Notably, *Grissom* did not apply harmless error analysis, which was consistent with the centuries-old common law rule while being somewhat inconsistent with the harmless error reform that occurred in this country just after the turn of the twentieth century.

C. Dixon*'s Application of the Harmless Error Statute*

In Kansas, harmless error reform dates back at least to the general session laws of 1909.[230] The 1909 harmless error statute is identical to the one currently in effect, which states:

> The appellate court shall disregard all mere technical errors and

226. *See* Am. Gen. Fin. Servs., Inc. v. Carter, 184 P.3d 273, 277 (Kan. Ct. App. 2008) ("[W]hen the legislature has intended to abolish a common-law rule, it has done so in an explicit manner. In the absence of such an expression of legislative intent, the common law remains part of our law.").

227. *See infra* Part IV.C.

228. *See* Wiseman v. Armstrong, 989 A.2d 1027, 1034 (Conn. 2010) ("Before the harmless error reform, the American legal system had followed what was known in the English courts as the 'Exchequer Rule,' which created the presumption that prejudice accompanies every trial court error and new trials were required to remedy all instances of error. As one scholar noted: '[T]he American courts did not change the rule and even in the early twentieth century were still leaving no error unremedied, no matter how inconsequential . . . .") (quoting S. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 422 (1980)). *See also* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 3 (1970) ("There was a time in the law, extending into our own century, when no error was lightly forgiven. In that somber age of technicality the slightest error in a trial could spoil the judgment.").

229. *See Wiseman*, 989 A.2d at 1034.

230. Laws 1909, ch. 182, § 581 (1909) (recodified as K.S.A. § 60-2105 (2012)).

> irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it, the court shall render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors and irregularities in the proceedings of the trial court.[231]

The question here is: Does this harmless error statute replace the common law's more rigid, one-dimensional presumption that juries convict on the factually supported theory? The short answer: Yes.

K.S.A. 77-109 adopts the common law as modified by "statutory law."[232] K.S.A. 77-109 sets forth that "such statutes shall be liberally construed to promote their object," and are not to be "strictly construed" when in "derogation" of the common law.[233] As alluded to earlier in this article, the language of K.S.A. 77-109 contradicts the case law's requirement that the change in the common law must be explicit.[234] Requiring a change to be "explicit" seems equivalent to the "strict construction"[235] prohibited by the statute. Fairly read, K.S.A. 77-109 only requires that any change be clear.[236] Applying this method of construction to the harmless error statute, the statute's object is to direct appellate courts to review the "whole record" in individual cases in an attempt to distinguish between errors which are merely technical and those which affect the substantial rights of a party. The harmless error statute does not speak in terms of starting off with any abstract presumptions like the state would have enjoyed under *Grissom*. Instead, the statute imposes a duty on the court to take a holistic approach to individual cases and exercise judgment, eschewing abstract assumptions such as: jurors always convict on the theory supported by the evidence;[237] or

231. KAN. STAT. ANN. § 60-2105 (2012).

232. KAN. STAT. ANN. § 77-109 (2012).

233. *Id.*

234. *See supra* Part III.A.2.

235. SCALIA & GARNER, *supra* note 145 at 355 (explaining that "in the 19th century, a 'strict' construction came to mean a narrow, crabbed reading of the text").

236. *See Id.* at 318. (footnotes omitted) ("It has often been said that statutes in derogation of the common law are to be strictly construed. That is a relic of the courts' historical hostility to the emergence of statutory law. The better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity. There is no more reason to reject a fair reading that changes the common law than there is to reject a fair reading that repeals a prior statute . . . . For both, the alteration of prior law must be clear—but it need not be express, nor should its clear implication be distorted.").

