Kentucky Law Journal

Volume 67 | Issue 3 Article 5

1979

Kentucky Law Survey: Criminal Law

Ellen Liebman Brice
University of Kentucky

Kenneth Taylor
University of Kentucky

Criminal Law

BY ELLEN LIEBMAN BRICE* AND KENNETH TAYLOR**

INTRODUCTION

The authors of this survey article have taken the liberty of departing from the traditional format of simply synopsizing a year's worth of cases in a subject area. Instead, the Kentucky Supreme Court and Court of Appeals cases decided during the survey year which dealt with criminal law issues were read with an eye toward selecting several specific problem areas deserving extensive research and comment. It is hoped that the in-depth treatment given to those areas selected will compensate for the lack of comprehensiveness inherent in this approach.

Section I represents an attempt to rationalize the Court's recent decision upholding a murder conviction arising from an automobile collision. Section II discusses the issue of what constitutes a deadly weapon under the new penal code definition. Section III analyzes that section of the rape statute dealing with the mentally defective victim.

I.

On February 15, 1976, Danny Hamilton murdered Patsy Ann Davidson. He didn't shoot, stab, or strangle her. On the contrary, he didn't intend to harm her. In fact, he didn't know of her presence in the vicinity of the crime immediately prior to its occurrence. Nonetheless, a jury found that Hamilton had acted wantonly and under "circumstances manifesting extreme indifference to human life."[1] Under the Kentucky Penal Code such conduct is murder[2] and a capital offense.[3]

There is little doubt that Hamilton's conduct was unreasonable and posed a threat to human life. He was inebriated, driving at a high rate of speed within the city limits, and was

---

* J.D. 1979, University of Kentucky.

** J.D. 1979, University of Kentucky.

The authors acknowledge the valuable assistance of Robert Gene Lawson, Professor of Law, University of Kentucky.

[1] Hamilton v. Commonwealth, 560 S.W.2d 539, 541 (Ky. 1978) (*quoting* KY. REV. STAT. § 507.020(1)(b) (Supp. 1978) [hereinafter cited as KRS].

[2] KRS § 507.020(1)(b) (Supp. 1978).

[3] KRS § 507.020(2) (Supp. 1978).

recklessly dodging traffic in his path.[4] This extreme course of conduct culminated in a fatal accident when Hamilton ignored the red light at an intersection and collided with the victim's automobile.[5]

While the extreme and outrageous nature of Hamilton's conduct offends almost everyone's sense of propriety, his "murder" conviction has undoubtedly raised some eyebrows. The unlawfulness of his action is a foregone conclusion, but its characterization as the highest degree of criminal homicide does not enjoy such unanimity.[6] Is the result in *Hamilton* justifiable, especially with the death penalty looming in the background?

The inequitable result in *Hamilton* raises two questions. The first question concerns the propriety of the jury verdict; the second centers on the murder statute. If the jury was incorrect in finding both wantonness and extreme indifference to human life, then Hamilton should have been convicted of second degree manslaughter[7] or reckless homicide.[8] On the other hand, if the verdict was correct, the statute itself becomes suspect. Perhaps the type of homicide described in KRS § 507.020(1)(b) should be defined as second degree murder or included under first degree manslaughter. Maybe a distinction in penalty should be made between wilful murders and unintentional ones. Both suggestions will be examined in an attempt to rationalize the *Hamilton* result.

To fully understand murder under KRS § 507.020(1)(b), it is necessary to consider it in relation to Kentucky's statutory framework of homicide. The 1975 Kentucky Penal Code replaced a myriad of special statutory homicide offenses[9] and a

---

[4] Hamilton v. Commonwealth, 560 S.W.2d 539, 540-41 (Ky. 1978).

[5] *Id.*

[6] *See* notes 66-69 *infra* for various approaches to the classification of murders.

[7] KRS § 507.040 (1975) (wantonly causing the death of another).

[8] KRS § 507.050 (1975) (recklessly causing the death of another).

[9] 1952 Ky. Acts, ch. 51 (death occurring as a result of negligently operating a motor vehicle); 1924 Ky. Acts, ch. 50, § 1 (amending 1893 Ky. Acts, ch. 171, § 211) (reckless shooting or throwing of missile into train, station, or motor vehicle); 1920 Ky. Acts, ch. 100, § 8 (homicide occurring in the course of criminal syndicalism or sedition); 1910 Ky. Acts, ch. 58, § 3 (homicide occurring in the course of abortion); 1893 Ky. Acts, ch. 182, § 24 (homicide occurring in course of striking, stabbing, or shooting); 1892 Ky. Acts, ch. 42 (homicide resulting from obstruction of road).

long line of court decisions defining various types of conduct as homicide under a general statute[10] with a comprehensive scheme which defines six types of homicide.[11] These six types of homicide comprise four offenses: murder[12] (two types), first degree manslaughter[13] (two types), second degree manslaughter,[14] and reckless homicide.[15]

Upon examination of the six types of homicide it is apparent that three of them (negligent murder, second degree manslaughter, and reckless homicide) are strikingly similar. It is extremely difficult for the lay reader to discern an appreciable difference between the mental states involved in each. Because these three offenses are closely related they must be examined together to understand the function of any one of them.

These three homicide offenses involve conduct creating a "substantial and unjustifiable risk" that death will result.[16] The distinguishing factor between any two of these offenses is the actor's mental state. Reckless homicide is committed by acting recklessly,[17] defined as the failure to perceive the risk of death.[18] Second degree manslaughter requires "wantonness",[19] defined as a conscious disregard of a known risk.[20] Finally,

---

[10] 1962 Ky. Acts, ch. 90, § 1 (involuntary manslaughter); 1893 Ky. Acts, ch. 182, § 22 (murder); 1893 Ky. Acts, ch. 182, § 23 (voluntary manslaughter).

[11] KRS § 507.020-.050 (1975).

[12] KRS § 507.020(1)(a) provides that "[a] person is guilty of murder when with intent to cause the death of another he causes the death of such person or of a third person." The second type of murder, negligent murder, is defined as: "A person is guilty of murder when under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." KRS § 507.020(1)(b) (1975).

[13] A person is guilty of manslaughter in the first degree when with intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance. . . .

