



1980

Kentucky Law Survey: Criminal Law

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Recommended Citation

Overstreet, Rebecca M. and Collier, Jean (1980) "Kentucky Law Survey: Criminal Law," *Kentucky Law Journal*: Vol. 68 : Iss. 3 , Article 10.
Available at: <https://uknowledge.uky.edu/klj/vol68/iss3/10>

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Criminal Law

BY REBECCA M. OVERSTREET* AND JEAN COLLIER**

INTRODUCTION

Before the state can impose a criminal penalty it must prove that the proscribed act, *actus reus*, was accompanied by a culpable mental state,¹ the *mens rea*. The Kentucky Penal Code,² which became effective January 1, 1975, details these culpable mental states. Specifically, Kentucky Revised Statutes (KRS) § 501.020 defines the requisite mental state³ while KRS § 504.020 codifies the common law standard for exculpating the defendant because of mental disease or defect.⁴ This survey examines the Kentucky appellate courts' interpretation of these statutes, focusing principally on the requirements placed upon defendants pleading insanity or diminished capacity.

I. THE INSANITY DEFENSE

A basic tenet of our criminal justice system is that the prosecution must prove beyond a reasonable doubt all elements of the crime charged in order to convict the defendant.⁵ The reasonable doubt standard is afforded the accused to protect him from the consequences of an unwarranted conviction.⁶ This prosecutorial burden has on numerous occasions

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¹ KY. REV. STAT. § 501.030 (1975) [hereinafter cited as KRS].

² KRS chs. 500-34 (1975).

³ KRS § 501.020 (1975) defines the mental states of "intentionally", "knowingly," "wantonly," and "recklessly".

⁴ K. Brickey, KENTUCKY CRIMINAL LAW § 5.02, at 43 (1974) [hereinafter cited as BRICKEY].

⁵ *Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) (Frankfurter, J. dissenting); *Brieweg v. U.S.*, 338 U.S. 160, 174 (1949).

⁶ *In re Winship*, 397 U.S. 358, 363 (1970). *See also Coffin v. United States*, 156 U.S. 432, 453 (1895). That the reasonable doubt standard is of constitutional magnitude was confirmed by the United States Supreme Court in *In re Winship*: "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against

conflicted with the concept of an affirmative defense,⁷ where the burden of production and, in some instances, the burden of persuasion on that affirmative defense is shifted to the defendant.⁸ Like other defenses, however, the defendant need raise an affirmative defense only after the prosecution has proven each element of the offense beyond a reasonable doubt.⁹

A. *Burden of Proof of Insanity*

As a result of judicial experience with the insanity defense¹⁰ and the presumption that most men are sane,¹¹ the defendant bears the burden of proof¹² as to his insanity. In *Leland v. Oregon*¹³ the United States Supreme Court upheld this shifting of the burden of proof, rejecting the contention that due process requires the state to carry the burden of proof of sanity. The Court held that an Oregon statute requiring the defendant to prove his insanity beyond a reasonable doubt fell within the "limits of accepted notions of justice"¹⁴ and was in accord with "generally accepted concepts

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 364 (1970).

⁷ The treatment of an affirmative defense may be characterized as a rebuttable presumption. When an affirmative defense is at issue, the lack of mitigation or absence of the defense is treated as a presumed fact. This presumption is settled in favor of the prosecution unless the defendant provides sufficient evidence to negate it. See *Tot v. United States*, 319 U.S. 463, 469 (1943).

⁸ 9 J. WIGMORE, EVIDENCE § 2501 (3rd ed. 1940).

⁹ See C. McCORMICK, LAW OF EVIDENCE § 314, at 800-01 (2d ed. 1972).

¹⁰ 9 J. WIGMORE, EVIDENCE § 2501, at 361 (3rd ed. 1940).

¹¹ *Kriel v. Commonwealth*, 68 Ky. (5 Bush) 362 (1869); *Graham v. Commonwealth*, 55 Ky. (16 B. Mon.) 468 (1855).

¹² What commonly is referred to as the burden of proof actually consists of two separate burdens: the burden of production and the risk of non-persuasion. The burden of production on an issue is "the liability to an adverse ruling . . . if the evidence on the issue has not been produced." C. McCORMICK, LAW OF EVIDENCE § 336, at 784 (2d ed. 1972). In meeting the burden the parties "must first satisfy the judge that they have a quantity of evidence fit to be considered by the jury, and to form a reasonable basis for the verdict." 9 J. WIGMORE, EVIDENCE § 2487, at 279 (3rd ed. 1940). The risk of nonpersuasion "is the burden of persuading the trier of fact that the alleged fact is true." C. McCORMICK, LAW OF EVIDENCE § 336, at 783-84 (2d ed. 1972).

¹³ 343 U.S. 790 (1952).

¹⁴ *Id.* at 799 (quoting *Malinski v. New York*, 324 U.S. 401, 417 (1945)).

of basic standards of justice."¹⁵

Courts and legislatures almost uniformly have shifted to the defendant the burden of proving his insanity,¹⁶ but two approaches have emerged in delineating the extent of the defendant's burden. While it is clear that the defendant must carry the initial burden of production of evidence, jurisdictions have split almost evenly respecting which side then bears the risk of nonpersuasion. Twenty-two states¹⁷ and the District of Columbia¹⁸ require the defendant to demonstrate his insanity to the jury by a preponderance of the evidence. Thus the presumption of sanity continues to operate until the defendant by a preponderance of the evidence persuades the jury of its inapplicability. The federal courts¹⁹ and twenty-six states²⁰ have rejected that standard and require the prosecu-

¹⁵ *Id.* at 799.