237. If this were always true, jurors would never find a defendant guilty based on insufficient evidence.

alternative means errors are always prejudicial.[238] As the United States Supreme Court in *Kotteakos* explained, the object of developing the doctrine of harmless error was to:

> substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.[239]

As noted by the Kansas Supreme Court, the development of harmless error analysis and the applicable standards in Kansas tracks a similar history to that of the federal courts.[240]

While *Timley*'s super sufficiency rule draws conclusions using Washington law, and the rationale for its holding has nothing to do with the harmless error statutes, analyzing cases for super sufficiency would necessarily be the first logical step in analyzing claims of alternative means error. Indeed, if there is super sufficiency of the evidence, there is no error to analyze for harmlessness. This is fundamentally different than requiring super sufficiency. *Dixon*'s holding, that the alternative means error was harmless, by definition did not require super sufficiency. *Dixon* simply applied the statute's harmless error rule, not the common law rule's more rigid, one-dimensional presumption.

V. CONCLUSION

When a trial court makes an alternative means error in Kansas by allowing a jury the option of convicting a defendant on a factually inadequate statutory theory, the harmless error statute should apply no

238. Sometimes the stark difference between the several means of committing a crime would functionally guarantee the jury was not misled. For instance, in a sodomy case, a jury hearing only evidence of oral sex perpetrated against a victim would have to be collectively delusional to be misled by the inclusion of the anal-sex or sex-with-an-animal alternatives in the instructions. Yet, under the current law, that stark difference between means would be the very basis for reversal. *See* State v. Burns, 287 P.3d 261, 272–73 (Kan. 2012) (stating that oral sex, anal sex, and animal sex are alternative means of committing sodomy).

239. Kotteakos v. United States, 328 U.S. 750, 759–60 (1946).

240. *See* State v. Ward, 256 P.3d 801, 811–13 (Kan. 2011). *See also* KAN. STAT. ANN. § 60-261 (2012) ("Unless justice requires otherwise, no error in admitting or excluding evidence, *or any other error by the court* or a party, is ground for granting a new trial, for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." (emphasis added)).

matter how *Brown*'s judicially-enhanced definition of alternative means might classify the elements in question. *Brown*'s class-system-for-elements holding lacks textual foundation in Kansas law and is an insufficient substitute for the harmless error statute. Indeed, *Brown*'s regime, taken at face value, does not even pretend to claim any utility for sorting harmful errors from harmless ones. Only sheer luck—or a surreptitious glance at the degree of harm actually at play—can connect harmless errors with an "option" finding and harmful errors with a "means" finding. Without manipulation, *Brown*'s constructs serve to provide windfalls to those fairly convicted on the basis of undeniably innocuous "means" errors while routinely cutting off harmless error analysis in "option" error cases.

In short, *Brown*'s class-system-for-elements regime supplanted what the legislature enacted—a statute calling for the courts to analyze and categorize error as either harmless or harmful. Ironically, it is precisely the combination of *Wright*'s and *Brown*'s holdings which prevents application of the rightful "law of the land," which is the predecessor term for "due process of law."[241] Ordinary adherence to canons of statutory construction simplifies and clarifies this unnecessarily complicated area of Kansas's jurisprudence. *Dixon*'s rule should be reinstated, but this time with the benefit of a principled justification based upon Kansas's constitution and statutes. *Wright*'s holding, barring harmless error analysis in alternative means cases, should be overruled because the decision is textually and historically wrong. It permanently places the court in the position of applying judicially created constructs in place of the harmless error statute. Instead, courts should be applying harmless error analysis, which overwhelmingly follows from the proper application of Kansas's canons of textual construction.[242]

241. *See In re* Gault, 387 U.S. 1, 62 (1967) (Black, J., concurring) ("The phrase 'due process of law' has through the years evolved as the successor in purpose and meaning to the words 'law of the land' in Magna Charta . . . .").

242. *See* SCALIA & GARNER, *supra* note 145 at 411–12 (footnotes omitted) (asserting that among the factors to consider for setting aside precedent are "how clear it is that the decision was textually and historically wrong" and "whether the decision permanently places courts in the position of making policy calls appropriate for elected officials"). If the legislature wanted to create the regime *Brown* has created, it could certainly have done so any number of ways, including publishing in red the primary elements which require super sufficiency and leaving secondary elements in plain black ink while setting forth the reason for the two-toned criminal code. Any legislature sophisticated enough to create the highly nuanced class-system-for-elements regime that has emerged in the wake of *Brown* would certainly recognize the necessity of communicating this exotic intent in the text of its laws.