KRS § 507.030(1)(a)-(b) (1975).

[14] Manslaughter in the second degree is defined by KRS § 507.040(1) as "wantonly . . . [causing] the death of another person."

[15] KRS § 507.050(1) provides that "[a] person is guilty of reckless homicide when, with recklessness he causes the death of another person."

[16] KRS § 501.020(3), .020(4) (1975).

[17] KRS § 507.050 (1975).

[18] KRS § 501.020(4) (1975).

[19] KRS § 507.040 (1975).

[20] KRS § 501.020(3) (1975).

negligent murder results from a mental state which is both wanton and extremely indifferent to human life.[21] Extreme indifference to human life is not defined in the penal code.

The preceding discussion demonstrates that the nebulous concept of "extreme indifference to human life" represents a crucial determination. Exactly what type of conduct was contemplated by the drafters of the penal code by this phrase? It is generally understood that "extreme indifferences to human life" was meant to incorporate into the murder statute the widely recognized concept of the "depraved heart" killing, or negligent murder, as it is sometimes called.[22] This concept is found in the early English common law and has been picked up by the common law of practically every American jurisdiction.[23] More recently it has been incorporated into the homicide statutes of many states.[24] The various American jurisdictions have used different nomenclature[25] and have treated the offense differently with regard to degree of homicide or severity of punishment,[26] but its recognition in some form is widespread.[27] Because the concept of negligent murder is wide-

[21] KRS § 507.020(1)(b) (1975). It should be noted that for any of these offenses just discussed, the defendant's disregard of a known risk or failure to perceive the risk must constitute a gross deviation from the standard of conduct that a reasonable person would observe under the circumstances, KRS § 501.020(3) and (4) (1975). This is designed to protect defendants who take chances for legitimate purposes, such as driving fast to get an injured person to the hospital.

[22] K. BRICKEY, KENTUCKY CRIMINAL LAW § 8.02 at 75 (1974); *See* R. MORELAND, LAW OF HOMICIDE 31-41, 213-16 (1952).

[23] R. MORELAND, *supra* note 22, at 31.

[24] *Id.*

[25] *E.g.*, killing with "implied malice," Hill v. State, 251 N.E.2d 429 (Ind. 1969); Cockrell v. State, 117 S.W.2d 1105, 1108 (Tex. Crim. App. 1938); killing with "universal malice," Langford v. State, 354 So.2d 297 (Ala. Crim. App. 1977); death resulting from doing an "eminently dangerous act," FLA. STAT. ANN. § 782.04(2) (West 1976); killing which evinces a "depraved mind," ALA. CODE tit. 14, § 13-1-70 (1975); killing which evinces "depraved indifference," People v. LeGrand, 402 N.Y.S.2d 209 (App. Div. 1978) and DEL. CODE tit. 11, § 635 (1974); "wanton and wicked disregard for human life," Commonwealth v. Stock, 345 A.2d 654 (Pa. 1975); "depravity," Thomas v. United States, 419 F.2d 1203 (D.C. Cir. 1969).

[26] *See generally* R. MORELAND, *supra* note 22, at 213-16 for a discussion of various statutory treatments of this offense. Negligent murder has been treated as first degree murder, COLO. REV. STAT. § 18-3-102(1)(d) (1973), second degree murder, OKLA. STAT. tit. 21, § 701.8(1) (Supp. 1978), and even third degree murder, MINN. STAT. ANN. § 609.195 (West 1970).

[27] *Id.* at 213-16.

spread, its application in other jurisdictions sheds some light on the present inquiry.

Before comparing *Hamilton* with other cases, however, it is necessary to isolate and list the potentially controlling factors in the jury's determination that his behavior manifested an extreme indifference to human life. Because driving an automobile is such a common act there is considerable difficulty in determining the driver's mental state from his actions. Consequently, any number of evidentiary facts, or even the defendant's remorsefulness or demeanor at trial, could be influential in the determination. However, for comparison purposes, as well as for prediction of future fact patterns which will support a verdict of murder on appeal, certain facts and circumstances surrounding the *Hamilton* case can be listed.

Hamilton involved intoxication while driving, excessive speed, recklessness while driving, and disregard of a traffic signal. Also important was the fact that the collision occurred at a downtown intersection.[28] In addition, Hamilton's conduct before and immediately after the accident may have been relevant in determining his mental state at the time of the accident since the Kentucky Supreme Court noted in its opinion that Hamilton had been drunk and rowdy earlier that night and was erratic and unremorseful after the accident.[29]

Characterizing certain vehicle-related killings as negligent murder is not unprecedented, but rather is supported by a long line of authority.[30] Logically, there is no reason to distinguish an automobile from any other instrument of death. It is the actor's mental state that should govern his culpability, not the particular means used to kill. However, as the following cases will demonstrate, different juries, presented with facts similar to those in *Hamilton,* have reached different conclusions regarding the driver's mental state.

A case from the District of Columbia involving similar, but probably more outrageous, conduct by the defendant was *Nesterlode v. United States.*[31] The defendant was extremely intoxicated and drove "through traffic lights and at a reckless

---

[28] 560 S.W.2d at 540-41.

[29] 560 S.W.2d at 541.

[30] *See* text accompanying notes 31-42 *infra.*

[31] 122 F.2d 56 (D.C. Cir. 1941).

speed over the busiest thoroughfares in the City of Washington", striking and killing two pedestrians.[32] The resulting second degree murder conviction was upheld.

Two Georgia appellate decisions upheld murder convictions resulting from the operation of an automobile where the driver's actions were found to be "unlawful and . . . naturally tending to destroy human life."[33] In *Wallace v. State*[34] the defendant was intoxicated and driving rapidly when he struck and killed a policeman on a motorcycle. The defendant in *Geter v. State,*[35] while driving under the influence of alcohol, crossed the yellow line just below the crest of a hill and attempted to pass three cars, resulting in a head-on collision which killed three persons.