¹⁶ See notes 17-20 and accompanying text *infra* for further discussion of the relevant statutes and cases.

¹⁷ Six of the states have enacted the requirement by statute: ALA. CODE § 15-16-2 (1975); DEL. CODE ANN. tit. 11, §§ 304, 401(a); LA. CODE CRIM. PRO. ANN. §§ 432, 439 (West 1967); MINN. STAT. ANN. § 611.025 (West 1979); MONT. REV. CODES ANN. § 95-503(a) (1947); OR. REV. STAT. §§ 161.055(2), 161.305 (1977). The remaining sixteen states, including Kentucky, by judicial decision require the defendant to prove his insanity by a preponderance of the evidence: *Stanley v. State*, 454 S.W.2d 72 (Ark. 1970); *People v. Kelly*, 516 P.2d 875 (Cal. 1973); *Durham v. State*, 238 S.E.2d 334 (Ga. 1977); *Henderson v. Commonwealth*, 507 S.W.2d 434 (Ky. 1974); *State v. Collins*, 297 A.2d 620 (Me. 1972); *State v. Holmes*, 439 S.W.2d 518 (Mo. 1969); *Phillips v. State*, 475 P.2d 671 (Nev. 1970), *cert. denied*, 403 U.S. 940 (1971); *State v. DiPaglia*, 315 A.2d 385 (N.J. 1974); *State v. Harris*, 28 S.E.2d 232 (N.C. 1943); *State v. Staten*, 267 N.E.2d 122 (Ohio 1971); *vacated and remanded on other grounds*, 408 U.S. 938 (1972); *State v. Nault*, 314 A.2d 627 (R.I. 1974); *State v. Hinson*, 172 S.E.2d 548 (S.C. 1970); *Breland v. State*, 489 S.W.2d 623 (Tex. Crim. App.), *cert. denied*, 412 U.S. 939 (1973); *Taylor v. Commonwealth*, 157 S.E.2d 185 (Va. 1967); *State v. Canaday*, 488 P.2d 1064 (Wash. 1971), *vacated and remanded on other grounds*, 408 U.S. 940 (1972); *State v. Grimm*, 195 S.E.2d 637 (W. Va. 1973).

¹⁸ D.C. CODE ENCYCL. § 24-301 (West Supp. 1978-79). See *United States v. Greene*, 489 F.2d 1145 (D.C. 1973), *cert. denied*, 419 U.S. 977 (1974).

¹⁹ *Davis v. United States*, 160 U.S. 469 (1895).

²⁰ Three states have done so by statute: ALASKA STAT. § 12.45.083(b) (1972) (as construed by *Dolchok v. State*, 519 P.2d 457 (Alaska 1974)), labels insanity an affirmative defense but places the burden of persuasion on the prosecution following the defendant's production of any "evidence"; COLO. REV. STAT. § 16-8-105(2) (1973) (see also *People v. Ware*, 528 P.2d 224 (Colo. 1974)); WYO. STAT. 7-11-305(b) (1977) (see also *Reilly v. State*, 496 P.2d 899 (Wyo. 1972)). The remaining twenty-three have instituted the prosecutorial burden by judicial decision: *State v. Begay*, 516 P.2d 573 (Ariz. 1973); *State v. Dubina*, 318 A.2d 95 (Conn. 1972); *Byrd v. State*, 297 So.2d 22

tion to prove the defendant's sanity, after the defendant has met the initial burden of production, to the same degree as every other element of the offense—beyond a reasonable doubt.

B. *The Defendant's Burden of Proof in Kentucky*

Before the adoption of Kentucky's new penal code, a defendant attempting to rely on an insanity defense was required to raise the issue through the introduction of evidence and to persuade the jury by a preponderance of the evidence of his insanity.²¹ Section 504.020(3) of the new penal code adopts this prior law.²² In *Wiseman v. Commonwealth*²³ the Kentucky Supreme Court considered the collateral issue of whether the prosecution is required to rebut the defendant's evidence of his insanity.

The defendant in *Wiseman* appealed his conviction of voluntary manslaughter, arguing that the trial court erred in not directing a verdict of not guilty, since the prosecution failed to rebut the defendant's clear and convincing evidence that at the time of the killing he did not have the substantial capacity to appreciate the criminal nature of the act nor to conform his conduct to the requirements of the law. The Kentucky Supreme Court rejected the defendant's argument and held that the record clearly demonstrated that the jury had sufficient basis for finding the defendant sane at the time of

(Fla. 1974); *State v. Moeller*, 433 P.2d 136 (Hawaii 1967); *State v. Myers*, 494 P.2d 574 (Idaho 1972); *People v. Hawkins*, 290 N.E.2d 231 (Ill. 1972); *Young v. State*, 280 N.E.2d 595 (Ind. 1972); *State v. Thomas*, 219 N.W.2d 3 (Iowa 1974); *State v. Chase*, 480 P.2d 62 (Kan. 1971); *Fowler v. State*, 206 A.2d 802 (Md. 1965); *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967); *People v. Woody*, 157 N.W.2d 201 (Mich. 1968); *Myrick v. State*, 290 So.2d 259 (Miss. 1974); *State v. Jacobs*, 205 N.W.2d 662 (Neb.), *cert. denied*, 414 U.S. 860 (1973); *State v. Bartlett*, 43 N.H. 224 (1861); *State v. James*, 511 P.2d 556 (N.M. 1973); *People v. Silver*, 310 N.E.2d 520 (N.Y. 1974); *Kehnamer v. State*, 57 P.2d 646 (Okla. 1936); *Commonwealth v. Demmitt*, 321 A.2d 627 (Pa. 1974); *State v. Kindvall*, 191 N.W.2d 289 (S.D. 1971); *Collins v. State*, 506 S.W.2d 179 (Tenn. Crim. App. 1973); *State v. Holt*, 449 P.2d 119 (Utah 1969); *State v. Bishop*, 260 A.2d 393 (Vt. 1969).