APPENDIX: HOW TO AVOID ALTERNATIVE MEANS ERROR AT TRIAL

For trial judges and trial level prosecutors looking for the most abbreviated dose of usefulness from this article, here it is: kill the shotgun approach. That is, edit out of the jury instructions all unproven statutory theories of guilt, whether these theories spring from elements instructions or from the definition of terms instructions.[243] To some extent, *Wright*'s due process innovations are the result of a combination of phenomena. The first is charging documents containing statutory theories in the Kansas penal code irrelevant to the respective facts of the crime charged. The second is equal inattention of trial court judges in passing factually inadequate statutory theories on to juries for their consideration.

Regardless of Kansas's case law on this issue, trial judges still hold the key to avoiding alternative means error. Meticulous attention to alternative means issues by trial courts when crafting jury instructions should result in the near extinction of cases in which a conviction is overturned for this type of error.[244] At any given time, trial courts should realize that a significant number of prosecutors are brand new to the profession or are simply not cognizant of the complications they are sowing into their complaints. These prosecutors tend to indiscriminately charge crimes in the all inclusive language of the statute in an effort to avoid the sometimes fatal error of having left out an element. When a trial court limits its instructions to juries to include only those statutory means of committing crimes in which a rational juror might find there is sufficient evidence, there can be no

243. Some definitional sections have been categorized as an explanatory definition rather than a fundamental definition of the crime itself. *See* State v. Waldrup, 263 P.3d 867, 879 (Kan. Ct. App. 2011) (holding that "the district court's definitional jury instruction of the term 'sale' did not create alternative means of committing the crime of sale of cocaine"). *See also* State v. Britt, 287 P.3d 905, 911–13 (Kan. 2012) (holding that the definition of sexual intercourse does not create alternative means). *But see* State v. Burns, 287 P.3d 261, 272–73 (Kan. 2012) (holding that the complete definition of sodomy contains three alternative means: (1) oral contact of genitalia, (2) anal penetration, and (3) sexual intercourse with an animal), *overruled on other grounds by* State v. King, 305 P.3d 641 (Kan. 2013).

244. Perhaps the lone exception is alternative means analysis when applied to principles of criminal liability, such as aiding and abetting, which bring in to play complications for the trial court beyond simple vigilance in spotting and dealing with an issue. It is common for there to be sufficient evidence to convict a defendant as either a principal or as an aider and abettor, with existing uncertainty as to a defendant's precise involvement. Panels of the Kansas Court of Appeals are split as to whether being charged as an aider and abettor or principal creates an alternative means scenario. *Compare* State v. Boyd, 268 P.3d 1210, 1215–16 (Kan. Ct. App. 2011) (holding that aiding and abetting creates an alternative means), *petition for review filed* January 23, 2012, *with* State v. Snover, 287 P.3d 943, 947–48 (Kan. Ct. App. 2012) (holding that aiding and abetting does not create alternative means), *petition for review filed* December 10, 2012.

legitimate issue. [245]

District court judges bring with them to the bench strengths and weaknesses. Prosecutors should know that not all trial judges have extensive criminal law backgrounds, and even if they do, they may not be attuned to alternative means issues. Trial judges in Kansas, particularly in rural Kansas, tend to be jacks-of-all-trades, so it is especially important for prosecutors to know their craft and take the time to banish the parts of the penal law they know lack foundation in the complaint. Then, prosecutors should re-evaluate the requested instructions after the presentation of all the evidence at trial to help the court make sure only those means for which there is sufficient evidence are submitted in the instructions. It is helpful for prosecutors to think of their case as a glass of water they will have to drink on appeal. Naturally, a prosecutor would not want to muddy the water she will be drinking.