For many years, Texas, like Kentucky, had one degree of murder. However, unintentional killings could still result in a murder conviction because malice could sometimes be inferred from a "high degree of recklessness and disregard for the rights of others."[36] Such was the result in *Cockrell v. State,*[37] where the defendant, while intoxicated, drove recklessly and at a high speed, striking two pedestrians who were walking along the highway.[38]

The Pennsylvania Supreme Court sustained a second degree murder conviction in *Commonwealth v. Taylor,*[39] where the defendant struck two bicycle riders with his automobile. In the court's words:

> The intoxicated condition of the driver, the excessive rate of speed which he was travelling, the distance the bodies and bicycles were propelled upon impact, his awareness that this was an area where children were likely to traverse, the absence of any physical or climatic condition which would explain or contribute to the happening of the accident and the

---

[32] *Id.* at 59.

[33] Geter v. State, 132 S.E.2d 30 (Ga. 1963).

[34] 115 S.E.2d 338 (Ga. 1960).

[35] 132 S.E.2d 30 (Ga. 1963).

[36] Cockrell v. State, 117 S.W.2d 1105, 1108 (Tex. Crim. App. 1938).

[37] 117 S.W.2d 1105 (Tex. Crim. App. 1938).

[38] *Id.* at 1106-07. *See also* Dorsche v. State, 514 S.W.2d 755 (Tex. Crim. App. 1974); Duff v. State, 503 S.W.2d 785 (Tex. Crim. App. 1974); Boening v. State, 422 S.W.2d 469 (Tex. Crim. App. 1967).

[39] 337 A.2d 545 (Pa. 1975).

> appellant's failure to stop immediately after impact, all exhibit the wickedness of disposition, the hardness of heart, cruelty and recklessness associated with murder in the second degree.[40]

Other courts, however, have refused to uphold murder convictions, when presented with similar fact patterns. The Alabama Supreme Court, in *Langford v. State*,[41] held that drunken, reckless driving alone will not support a first degree murder conviction, despite the Alabama statute which includes the "depraved mind" killing in first degree murder.[42] The court found that the defendant "determined only to drive upon the highway after drinking."[43] There was no showing that the defendant realized that death was likely to result.[44]

In an Arizona case, *State v. Chalmers*,[45] the defendant's speeding in the left lane resulted in a fatal head-on collision. The court reversed a murder conviction saying that such conduct might constitute gross negligence and a disregard for the safety of the defendant's passengers, but it did not evince "an abandoned and malignant heart" so as to constitute murder.[46]

Two Georgia cases involving very similar conduct resulted in reversals of murder convictions. In both *Huntsinger v. State*[47] and *Wright v. State*[48] the defendants lost control of their automobiles while attempting to negotiate a curve at an extremely high rate of speed and struck and killed pedestrians. In both cases the Georgia Supreme Court overturned murder convictions based upon allegations of an act which "naturally tends to destroy the life of a human being."[49] In *Huntsinger*, the court specifically held that the evidence did not support the finding of such an act. In *Wright*, the court found in the record sufficient evidence of the lawful operation of the vehicle so as

---

[40] *Id.* at 548.
[41] 354 So.2d 313 (Ala. 1978).
[42] ALA. CODE tit. 13, § 13-1-70 (1975).
[43] 354 So.2d at 315.
[44] *Id.*
[45] 411 P.2d 448 (Ariz. 1966).
[46] *Id.*
[47] 36 S.E.2d 92 (Ga. 1945).
[48] 141 S.E. 903 (Ga. 1928).
[49] 36 S.E.2d at 95, 100; 141 S.E. at 904, 905.

to make the failure to instruct the jury on involuntary manslaughter error.[50] A Texas case, *Freeman v. State,*[51] likewise held that drunken, reckless driving was insufficient to support a murder conviction where the defendant had been driving while intoxicated and weaved across the road, causing a fatal head-on collision.

Finally, an early Pennsylvania case, *Commonwealth v. McLaughlin,*[52] is of interest here because of Hamilton's unremorseful behavior after the accident. In *McLaughlin* the Court stated that despite the defendant's driving while intoxicated, his courageous attempts to render aid to his victims after the accident negated the imputation to him of a hardened heart.[53]

In light of these cases, it is apparent that the verdict in *Hamilton* is not unique or anomalous. Though it is clear that the contrary result would find support in the case law, many juries and courts have found that exaggerated disregard for safety on the highways constitutes negligent murder.

Assuming that the jury's verdict in *Hamilton* conforms to the present law of homicide, any remaining discomfort with the decision must emanate from the law itself. Therefore, further scrutiny should be directed toward the policy behind categorizing negligent murder as the most serious degree of homicide.

By providing for only one degree of murder, which includes the depraved heart type of killing, Kentucky has followed the lead of the Model Penal Code.[54] The justifications for this treatment, given by the commentators to the Model Penal Code, were incorporated into the Kentucky commentary to the murder statute:

> There is a kind of wanton homicide that cannot fairly be distinguished . . . from homicides committed intentionally. Wantonness . . . presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for

---

[50] 36 S.E.2d at 100; 141 S.E. at 905.

[51] 27 S.W.2d 162 (Tex. Crim. App. 1930).

[52] 142 A. 213 (Pa. 1928).

[53] *Id.* at 215.

[54] KY. REV. STAT. ANN. § 507.020 note (Baldwin 1975) (*quoting* MODEL PENAL CODE § 201.2, Comment (Tent. Draft No. 9, 1960).

> risk creation may be infinite in variation, some formula is needed to identify the case where wantonness should be assimilated to intention. The conception that the draft employs is that of extreme indifference to the value of human life.[55]

The original murder statute in the Kentucky Penal Code provided for more severe punishments for some murders than it did for negligent murder. The death penalty was reserved for specifically enumerated murders,[56] such as the intentional killing of a police officer[57] or prison guard.[58] All other murders were Class A felonies[59] punishable by imprisonment for twenty years to life.[60] The distinction between capital and noncapital murder did not rest solely upon the presence of an intent to kill, but all enumerated capital murder offenses expressly required such intent. In this manner the inadvertent killer was not subject to the death penalty.[61] In 1976, this penalty distinction was removed from the murder statute.[62] Every murder became a capital offense, even though alternative punishments, in addition to death, were provided for capital offenses.[63] Today, negligent murder is classified as the highest degree of homicide under Kentucky law.