²¹ *Abbott v. Commonwealth*, 55 S.W. 196 (Ky. 1900); *Moore v. Commonwealth*, 18 S.W. 833 (Ky. 1892); *Montgomery v. Commonwealth*, 11 S.W. 475 (Ky. 1889).

²² KY. REV. STAT. ANN. § 504.020 note (Baldwin 1975).

²³ 587 S.W.2d 235 (Ky. 1979).

the commission of the crime, thus the verdict was not clearly unreasonable.²⁴ Relying on *Tunget v. Commonwealth*,²⁵ the Court stated that even though all of the *expert* witnesses testified that the accused was insane, *any* evidence indicative of his sanity created a factual issue for the jury.²⁶

At first glance it appears that *Wiseman* only reaffirms earlier precedent,²⁷ as it is well settled in Kentucky that persons who are not experts, but by association and observation have had an opportunity to form an opinion as to the sanity of an individual, may testify to that opinion.²⁸ The important aspect of *Wiseman* is that the Court explicitly did not require the prosecution to produce any rebuttal evidence as to the defendant's sanity, allowing the jury to rely on the direct evidence presented by the Commonwealth on that issue.²⁹ Although it is clear that rebuttal evidence is not statutorily required where the defendant raises an affirmative defense,³⁰

²⁴ *Id.* at 237-38. In *Wiseman* the evidence presented consisted of the following: after a high school basketball game the defendant and his wife attended a party at a neighbor's apartment. While the defendant's wife was talking with the neighbor, Perry Joe Madden, the defendant entered the room and stated in a serious tone, "Perry, I'm sorry but I'm the jealous type." *Id.* at 237. The defendant and his wife then returned to their apartment. Sometime between 11:00 p.m. and 1:00 a.m. the defendant and his wife checked into a local motel. Later that evening the defendant was found scuffling with another guest on the balcony. The defendant's wife's body was found in the motel room. While being transported to jail the defendant pounded his head against the wire screen between the front and back seats in the cruiser. *Id.* at 236-37.

Both Madden and the motel clerk testified that the defendant had not acted strangely the night before the murder. Additionally, three psychiatrists testified that the defendant "lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *Id.* at 237. There was additional evidence presented regarding the defendant's past bouts with mental illness and previous psychiatric hospitalizations. *Id.*

²⁵ 198 S.W.2d 785 (Ky. 1947). See also *Waincott v. Commonwealth*, 562 S.W.2d 628 (Ky. 1978); *Edwards v. Commonwealth*, 554 S.W.2d 380 (Ky. 1977); *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963).

²⁶ 587 S.W.2d at 238.

²⁷ *Edwards v. Commonwealth*, 554 S.W.2d 380 (Ky. 1977); *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963); *Tunget v. Commonwealth*, 198 S.W.2d 785 (Ky. 1947).

²⁸ *Burgess v. Commonwealth*, 564 S.W.2d 532 (Ky. 1978); *Jewell v. Commonwealth*, 549 S.W.2d 807 (Ky. 1977); *Banks v. Commonwealth*, 141 S.W. 380 (Ky. 1911); *Abbott v. Commonwealth*, 55 S.W. 196 (Ky. 1900).

²⁹ 587 S.W.2d at 237-38.

³⁰ KRS § 500.070 (1975). The prosecution is required to present rebuttal evi-

this decision resolves the question of any judicially fashioned requirement that the prosecution must always present evidence in rebuttal of the defendant's evidence of his insanity.

Wiseman does, however, raise the issue of when the prosecution must in fact produce evidence in rebuttal of the defendant's evidence of his insanity. A test propounded by the Court for ruling on motions for a directed verdict of acquittal assists in resolving this issue:

Running throughout the decisions, and the slightly varying language in which the rule has been stated, the element of *reasonableness* is constant. If the totality of the evidence is such that the judge can conclude that reasonable minds might fairly find guilt beyond reasonable doubt, then the evidence is sufficient, albeit circumstantial. If the evidence cannot meet that test, it is insufficient.³¹

Therefore, the judge must decide whether on the basis of the evidence before the court a reasonable jury could believe to the exclusion of a reasonable doubt that the defendant is guilty of the offense charged. If the evidence before the court would allow the judge to reach this conclusion, then the Commonwealth is under no burden to rebut the defendant's proof of insanity. The principal advantage of such a test is that the court will be making a decision similar to the one required in responding to motions for directed verdicts for failure of the prosecution to prove an affirmative element of the crime;³² thus it will enable the court to utilize its past experience.

II. UNINTENTIONAL HOMICIDE AND THE DEFENSE OF DIMINISHED CAPACITY

In *Robinson v. Commonwealth*³³ the Kentucky Court of Appeals considered whether evidence of a defendant's mental retardation is admissible in a case of reckless homicide. Verna

dence where "the evidence tending to support the defense is of such probative force that in absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal." *Id.*

³¹ *Hodges v. Commonwealth*, 473 S.W.2d 811, 813-14 (Ky. 1971).

³² See, e.g., *Gailey v. Commonwealth*, 508 S.W.2d 574 (Ky. 1974); *Wheeler v. Commonwealth*, 472 S.W.2d 254 (Ky. 1971).