I. RULES FOR DEFENSE ATTORNEYS

A. The Schreiner Temptation

For defense attorneys, a thorough understanding of alternative means issues could result in temptation, that is, it could create an "incentive to salt jury instructions with language for alternative means on which no evidence had been submitted."[246] As noted by the *Schreiner* court: "A jury would be highly unlikely to convict on that means in the absence of evidence, so there would be little risk to a defendant. But inclusion of that language in the actual instructions would provide grounds for an automatic reversal . . . in an appeal of a guilty verdict."[247]

Not wanting to encourage "that sort of connivance," the *Schreiner* court found a defendant's request for an instruction which included unproved means, which the court then gave to the jury, was an invited error, and the

245. If a trial judge is in doubt whether a particular means of committing a crime has been proven, the trial judge could guard against reversible error by calling for separate verdicts on the theories. The jury would then be clear as to which theory it relied upon in reaching each verdict. However, if the State is actually able to sufficiently prove its weaker theory, this course of action by a trial court may prejudice the State. That is because it is acceptable for juries to be split on the theory of guilt as long as sufficient evidence supports each theory. State v. Wright, 224 P.3d 1159, 1165 (Kan. 2010) (quoting State v. Timley, 875 P.2d 242, Sy. 1. (Kan. 1994)). But if the prosecutor is eager to avoid application of the jurisprudence above and has reservations about how an appellate court may view his weaker theory, the prosecutor may actually welcome this approach to avoid the specter of retrial—particularly if the prosecutor views his stronger theory as a lead-pipe cinch.

246. State v. Schreiner, 264 P.3d 1033, 1043 (Kan. Ct. App. 2011).

247. *Id.*

court refused to overturn the conviction on that basis.[248] But encountering instructions pre-salted by the court with alternative means error still presents a defense attorney with an ethical hazard—or, some might say, a strategic choice.[249] Do you object to the instruction or hedge your bets and let it slide? Is this inaction "unprofessional and destructive game[-]playing" or sound trial strategy?[250]

Those who would classify this as zealous advocacy focus on strategy. After all, what could be sounder trial strategy than a free run at acquittal with a guaranteed option of a do over? When an advocate recognizes that the court has added irrelevant means to the jury instructions and passively allows the court to sow error into the trial for tactical advantage, the advocate is engaging in *suppressio veri*—a tacit lie. However, like in *Schreiner*, almost all of the cases in which factually unsupported alternative means have slipped into instructions without objection, the lack of objection was probably due to oversight, not strategy.

B. Defense Attorneys Beware the Downside of Brown

Defense attorneys should be aware that certain elements, or portions thereof, required to be proven by the state are now deemed "secondary matters."[251] These statutory secondary matters are called "options within a means."[252] Between two secondary options, even if there actually is legitimate concern of conviction based on a factually inadequate theory, it will not matter on appeal unless defendant's appellate counsel can convince the Kansas Supreme Court to apply a harmless error analysis to the alternative options case.[253] It is incumbent on defense counsel to understand this new landscape on which their clients' cases are won or lost to protect

248. *Id*. *See also* State v. Bailey, 255 P.3d 19, 27 (Kan. 2011) ("When defendant's requested instruction is given to the jury, the defendant cannot complain the requested instruction was error on appeal.").

249. *See* KANSAS RULES OF PROF'L CONDUCT R. 3.3(a) (2007) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . . ."). Is telling the court you have no objection to instructions in this scenario a violation if you know of the error? Comment 2 of this rule states: "This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." *Id.* at cmt. 2.

250. *See Schreine*r, 264 P.3d at 1043.

251. *See* State v. Brown, 284 P.3d 977, 990–91 (Kan. 2012) ("Jury unanimity on options within a means—secondary matters—is generally unnecessary; therefore, on appeal, a super-sufficiency issue will not arise regarding whether there is sufficient evidence to support all options within a means.").

252. *Id.*

253. *Id.*

their clients against options errors for which there is currently no recourse.