Kentucky is not the only jurisdiction to treat negligent murder as the highest degree of homicide. Several states include the depraved heart killing within one degree of murder.[64] A few states with a bifurcated murder offense place negligent murder under first degree murder.[65]

Though Kentucky's classification of the depraved heart murder as the highest degree of homicide is supported by the Model Penal Code, and a number of other jurisdictions, it is

---

[55] *Id.*

[56] KRS § 507.020 (1975).

[57] KRS § 507.020(f) (1975).

[58] KRS § 507.020(c) (1975).

[59] 1964 Ky. Acts ch. 406, § 61 (repealed 1976).

[60] KRS § 532.060(2)(a) (1975).

[61] 1974 Ky. Acts ch. 406, § 61 (repealed 1976).

[62] 1976 Ky. Acts ch. 183, § 1; 1976 Ky. Acts (Ex. Sess.) ch. 15, § 1.

[63] KRS § 532.035 (Supp. 1978). Capital offenses are punishable by death, life imprisonment, or a prison term in excess of 20 years.

[64] *E.g.*, ILL. REV. STAT. ch. 38, § 9-1(2) (Supp. 1978). This subsection of the single murder statute speaks in terms of conduct creating a strong probability of death, which is generally equivalent to an imminently dangerous act or the depraved heart killing.

[65] *E.g.*, ALA. CODE § 13-1-70 (1975); COLO. REV. STAT. § 18-3-102(1)(d).

clearly a minority approach. Most jurisdictions treat such killings as second degree murder, either by statute[66] or by case law[67] or by a combination of both.[68] At least one jurisdiction provides for this type homicide under a third degree of murder.[69]

The *Hamilton* case should awaken the state legislature to the potential for excessive penalty for reckless and wanton conduct charged and prosecuted under subsection (1)(b) of the murder statute. The verdict in *Hamilton* is defensible, especially in light of the jury's moderation in awarding a prison sentence. However, the case brings into focus the significance of the undefined legal phrase "extreme indifference to human life." The concept may prove too much for an unbridled jury to deal with judiciously. The depraved heart killing should not be a capital offense and would be better placed into a new, separate second degree of murder.

II.

The construction of "deadly weapon" for purposes of certain criminal offenses has been consistent since *Merritt v. Commonwealth*[70] was decided in 1965.[71] There the Kentucky

---

[66] This approach is characterized by a statutory scheme in which murder is bifurcated into degrees and second degree murder consists of, among other things the "depraved mind" or "cruel, wicked, and depraved indifference" killings. *E.g.*, DEL. CODE tit. 11, § 635 (1974); FLA. STAT. § 782.04(2) (1976) (This section specifically includes the doing of an "imminently dangerous act evincing a depraved mind regardless of human life" in second degree murder.); MICH. COMP. LAWS §§ 750.316 - 750.317 (1970); N.J. REV. STAT. § 2A:113-2 (1969); N.Y. PENAL LAW § 125.25 (McKinney 1975); OKLA. STAT. tit. 21 § 701.8(1) (Supp. 1978); UTAH CODE ANN. § 76-5-203 (1977); WISC. STAT. § 940.02 (Supp. 1978).

[67] In this approach only one degree of murder is provided for by statute, but case law has supplied the bifurcation with the depraved heart killing being placed with second degree murder. *E.g.*, CAL. PEN. CODE § 187-188 (West 1970); People v. Wallace, 37 P.2d 1053 (Cal. 1935); People v. Butts, 46 Cal. Rptr. 362 (1965).

[68] This approach is typically characterized by a bifurcated murder statute based upon the presence or absence of premeditation or malice. As at common law, first degree murder is defined as killing with malice and premeditation. Second degree murder is killing with malice but without premeditation. By case law, these jurisdictions have construed the depraved heart killings as involving "implied malice" but because there exists no premeditation, the offense is second degree, not first degree, murder. *E.g.*, Thomas v. U.S., 419 F.2d 1203 (D.C. Cir. 1969); Hill v. State, 251 N.E.2d 429 (Ind. 1969); D.C. CODE § 22-2403 (1973); IND. CODE § 10-3404 (Supp. 1975).

[69] MINN. STAT. § 609.195 (Supp. 1978).

[70] 386 S.W.2d 727 (Ky. 1965).

[71] In a case which followed soon after *Merritt*, the Court apparently ignored it and

Court of Appeals, in defining a "deadly weapon," said that "any object which is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one."[72] Kentucky's high court, now the Kentucky Supreme Court, posited in 1977 that the definition of "deadly weapon" was well settled and that it was "not disposed to belabor this question further."[73]

When the new penal code took effect in 1975, the law of deadly weapons changed, at least literally. The statutory scheme now includes a definitional section in which seven categories of weapons are delineated as deadly *per se*,[74] including "any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."[75] Thus it appears that the legislature has rejected *Merritt* and mandated that a toy pistol is not a deadly weapon. However, a palpable contradiction exists because the Commentary to the Final Draft of the Penal Code stresses that the legislature intended to leave *Merritt* intact.[76] Consequently, the Court has relied heavily upon this language in recent cases to justify its continued adherence to *Merritt*.[77] Before a proper analysis of

based its decision on prior law. In a trial for carrying a concealed deadly weapon, there was conflicting testimony as to whether the pistol in question would fire. Although the Court had rejected the importance of this factor in *Merritt*, it held that "there was sufficient evidence to generate a belief as well as disbelief that the pistol would fire. Consequently, it was the duty of the court to give an affirmative defense instruction." Stevens v. Commonwealth, 406 S.W.2d 723, 724 (Ky. 1966). The *Stevens* court made no mention of *Merritt*, possibly because *Merritt* limited its holding to the robbery statute. However, it will be demonstrated that this distinction is no longer made.

[72] Merritt v. Commonwealth, 386 S.W.2d 727, 729 (Ky. 1965). The victim was only able to testify that the robber displayed "what appeared to be a pistol," and the Court acknowledged that it might have been a "toy or simulated weapon rather than a deadly weapon in fact." *Id.* at 728-29.

[73] Mishler v. Commonwealth, 556 S.W.2d 676, 680 (Ky. 1977).

[74] KRS § 500.080(4) (Supp. 1978).

[75] *Id.*

[76] In describing what constitutes a "deadly weapon," the Court of Appeals recently ruled that any object can be a deadly weapon if intended by its user to convince a victim that it is deadly and if the victim is in fact convinced. Merritt v. Commonwealth, 386 S.W.2d 727 (Ky. 1965). In that case, the defendant was convicted of armed robbery despite the fact that the "weapon" he used may have been a toy pistol. There is no intention to change this decision through the provisions of this chapter.

LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE, Final Draft, Commentary 181 (1971).

[77] *E.g.*, Hicks v. Commonwealth, 550 S.W.2d 480 (Ky. 1977); Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1977).

the post-1975 cases may be made, however, it is necessary to consider the historical development of the law of deadly weapons.[78]

Approximately thirty years ago in *Jarvis v. Commonwealth,*[79] Kentucky's highest court construed the deadly weapon requirement of the statute prohibiting carrying such a weapon concealed on the person. The weapon in question was one without a cylinder, and hence incapable of firing. The Court, persuaded by cases from a number of other jurisdictions, concluded that "the better view" is "that a pistol or revolver without an essential part, and consequently incapable of being used as a firearm, is not a deadly weapon."[80] Several years later, in *Couch v. Commonwealth,*[81] it was argued that *Jarvis* mandated that the Commonwealth must prove that the pistol was in working order as part of its case in chief. The Court disagreed. It held that "[a] pistol is a deadly weapon per se" and that the defective condition of the gun is "an affirmative defense which the defendant [is] called on to prove."[82] Thus the Court broadened *Jarvis* to mean that a deadly weapon must in fact be deadly, but it will be presumed to be so unless shown to be otherwise by the accused.

The first serious modification of this construction appeared six years later in *Commonwealth v. Harris.*[83] In *Harris,* although the weapon was indeed capable of firing, it was not loaded, nor was the defendant in possession of any ammunition at the time. Recalling its decision in *Jarvis,* the Court distinguished a "firearm incapable of being fired for want of ammunition" from one "incapable of being fired because of mechanical defects."[84] It decided that the former is clearly within the category of weapons which the statute intends to deter people from carrying, since the gun was "mechanically capable of pro-

[78] Kentucky law on this subject has not developed solely in cases involving armed robbery. The courts have also considered the issue in cases of carrying a concealed deadly weapon, borrowing the definition from the robbery cases. Both types of cases will be examined as they relate to the issue of what constitutes a deadly weapon.

[79] 206 S.W.2d 831 (Ky. 1947).

[80] *Id.* at 833.

[81] 255 S.W.2d 478 (Ky. 1953).

[82] *Id.* at 479.

[83] 344 S.W.2d 820 (Ky. 1961).

[84] *Id.* at 821.

ducing death upon being fired."[85] The Court consequently held the weapon to be a deadly one. The standard of *Jarvis* was changed from "deadly at the time" to "having the capacity to become deadly," with the actual ability to cause death still being required.

Then, in 1965, *Merritt v. Commonwealth*[86] was decided. Although there was conflicting evidence at trial as to whether the appellant used a real or toy gun in perpetrating the crime, he was convicted of armed robbery and sentenced to life imprisonment. His attorney argued that the court should have instructed on simple robbery because the jury might have found that Merritt used only a simulated weapon. Judge Palmore, writing for the Court, did not discuss prior law, but adopted the position that the subjective view of the victim controls as to the nature of the instrument used.[87] Since *Merritt,* the subjective construction of "deadly weapon" has been applicable to arguably all offenses that involve such an element.[88] When most strictly applied it has been relied upon to support a conviction for armed robbery, where the victim testified that something sharp, which he never saw but presumed was a knife, was held against his back.[89] The actual nature of the object used is no longer relevant; the crucial question is the belief of the victim.[90]

Ten years after *Merritt,* Kentucky's criminal law changed radically. The common-law system was replaced by a comprehensive code fashioned to a significant extent after the Model Penal Code. Under the Kentucky Penal Code armed robbery became robbery in the first degree:

> A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or

---

[85] *Id.*

[86] 386 S.W.2d 727 (Ky. 1965).

[87] *Id.* at 729.

[88] For the one exception to this rule, see note 71 *supra.*

[89] Travis v. Commonwealth, 457 S.W.2d 481 (Ky. 1970).

[90] *See, e.g.,* Styles v. Commonwealth, 507 S.W.2d 487, 489 (Ky. 1974).

(b) Is armed with a deadly weapon; or

(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.[91]

As noted above, there is also a statutory definition to be read in conjunction with this section. It defines a deadly weapon as:

(a) Any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged; or

(b) Any knife other than an ordinary pocket knife or hunting knife; or

(c) Billy, nightstick, or club; or

(d) Blackjack or slapjack; or

(e) Nanchaku karate sticks; or

(f) Shuriken or death star; or

(g) Artificial knuckles made from metal, plastic or other similar hard material.[92]

This legislation exhibits several substantial changes from the common law.[93] A literal reading of the statute evidences a modification in the area of deadly weapons. However, the drafters of the Penal Code carefully specified that "[t]here is no intention to change [the *Merritt*] decision through the provisions of this chapter."[94] The apparent conflict between the statute and the commentary has caused uncertainty and litigation. For example, a recent opinion issued by the Office of the Attorney General indicated that the listing of deadly weapons in the statute is intended to be exhaustive.[95] Moreover, the Court's

---

[91] KRS § 515.020 (1975).

[92] KRS § 500.080(4) (Supp. 1978).

[93] For an explanation of those changes which are related to the discussion at hand, see CRIMINAL LAW OF KENTUCKY ANNOTATED 774 (1975).

[94] Commentary, *supra* note 76, at 181. This result was proposed as early as 1968 by the Kentucky Crime Commission, which recommended that "[i]mitation pistols should be specifically covered and their use punished to the same extent as deadly weapons." KENTUCKY CRIME COMMISSION, 1 OUTLINE FOR PROPOSED CRIMINAL LAW REVISION, Commentary 25 (1968).