³³ 569 S.W.2d 183 (Ky. Ct. App. 1978).

Robinson was convicted of reckless homicide in connection with the death of her infant son. She was charged with killing him by failing to feed him properly and to obtain needed medical attention. At trial the circuit judge excluded evidence of the defendant's mental retardation on the ground that, because such evidence is admissible only for the purpose of proving an absence of intent, it was irrelevant when the alleged offense did not require intent. The court of appeals reversed, holding that evidence of the defendant's mental retardation could be presented for consideration by the jury.³⁴ Explaining its decision, the court stated that although the pertinent statute does not require subjective realization of intent, "[t]he failure of a person to perceive a danger when he is mentally incapable of perceiving it cannot be the basis for criminal liability."³⁵ If the prosecution's argument were taken to its logical conclusion, "total insanity would not be a defense in a case where the insane person failed to perceive a substantial risk and his failure amounted to a gross deviation from what a reasonable person would have perceived in the circumstances."³⁶

Robinson is a case of first impression in Kentucky. Its suggestion that evidence of a mental defect³⁷ may be presented by a defendant charged with unintentional homicide³⁸ implies a judicial dissatisfaction with the rigid objectiv-

³⁴ *Id.* at 185.

³⁵ *Id.*

³⁶ *Id.*

³⁷ The term "mental defect" as used here refers to cases of subnormal mentality. The term can also be used to refer to a condition of partial insanity or mental disorder. In short, "mental defect" can be used to refer to all degrees of mental condition which can exist between sanity and insanity. Note, *Criminal Law—"Partial Insanity" As a Means of Reducing an Intentional Homicide to Voluntary Manslaughter*, 37 Ky. L.J. 412 (1948-1949); Note, *The Effects of Mental Defects Amounting to Less Than Insanity Upon Criminal Responsibility*, 31 Ky. L.J. 83 (1942-1943).

³⁸ The Kentucky Penal Code defines two types of unintentional homicide: manslaughter in the second degree, KRS § 507.040 (1975), and reckless homicide, KRS § 507.050 (1975). Manslaughter in the second degree is the wanton killing of another. KRS § 507.040(1) (1975). The penal code defines wantonly as follows:

A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree

ity of the reasonable man standard in the context of criminal liability. The following discussion will examine this new development in the law and analyze its impact on unintentional homicide under the Kentucky Penal Code.

A. *Historical Judicial Treatment of Evidence of Mental Defect*

Use of evidence of a mental defect has existed in some form since the mid-nineteenth century and is variously labelled as the doctrine of partial insanity, diminished responsibility, diminished capacity, feeble-mindedness, mental weakness, or mental defect.³⁹ Regardless of the terminology used, the basic concept is the same. A person who is not insane, who can distinguish right from wrong and realize that a particular act is in violation of the law, and who does not suffer from an irresistible impulse, may yet be so manifestly deficient in his powers of deliberation, judgment and self-control⁴⁰ that he commits criminal acts despite his desire not to do so.⁴¹

Accepting the existence of this gray area between sanity

that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

KRS § 501.020(4) (1975). Reckless homicide is the reckless killing of another person.

KRS § 507.050(1) (1975). "Recklessly" is defined thusly:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

KRS § 501.020(4) (1975).

³⁹ R. PERKINS, CRIMINAL LAW 850 (2d ed. 1969); Weihofen, *Partial Insanity and Criminal Intent*, 24 ILL. L. REV. 505 (1930); Note, *Criminal Law: Abnormal Mental Condition and Diminished Criminal Responsibility*, 23 OKLA. L. REV. 93 (1970); Note, *Criminal Law—"Partial Insanity" As A Means of Reducing An Intentional Homicide To Voluntary Manslaughter*, 37 KY. L.J. 412 (1948-1949); Note, *The Effects of Mental Defects Amounting to Less Than Insanity Upon Criminal Responsibility*, 31 KY. L.J. 83 (1942-1943); Comment, *Criminal Law—Partial Insanity—Evidentiary Relevance Defined*, 16 RUTGERS L. REV. 174 (1961-62).

⁴⁰ Weihofen, *supra* note 39, at 507.

⁴¹ See Sparks, *"Diminished Responsibility" in Theory and Practice*, 27 MOD. L. REV. 9, 11 (1964).

and insanity, the law has developed several procedures for weighing a defendant's subnormal mental ability in determining his guilt and resultant punishment. Usually evidence of a defendant's deficient mental ability is used to negate the element of intent under the theory that such a defendant is incapable of possessing the requisite intent.⁴² The defense of diminished responsibility⁴³ is not a complete defense, however, because even if raised successfully it will not result in an acquittal.⁴⁴ Instead it serves to reduce the degree of the crime.⁴⁵ For example, evidence of a defendant's diminished capacity can negate the elements of intent and premeditation in a murder prosecution, thereby reducing the offense to voluntary manslaughter.⁴⁶

Some jurisdictions which reject the doctrine of diminished responsibility will allow evidence of the defendant's defective mental condition to be introduced for the purpose of mitigating punishment.⁴⁷ The Model Penal Code, for example, contains an optional provision allowing a reduction of the death penalty to life imprisonment where the defective mental condition is proved to be causally related to the crime.⁴⁸ Only a minority of states allowing evidence of the defendant's mental condition to be introduced have adopted the mitigation of punishment doctrine, possibly because of doubts

⁴² Weihofen, *supra* note 39, at 516-20.

⁴³ As noted in the text accompanying note 39, *supra*, the terminology in this area is varied. For purposes of this article the doctrine (or defense) of diminished responsibility means the use of evidence of the defendant's mental defect to negate the element of intent.

⁴⁴ Weihofen, *supra* note 39, at 516-20.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Annot., 22 A.L.R. 3d 1229, 1243-46 (1968).

⁴⁸ MODEL PENAL CODE § 4.02(2) (1962) provides:

Whenever the jury or the Court is authorized to determine or to recommend whether or not the defendant shall be sentenced to death or imprisonment upon conviction, evidence that the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect is admissible in favor of sentence of imprisonment.

The Model Penal Code alternatively provides: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." *Id.* § 4.02(1).

concerning the judiciary's ability to implement it effectively and the belief that such a task is more properly the function of the legislature.⁴⁹ Still, the mitigation theory has some support, as a few courts have chosen to implement both it and the doctrine of diminished capacity.⁵⁰

While diminished responsibility and mitigation of punishment conceptually are separate theories, in effect they are quite similar.⁵¹ Reducing the degree of the charged offense necessarily results in lessening the punishment. The advantage of the mitigation of punishment doctrine is that it allows receipt of evidence of a defendant's mental defect in cases in which the offense charged does not include a lesser degree.⁵² Further, even if the offense does have varying degrees of blameworthiness, once the existence of a mental defect is proved, the court may tailor the defendant's punishment to reflect the extent to which his mental defect caused the criminal behavior.⁵³ Thus the courts can structure the punishment to fit the particular criminal, a practice much in line with the modern development of criminal law.⁵⁴

1. *Historical Use of Evidence of Mental Defect in Kentucky*

The doctrine of diminished responsibility was first applied in Kentucky at the turn of the century. Early cases established that evidence of a defendant's mental defect, if proved to be causally related to the commission of the crime, could be used to reduce the degree of the offense by negating a necessary element of the higher crime.⁵⁵ For example, in

⁴⁹ Weihofen, *supra* note 39, at 521.

⁵⁰ Jurisdictions which have adopted both the doctrine of diminished responsibility and mitigation of punishment are New Jersey and Oregon. Annot., 22 A.L.R. 3d 1228, 1233-46 (1968).

⁵¹ Weihofen, *supra* note 39, at 523.

⁵² *See id.* at 524-25.

⁵³ *Id.*

⁵⁴ Weihofen, *supra* note 39, at 510.

⁵⁵ *See Note, Criminal Law—"Partial Insanity" as a Means of Reducing an Intentional Homicide to Voluntary Manslaughter*, 37 Ky. L.J. 419 (1948-49); Annot., 22 A.L.R.3d 1228 (1968); Annot., 44 A.L.R. 584, 586 (1926).

Mangrum v. Commonwealth,⁵⁶ the defendant was convicted of manslaughter. Counsel for the defense introduced evidence that the eighteen year old defendant had no more discretion than a child of thirteen or fourteen years of age, that he preferred the company of children, and that when given more than one task to perform he would forget everything. The Court of Appeals authorized an instruction that if the jury were to find the defendant mentally deficient, they were to weigh the fact in determining the degree of his guilt and any possible mitigation of his punishment.⁵⁷

In a similar case, *Rogers v. Commonwealth*,⁵⁸ a nineteen year old man was convicted of murder and sentenced to life imprisonment. The Court of Appeals reversed, holding that the defendant was entitled to an instruction of voluntary manslaughter. To determine whether malice existed, the jury could consider evidence of the defendant's condition, including testimony that he was feeble-minded.⁵⁹ Although this precedent existed, prior to the *Robinson* decision,⁶⁰ Kentucky always had restricted the use of evidence of a defendant's mental defects to intentional homicides.

2. *The Use of Evidence of Mental Defect in Other Jurisdictions*

In allowing juries to consider evidence of mental deficiency to reduce the grade or degree of the offense, Kentucky

⁵⁶ 39 S.W. 703 (Ky. 1897).

⁵⁷ The instruction given by the court was as follows:

The court instructs the jury, further, that if they believe from the evidence that defendant, at the time he shot the deceased, had not mind and intelligence sufficient to know right from wrong and to understand the nature and consequences of his acts, they should acquit the defendant on the ground of insanity; and, if they should acquit him on such ground, they should so state in their verdict; or, if they believe from the evidence that he was of weak or feeble mind, they should consider that fact in determining the degree of guilt and the measure of his punishment.

Id. at 704.

⁵⁸ 27 S.W. 813 (Ky. 1894).

⁵⁹ *Id.* at 814.

⁶⁰ See notes 33-36 *supra* and accompanying text for discussion of the *Robinson* facts.

is part of a significant minority.⁶¹ Twenty-three states now permit evidence of mental defects to be submitted to the jury under the doctrines of diminished responsibility and/or mitigation of punishment.⁶² In all but one of these jurisdictions, however, admission of the evidence is restricted to intentional crimes.⁶³ Only Kentucky has expanded the use of the concept to unintentional crimes.

The remarkable aspect of the use of evidence of the defendant's mental capacity is not that the number of jurisdictions permitting it is so small, but rather that the number is relatively large, since the doctrines of diminished responsibility and mitigation of punishment are not constitutionally mandated. In *Fisher v. United States*,⁶⁴ the United States Supreme Court held that lower courts had not erred in refusing to hear evidence of the defendant's mental capacity. Denoting the admission of such evidence as "a radical departure from the common law,"⁶⁵ the Court ruled that a decision on the admissibility of this evidence should be left to legislative discretion.⁶⁶

⁶¹ Note, *Criminal Law: Abnormal Mental Condition and Diminished Criminal Responsibility*, 27 OKLA. L. REV. 93, 98 (1970); Annot., 22 A.L.R.3d 1228 (1968).