[95] Ky. Op. Att'y Gen. 75-451 (1975). The question considered was whether the Nanchaku, an instrument consisting of two pieces of wood fastened at the ends by a cord, sometimes referred to as karate sticks, is a "deadly weapon." The opinion states that "deadly weapon" "is a quite limited term under the Code and includes *only those six* items listed in the definition." *Id.* at 1-2 (emphasis in original). Although the opinion is directed toward an inquiry regarding the concealed deadly weapon statute,

continued application of *Merritt* has been criticized and challenged.[96]

The Kentucky Supreme Court has steadfastly applied the rule of *Merritt* subsequent to the enactment of the Kentucky penal code. The Court's first opportunity to affirm *Merritt* occurred in *Kennedy v. Commonwealth.*[97] In that case, an unloaded pistol with a broken firing pin, incapable of firing a shot, was used by the defendant in a robbery. Defense counsel argued that such a pistol could not technically constitute a deadly weapon within the terms of the statute and that the statute overruled *Merritt.*[98] The Court recognized that such a reading is plausible if the statute is taken out of context. However, the Court found that because the Penal Code Commentary is a proper aid in construction of statutory material,[99] relevant portions of the Commentary may alter a literal reading of the statute. Accordingly, because the Commentary specifically "saves" the *Merritt* decision,[100] the Court held that *Merritt* "is as viable now as it was prior to the adoption of the code."[101]

The soundness of the *Kennedy* decision was immediately challenged. In *Little v. Commonwealth,*[102] defense counsel argued that the Court's interpretation "represents an unconstitutional encroachment upon the power of the Legislature to specifically and definitively delineate the kinds of weapons which are 'deadly' under the Penal Code."[103] The Court disagreed and affirmed Little's armed robbery conviction, although there was no evidence that the weapon used was capable of firing.[104] Dismissing the defendant's interpretation, it stated

---

it is indicated therein that the list is exclusive as to any provision in the Code.

It is interesting to note that KRS § 500.080 was amended in 1978 to specifically include the Nanchaku as a deadly weapon. KRS § 500.080(4) (Supp. 1978).

[96] *E.g.*, Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1977); Little v. Commonwealth, 550 S.W.2d 492 (Ky. 1977).

[97] 544 S.W.2d 219 (Ky. 1977).

[98] *Id.* at 220.

[99] KRS § 500.100 (1975).

[100] *See* note 76 *supra* for the text of the Commentary.

[101] 544 S.W.2d at 221 (Ky. 1977).

[102] 550 S.W.2d 492 (Ky. 1977).

[103] *Id.* at 494.

[104] The Court suggested that defense counsel's argument "stretches the bounds of credulity" and stated that "[i]t appears from counsel's argument that in order for [Little] to have had a fair trial it would have been incumbent upon the trial court to

that the effect of *Kennedy* "is to construe the definition of 'deadly weapon' under KRS 500.080(4) as including the words, *'whether real or simulated,'* in accordance with *Merritt*."[105] If there had been any doubt about the extent of the holding in *Kennedy*, it is now clear; the *Merritt* definition applies to all sections of the Penal Code involving deadly weapons.[106]

Fruitless attacks on the Court's position have continued in the past few years.[107] In *Helpenstine v. Commonwealth*,[108] it was argued that where the trial court applies the *Merritt/Kennedy* rule to an offense which occurred prior to the decision in *Kennedy*, the effect is an *ex post facto* application of the law. The Court rejected this theory on the grounds that the decision in *Kennedy* followed logically from the premise of *Merritt*, and that neither case is an example of "judicial legislation."[109] Defense counsel in *Helpenstine* further claimed that instructing the jury that the pistol used is a deadly weapon as a matter of law serves to shift the burden of proof to the defendant on an essential element of the crime.[110] The Court was similarly unimpressed by this approach. It found that the burden remains on the Commonwealth, and that the Commonwealth did satisfy the burden.[111]

Although the Kentucky Supreme Court is patently convinced that *Merritt* retains its prior vitality, it has failed to

---

have each of the jurors fire the shotgun to see if it was operable." *Id.* This was in response to the defendant's contention that the trial court should have allowed the jury to determine if the shotgun was a "deadly weapon" for purposes of the statute. This approach has failed to find acceptance. In Bishop v. Commonwealth, 549 S.W.2d 519 (Ky. 1977), the Court cited PALMORE AND LAWSON, INSTRUCTIONS TO JURIES IN KENTUCKY (rev. ed. 1975), to support the proposition that an instruction regarding the alleged deadly weapon need not be given to the jury. The determination is one of law to be made by the trial court and *Little* was decided accordingly.

[105] 550 S.W.2d at 494. *See* text accompanying note 92 *supra* for the text of the statute.

[106] KRS §§ 508.010(1)(a), .020(1)(b), .030(1)(b) (degrees of assault); KRS §§ 511.020(1)(a)(1,), .030(1)(a) (degrees of burglary); KRS § 515.020(2) (firearm defined) (1975). *Cf.* Thomas v. Commonwealth, 25 Ky. L. Summ. 5 (April 12, 1978), (application of *Merritt* to the wanton endangerment statute).

[107] *See, e.g.*, Hicks v. Commonwealth, 550 S.W.2d 480 (Ky. 1977); Mishler v. Commonwealth, 556 S.W.2d 676 (Ky. 1977).

[108] 566 S.W.2d 415 (Ky. 1978).

[109] *Id.* at 416-17.

[110] For a discussion of how the Court has previously disposed of such a contention, *see* note 104 *supra*.

[111] 566 S.W.2d at 417.

discover some serious inconsistencies in that position. When the Court of Appeals decided *Merritt,* there was no statute applying to deadly weapons *per se;* now there is. By construing the definition of weapons to include the words "real or simulated," the Court affects nine different sections of the Code which require a uniform interpretation.[112] Moreover, the Code no longer requires that the weapon be used or even brandished to satisfy first degree robbery. While the former statute made the use or display of "any pistol, gun or other firearm or other deadly weapon" an element of first degree robbery, the new statute requires only that a person be "armed with a deadly weapon."[113] Attaching the *Merritt* rule to the new statute thus has the effect of broadening its application far beyond that anticipated by the *Merritt* Court. Considering the subjective belief of the victim requires that some effort be made to use the weapon as if it were deadly. Now an offender "armed" with a toy gun could conceivably be convicted of first degree robbery even if it is never used by the defendant or seen by the victim.[114] This result is unjustifiable.

The problem presented is not unique to Kentucky. It exists in many jurisdictions and a survey of other states' solutions is helpful in examining Kentucky's approach. Ten states employ the common-law definition of robbery, which requires only that the victim be put in fear, by whatever means.[115] These jurisdictions have no specific statutory provisions dealing with the use of firearms.