⁶² Jurisdictions allowing evidence of mental deficiency to be admitted to determine the degree of the offense are: California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kentucky, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Utah, Virginia, Wisconsin, Wyoming. Annot., 22 A.L.R.3d 1228, 1238-43 (1968).

Jurisdictions which permit evidence of mental deficiency to be admitted for the possibility of mitigating punishment are: Arizona, Georgia, New Jersey, Oregon, Pennsylvania, Tennessee, Texas. *Id.* at 1243-46.

Jurisdictions which do not permit evidence of mental deficiency to be used to determine the offense are: Arizona, Arkansas, District of Columbia, Florida, Idaho, Maryland, Massachusetts, Missouri, New York, West Virginia. *Id.* at 1235-36.

⁶³ *Id.*

⁶⁴ 328 U.S. 463 (1946).

⁶⁵ *Id.* at 476.

⁶⁶ The instruction which the Supreme Court rejected was as follows:

If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of judging between right and wrong; yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question

The Supreme Court's decision undoubtedly curbed extensive development of the doctrines of diminished responsibility and mitigation of punishment. However, good arguments do exist for the continuation of both doctrines, for their expansion to unintentional homicides and for their use as a complete defense in some instances. The remaining sections of this survey will examine these possibilities.

B. *A Rationale for the Use of Evidence of Mental Defect in Cases of Unintentional Homicide*

It is generally accepted that the world cannot be divided neatly into two mutually exclusive groups, the sane and the insane.⁶⁷ Rather, there exists a state of "partial insanity"⁶⁸ between the two polar classifications. A common characteristic of these partially insane individuals is that while they are able to function in society, they occupy its fringes, performing the lowest paying and least desirable jobs.⁶⁹ Although they are perceived as having the ability to distinguish between right and wrong, it is also acknowledged that their lives are to a certain degree out of their control.⁷⁰ The minds of the par-

whether the act was murder or manslaughter.

Id. at 471 n.9.

⁶⁷ "No one doubts that there are more possible classifications of mentality than the sane and the insane." *Fisher v. United States*, 328 U.S. 463, 475 (1946).

⁶⁸ Weihofen, *supra* note 39, at 508.

[A]ll of us probably have met persons who were certainly not insane, but whom we nevertheless considered "a bit off," or "not quite bright," or perhaps quite clever and brilliant, but obviously crack-brained none the less. This great group of borderline types, popularly dismissed as fools, fanatics, fakers or failures, constitute what we have called the partial or the semi-insane.

Id.

⁶⁹ *Id.*

⁷⁰ It is characteristic of most of these abnormal conditions not merely that they may result in untoward or socially harmful behavior, but that they may interfere with the agent's ability to form or carry out his own conscious plans of action, and to maximize his own interests. A valid psychiatric diagnosis, based on an indeterminate minimum amount of "symptomatic" behavior of various recognized kinds, indicates that the person so described is similar to a class of people who have been similarly identified in the past, and who have been observed to persist in behaving inappropriately for no good reason, or who have been incapable of thinking or reasoning correctly or modifying or controlling their conduct or performing certain actions, de-

tially insane are like watches "which [are] always gaining or losing a little."⁷¹

Mentally retarded persons are included within this categorization of mental deficiency,⁷² although the term "partial insanity" is inappropriate to describe their condition. "Mental retardation has been defined as significantly sub-average general intellectual functioning which appears during the developmental period and produces inadequacy in adaptive behavior. It also includes the inability to fulfill the requirements of the social role."⁷³ This definition does not suggest any positive correlation between mental retardation and crime, and it has been argued that no such correlation exists.⁷⁴ In more simple terms, the mentally retarded person is perceived as being someone whose child-like mind and dulled powers of perception prevent him from fully and correctly understanding the requirements of mature adult life.⁷⁵

This inability of the partially insane and the mentally retarded to assess and comprehend the world around them correctly and to control their actions adequately is particularly important in cases of unintentional homicide where statutes define criminal culpability in terms of risk,⁷⁶ calculated by a standard of awareness.⁷⁷ Courts, however, traditionally have refused to admit evidence of the defendant's mental defects not amounting to insanity in cases of unintentional crimes.⁷⁸ They have reasoned that such evidence was irrelevant since

spite having the strongest incentives to do so. Sparks, "Diminished Responsibility" in *Theory and Practice*, 27 *Mod. L. Rev.* 9, 11 (1964).

⁷¹ GRASSET, *THE SEMI-INSANE AND THE SEMI-RESPONSIBLE* 392 (Jelliffe Eng. trans. 1907) (cited in Weihofen, *supra* note 39, at 509).

⁷² Note, *Criminal Law: Abnormal Mental Condition and Diminished Criminal Responsibility*, 23 *OKLA. L. REV.* 93, 95 (1970).

⁷³ *Id.*

⁷⁴ R. WOODY, *LEGAL ASPECTS OF MENTAL RETARDATION: A SEARCH FOR RELIABILITY* 43 (1974).

⁷⁵ *Id.* See Weihofen, *supra* note 39, at 508-09.

⁷⁶ See generally Lawson, *Kentucky Penal Code: The Culpable Mental States and Related Matters*, 61 *KY. L.J.* 657, 667 (1972-73).

⁷⁷ See note 38 *supra* for the text of the Kentucky Penal Code sections defining the terms "wantonly" and "recklessly".