However, the majority of states now have statutes which require an objective determination of the existence of a deadly weapon and provide an enhanced penalty when the offender is actually armed with a real weapon.[116] As noted by the Ohio

---

[112] *See* note 106 *supra* for a list of these statutes.

[113] KRS § 433.140 (1966) (repealed 1974); KRS § 515.020(b) (1975).

[114] K. BRICKEY, KENTUCKY CRIMINAL LAW § 15.02 (1974). The Court has not had occasion to rule on such a case, but this situation clearly falls within the statute as construed in *Kennedy.*

[115] CAL. PENAL CODE § 211 (West) (1978 Compact Edition); IDAHO CODE § 18-6501 (Cum. Supp. 1978); KAN. STAT. § 21-3701 (1974); MONT. REV. CODES ANN. § 94-5-401 (Supp. 1977); NEB. REV. STAT. § 28-324 (Supp. 1977); NEV. REV. STAT. § 200.380 (1973); N.J. STAT. ANN. § 2A:141-1 (West) (1969); 18 PA. CONS. STAT. ANN. § 3701 (Purdon) (Supp. 1978-1979); S.D. COMP. LAWS ANN. § 22-30-6 (Supp. 1978); W.VA. CODE § 61-2-12 (1977).

[116] ALASKA STAT. § 11.15.295 (1970); FLA. STAT. ANN. § 812.13(2)(a) (1976); HAW.

Court of Appeals, the emphasis of such statutes is upon penalty considerations: "We do not believe, in short, that the distinction between robbery and unarmed robbery may be made on the basis of what the victim thinks or feels his attacker may be wielding. Had the legislature intended this result, it could easily have said so."[117]

Nine state legislatures *have* so stated, however, and their robbery statutes recognize something less than a weapon capable of inflicting death, emphasizing proof rather than penalty considerations. Two of these states denote "any article fashioned" as a deadly weapon or a "facsimile" thereof.[118] Three require only that the person "represent" the existence of such a weapon, or "pretend" to be so armed.[119] The other four allow "what appears to be" a deadly weapon to be treated as one.[120] These variations are essentially the statutory equivalent of the *Merritt* decision.

Finally, there are seven states which, like Kentucky, have statutes which appear to provide an objective standard, yet have been construed by the courts of the state to require a subjective analysis of the victim's belief.[121] For example, the

---

REV. STAT. § 708.840(2) (1976); ILL. ANN. STAT. ch. 38, § 18-2 (Smith-Hurd) (1977); IND. CODE ANN. § 35-42-5-1 (Burns) (Cum. Supp. 1978); IOWA CODE ANN. § 711.2 (West) (Special Pamphlet 1978); ME. REV. STAT. tit. 17-A, § 651 (Pamphlet 1978); MINN. STAT. ANN. § 609.245 (West) (1964); MISS. CODE ANN. § 97-3-79 (Cum. Supp. 1977); N.M. STAT. ANN. § 40A-16-2 (Supp. 1975); N.C. GEN. STAT. § 14-87 (Cum. Supp. 1977); OHIO REV. CODE ANN. § 2911.01 (Page) (1975); OKLA. STAT. ANN. tit. 21, § 1287 (West) (Supp. 1977-1978); R.I. GEN. LAWS § 11-47-1 (Cum. Supp. 1977); S.C. CODE § 16-11-330 (1976); VT. STAT. ANN. tit. 13, § 608(b) (1974); WIS. STAT. ANN. § 943.32 (West) (Supp. 1978-1979); WYO. STAT. § 6-66 (1975).

[117] State v. Matthews, 322 N.E.2d 289, 291 (Ohio Ct. App. 1974).

[118] MICH. COMP. LAWS ANN. § 750.529 (1968), People v. Jury, 142 N.W.2d 910 (Mich. Ct. App. 1966); UTAH CODE ANN. § 76-6-302 (1977).

[119] ARK. STAT. ANN. § 41-2102 (1976); CONN. GEN. STAT. § 53a-134, 135 (1975); N.D. CENT. CODE § 12.1-22-01 (1976).

[120] DEL. CODE tit. 11, § 832(a)(2) (Cum. Supp. 1977); Mo. ANN. STAT. § 569.020 (Vernon) (Special Pamphlet 1978); N.H. REV. STAT. ANN. § 636.1 (Supp. 1973); WASH. REV. CODE § 9A.56.200 (1976).

[121] D.C. CODE ENCYCL. § 22-2901 (West) (1967), Meredith v. United States, 343 A.2d 317 (D.C. 1975); GA. CODE ANN. § 26-1902 (1977), Pettiford v. State, 221 S.E.2d 43 (Ga. 1975); LA. REV. STAT. ANN. § 14:64 (West) (1974), State v. Sonnier, 317 So.2d 190 (La. 1975); MD. CRIM. LAW CODE ANN. Art. 27, § 488 (1976); Crum v. State, 227 A.2d 766 (Md. Ct. Spec. App. 1967); MASS. ANN. LAWS ch. 265, § 17 (Michie/Law Co-op) (1968); Commonwealth v. Tarrant, 314 N.E.2d 448 (Mass. Ct. App. 1974); TEX. PENAL CODE ANN. tit. 7, § 29.03 (Vernon) (1974); Walker v. State, 543 S.W.2d 634, 637

Massachusetts armed robbery statute requires that a person be "armed with a dangerous weapon."[122] However, the Massachusetts Court of Appeals has determined that the statute:

> is intended to punish not merely those robbers who possess a weapon dangerous in fact, but also those who possess a weapon which gives the appearance of being dangerous, since the fear felt by victims and bystanders and the danger to public order resulting from their possible reactions are the same in either case.[123]

Thus, the Massachusetts court has applied the same gloss that the Kentucky Supreme Court placed on the Kentucky statute through the *Merritt* and *Kennedy* decisions. While the policy bases expressed by the court above are persuasive, the reasoned opinion of the Ohio court mentioned above should not be wholly disregarded. Basing the punishment upon the degree of danger actually caused by the defendant bears consideration.