⁷⁸ Note, *The Effects of Mental Defects Amounting to Less than Insanity Upon Criminal Responsibility*, 31 *KY. L.J.* 83, 85 (1942-43).

its only function is to negate the element of intent,⁷⁹ which by definition is not required to obtain a conviction for an unintentional crime.⁸⁰ If, however, a person lacks the requisite ability to formulate intent, why should it be presumed that such person is capable of perceiving a risk "of gross deviation from the standard of care that a reasonable person would observe in the situation,"⁸¹ and if he is able to perceive such a risk, is capable of not proceeding in the face of it? Inability to appreciate the risk constitutes a reckless mental state while incapacity to accomplish the latter results in wantonness.⁸² It seems the height of injustice to convict someone with a mental defect of unintentional homicide, since to do so is to hold the partially insane and the mentally retarded to the standard of care of a reasonable person, a standard which by definition they are unable to attain.

The introduction of evidence of the defendant's mental capacity will permit a jury to make its determination of guilt in a better informed fashion and consequently is a more humane approach. Despite the public popularity of the notion that persons committing like crimes should receive like punishment, such a theory rarely is accomplished in practice, as the jury system alone makes such a result impossible.⁸³ Because no two juries are alike, cases of unintentional homicide in which the conduct is essentially the same are likely to vary widely in result.⁸⁴ The jury system necessarily results in a cer-

⁷⁹ *Hill v. Commonwealth*, 40 S.W.2d 261 (Ky. 1931) (defendant carelessly fired pistol which resulted in death); *Held v. Commonwealth*, 208 S.W. 772 (Ky. 1919) (careless use of an automobile, a necessarily dangerous instrumentality, was defined as culpable); *Speaks v. Commonwealth*, 149 S.W. 850 (Ky. 1912) (defendant pointed pistol at decedent and snapped the trigger); *Brown v. Commonwealth*, 17 S.W. 220 (Ky. 1891) (defendant fired pistol in a room crowded with persons).

⁸⁰ Note, *supra* note 78, at 85.

⁸¹ KRS § 501.020(4) (1975) (definition of "recklessly").

⁸² See KRS § 501.020(3), (4) (1975).

⁸³ *Weihofen, supra* note 39, at 511.

⁸⁴ This has been illustrated dramatically by two homicide cases in Kentucky in the last few years. In *Hamilton v. Commonwealth*, 560 S.W.2d 539 (Ky. 1977), the defendant was convicted of wanton murder under KRS § 507.020(1)(b) (1975). Wanton murder requires a finding that the defendant perceived and disregarded a risk to life, acting with extreme indifference to life. The jury convicted the defendant under this statute for driving while drunk, at night with his lights off at a high rate of speed. The defendant ran a red light at an intersection, killing a woman.

tain amount of arbitrariness, and if that factor is to be minimized, jurors need to have as much information as possible upon which to base their determination of guilt.

2. *Evidence of Mental Defect and the Theory of Criminal Punishment*

Although fairness to an individual criminal offender is an important goal of the criminal law, it is not the only purpose. Indeed, the vast majority of citizens would probably consider that goal of relatively minor importance. Some commentators have espoused that, "[t]he broad purposes of the criminal law are . . . to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable."⁸⁵ The law accomplishes this end through the mechanism of punishment; that is, an individual is punished for improper behavior even though his good behavior is not necessarily rewarded.⁸⁶ Since punishment satisfies such an important function, it is necessary to examine how the admission of evidence of mental defect in cases of unintentional homicide affects it.

Modern legal theorists hypothesize that punishment serves to control criminal behavior in a variety of ways.⁸⁷ Punishment deters criminal behavior,⁸⁸ and incarceration serves to isolate convicted criminals from society, preventing them from committing other crimes.⁸⁹ During the period of incarceration, the justice system seeks to rehabilitate the criminal

In an unreported case involving William Wilson, a truck driver, the jury returned a verdict for acquittal. Wilson was transporting gasoline from Louisville to Beattyville, averaging about 70 m.p.h. The government theorized that the truck suffered "brake fade" whereby brakes overheat from excessive use as when the vehicle is driven at high speeds on a winding road. The prosecution further hypothesized that the driver took the truck over the hill in sixth gear. As the truck roared down the hill, a train was moving to cross the road at the bottom of the hill. The truck barely missed the train, crossed the tracks, flipped over and exploded, killing seven persons. Interview with Ray Larson, Sam Isaacs and Barbara Edelman, Kentucky Attorney General's Office in Frankfort (1979).

⁸⁵ W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 21 (1972).

⁸⁶ *Id.*

⁸⁷ *Id.* at 22-24.

⁸⁸ *Id.* at 22.

⁸⁹ *Id.*

offender, while publicity resulting from the trial and conviction serves to educate the public to the consequences of criminal behavior.⁹⁰ Finally, punishment is thought to satisfy the victim's desire for retribution.⁹¹

The question arises, however, whether any of these purposes can be accomplished in the case of the partially insane or mentally retarded offender. If a person commits a criminal act because he was either unable to control his behavior or was unable to perceive accurately what he was required to do, it is doubtful that through punishing him the criminal justice system accomplishes any of its goals, except perhaps retribution and physical restraint. Because the origin of his actions is beyond his control, punishment will not deter the mentally deficient offender.⁹² In addition, it is doubtful that a mentally defective offender's rehabilitation needs can be met in a penitentiary. Finally, the goals of public education and deterrence can be equally well served by punishing other more culpable offenders.

If partially insane or mentally retarded offenders are not punished as ordinary criminals, what is to be done with them? This aspect of the problem subjects the doctrines of diminished responsibility and mitigation of punishment to their severest criticism, for the ultimate effect of both procedures is to return to the street in a shortened period of time the very offender society is least likely to be able to deter and control.⁹³ The development of some program of treatment for these defendants is imperative, although the lack of success of such programs in cases of insane defendants is not very encouraging.⁹⁴

⁹⁰ *Id.* at 23.

⁹¹ *Id.* at 24.

⁹² "Abnormal mental condition is not volitional. Such conditions are acquired by injury, illness or through genetic defects." Note, *supra* note 72, at 98.

⁹³ Weihofen, *supra* note 39, at 525-26.

⁹⁴ Some scholars who have studied the use of psychotherapy in the treatment of criminal offenders are optimistic about the future success of such programs. But for the present they are forced to concede that "[i]n spite of the enormous effort that has gone into treatment of the mentally ill, there is no scientific proof of the effectiveness of psychotherapy . . . [and] there are even less objective data to prove the effectiveness of psychotherapy with offenders than there are with the mentally ill." S. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 338-39 (1967).

The solution to dealing with the partially insane defendant is not simple, but in some cases, viable alternatives are available. The *Robinson* case provides a good example. Upon a finding by the court that Ms. Robinson was mentally incapable of caring for her children, a court order could be obtained terminating her parental rights and declaring any children in her custody to be wards of the state.⁹⁵ If the defendant's character was nonviolent, this possibility coupled with some form of care or treatment program might well provide an effective solution.

3. *Judicial Problems with the Admission of Evidence of Mental Defects*

A final problem with the admission of evidence of mental defects is that the courts may not be the proper forum for determining the proper societal response to mentally defective persons' criminal behavior.⁹⁶ It is arguable that the legislature,

The difficulties in handling the psychopathic personality are enormous. The problems stem not only from a lack of money, sufficient facilities, and time, but also from the tremendous complexity of the endeavor. The criminal personality is seldom warmly receptive to either his therapist or his treatment program.

[P]sychopathy may be considered as basically a remedial condition. However, the complexities introduced by the peculiar sociopsychological relations of the psychopath to his society make therapy difficult or even hazardous. Social defenses are so strongly entrenched, reality circumstances are so infiltrated with negative attitudes, and such infinite patience and resourcefulness are required of the therapist that spectacular results cannot be expected in the treatment of this socially destructive group of neurotically ill persons.

W. BROMBERG, *CRIME AND THE MIND* 198 (1948).

⁹⁵ KRS § 199.600 (1977).

⁹⁶ The problem of classifying, assessing and analyzing the results of the application of modern psychiatry to administration of criminal law as it relates to gradations of punishment according to the relative intelligence of the defendant is beyond the competence of the judiciary. Courts are neither trained nor equipped for this delicate and important task. The basic framework for sentences of punishment must be established by the legislative branch. Indeed, one can hardly conceive of a process less suited to formulating general rules in this sensitive area, than an adversary proceeding. That must be done by long range studies by competent public and quasi-public entities and by legislative committees with trained staffs aided by objective technical and scientific witnesses who can deal with all aspects of the problem, not confined as we are to the facts of an individual case. In this process legislative committees can call upon the best scientific re-

which can take advantage of a wide variety of informational sources, is better equipped to make such decisions.⁹⁷ Whatever the force of this argument in other jurisdictions, it has minimal validity in Kentucky, where courts have been making these very findings in cases of intentional homicide for years. Furthermore, it is anomalous to contend that factual considerations of a defendant's mental state are too complex for a jury in cases of partial insanity or mental retardation when these same problems are inherent in the entire insanity issue.⁹⁸ A decision on the existence of either insanity or some lesser abnormal mental condition requires a determination of whether the abnormal mental state was causally related to the commission of the offense,⁹⁹ which requires reliance on experts to a substantial degree.¹⁰⁰ If the courts are competent to make these judgments of insanity in cases of intentional homicide, they are no less competent to make decisions of partial insanity.

CONCLUSION

Admitting evidence of a defendant's mental defect in cases of unintentional homicide possesses many positive features. Most significant is the resulting fairness to the defendant, who should not be held accountable for actions that were obviously dangerous to the average individual but which he was mentally incapable of perceiving as such. It is not incongruous to believe that Ms. Robinson sincerely meant to care for her child yet did not possess the mental ability to effect the result she desired. If this was truly the case, she should not be convicted of reckless homicide and imprisoned.

The admission of evidence of a mental defect is also important because incarceration of partially insane or mentally retarded offenders probably benefits neither society nor the

sources of the country without limit as has been done in studies conducted by Royal Commissions in England and Canada.
Stewart v. United States, 275 F.2d 617, 624 (D.C. Cir. 1960).

⁹⁷ *Id.*

⁹⁸ See Weihofen, *supra* note 39, at 521-23.

⁹⁹ *Id.* at 521.

¹⁰⁰ *Id.* at 522.

offender. Further, it is unlikely that the judicial process will be unduly burdened by the introduction of evidence of partial insanity and mental retardation. Juries have been deciding complex questions of insanity for years. Questions of partial insanity and mental retardation should pose no greater problems.

The real criticism to the admission of this evidence is that it unleashes a class of persons who are partially, and in some instances perhaps fully, "judgment-proof". These persons may commit crimes almost with impunity because the court, in its sense of justice, will not hold them blameworthy, yet their mental condition is something that society is at present without sufficient knowledge or funds either to control or improve. The problem is a difficult one—one in which it is not possible to provide a definitive answer. A partial solution, fairness to the defendant, seems at present the only solution.