The Model Penal Code adheres to this view, and deals with the problem by eliminating the weapon issue.[124] The Commentary explains:

> The factor of being "armed with a deadly weapon," so commonly used to aggravate robbery under present statutes, has been dropped in favor of the test in clause (b) of subsection (1), which requires threat or menace of serious bodily harm. Most cases of armed robbery will fall within this category. Only where the robber does not exhibit his weapon would clause (b) operate more narrowly than the armed robbery statutes. We have concluded that it is the employment of a weapon that should be significant in the grading of theft, rather than the discovery, for example, of a switchblade knife in the culprit's pocket.[125]

(Tex. Crim. App. 1976); VA. CODE § 18.2-58 (Cum. Supp. 1978); Cox v. Commonwealth, 240 S.E.2d 524, 525 (Va. 1978).

[122] MASS. ANN. LAWS ch. 265, § 17 (Michie/Law Co-op) (1968).

[123] Commonwealth v. Tarrant, 314 N.E.2d 448, 450 (Mass. Ct. App. 1974).

[124] (1) Robbery Defined. A person is guilty of robbery if, in the course of committing a theft, he:

(a) inflicts serious bodily injury upon another; or

(b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or

(c) commits or threatens immediately to commit any felony of the first or second degree.

MODEL PENAL CODE § 222.1 (Tent. Draft No. 11, 1960).

[125] *Id.* (footnote omitted).

A few states have adopted novel approaches to this problem, taking into account the real distinctions between crimes involving a deadly weapon and those involving a non-deadly one. The Oregon and New York statutes provide that a purported weapon, or an unworkable or unloaded weapon, satisfies second degree robbery, but a real firearm capable of firing (or a comparable weapon of another type) is required for first degree robbery.[126] Colorado's aggravated robbery provision similarly requires that a person be armed with a weapon actually capable of causing death. However, the statute provides some evidentiary qualifications:

> Possession of any article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence . . . that he was so armed.[127]

Consequently, a person who is able to present evidence that the article used was not deadly is entitled to have the trial court instruct on simple robbery, which carries a substantially lower penalty.[128]

In discussing the statute, the Colorado Supreme Court explained:

> The statute permits the jury to infer that the defendant actually possessed a deadly weapon when he has made such a representation to another. In the light of common sense and experience, the victim of a robbery—possessed of a reasonable belief—may infer that a defendant possesses a deadly weapon if the defendant makes such a representation. Certainly, nobody would require the victim to test this inference. The jury, guided by the light of reason, is permitted, under the statute, to draw the same inference, and the inference may be used to support a finding of guilt under the statute.[129]

---

[126] OR. REV. STAT. § 164.415(1) (1977), State v. Poole, 572 P.2d 320 (Or. Ct. App. 1977); N.Y. PENAL LAW § 160.10 (McKinney) (1975).

[127] COLO. REV. STAT. § 18-4-302 (1973).

[128] Under the Colorado law the penalty for aggravated robbery is five to forty years, while simple robbery carries a penalty of one day or $1,000 to ten years or $30,000 or both. COLO. REV. STAT. § 18-1-105 (Cum. Supp. 1976). In Kentucky, comparable statutes provide for ten to twenty years and five to ten years, respectively. KRS § 532.060(b), (c) (1975).

[129] People v. Lorio, 546 P.2d 1254, 1256 (Colo. 1976).

Colorado's solution for dealing with deadly weapon cases is consistent with the underlying policies. It provides protection for the potential victim, in that the government need not prove the actual character of the object used. Guilty persons will not be acquitted because the prosecution is unable to produce the weapon or prove that it is in working order. But it also protects the accused by allowing the presumption to be rebutted by competent evidence. The effect of the presumption is merely to shift the burden of production of evidence, thus benefitting the accused only when the presumption is not valid in the particular situation.

Such an approach has been fashioned judicially in Tennessee. The Tennessee robbery statute employs a common-law definition of simple robbery, but enhances the penalty when a deadly weapon is used. Recognizing that a serious proof problem was created by the statute, the Court of Criminal Appeals held that a prima facie case of armed robbery may be made out on the basis of a victim's testimony, but an accused can defeat this with competent evidence tending to show that the object was not a deadly weapon.[130]

It is clearly unreasonable to require the prosecution to carry the burden of production on the issue of whether a particular weapon was used and whether it was capable of causing death. Allowing the victim's testimony to satisfy and shift that burden is an equitable alternative. However, relying solely on the subjective belief of the victim when the accused is capable of presenting evidence to the contrary is manifestly unreasonable. An enhanced penalty cannot be justified where the victim's life was not in actual danger.

Alabama and Arizona have enacted statutes which are similar to the Colorado statute and which will take effect this year.[131] Tennessee's courts have interpreted its statute to reach an identical result. Kentucky's judicial and legislative branches would do well to reconsider their position in light of these sound alternatives.

---

[130] TENN. CODE ANN. § 39-3901 (Cum. Supp. 1978), Peabody v. State, 556 S.W.2d 547 (Tenn. Crim. App. 1977).

[131] ALA. CODE tit. 13A, § 13A-8-41 (1975) (eff. June 1, 1979); ARIZ. REV. STAT. § 13-1904 (1978).

III.

Much has been written recently about rape and its lasting psychological effect on the victim.[132] Little has been said about the effect that the victim's mental condition has upon her capacity to consent. In 1978, the Kentucky Court of Appeals was confronted with this problem in *Salsman v. Commonwealth.*[133] The *Salsman* court traced the development of the law of consent in rape cases, and discussed the changes brought about by the new Penal Code. It relied upon the Commentary to the Final Draft to support its holding, finding that the statute should be construed more narrowly to protect fewer victims. Whether this construction will be followed by the Kentucky Supreme Court depends primarily upon its compatibility with the policy bases of the statute.

In *Salsman,* the defendant was a delivery man; the victim was a twenty-four year old mentally retarded woman.[134] At trial, the defendant admitted having intercourse with the victim, but denied that any force was used and argued that she had consented.[135] The central issue was whether the victim possessed the legal capacity to consent.[136] In the Penal Code, lack of consent is a specific element of all sexual offenses,[137] and one who is "mentally defective" is considered incapable of giving legal consent.[138] According to the definitional section, "'[m]entally defective' means that a person suffers from a

---

[132] S. BROWNMILLER, AGAINST OUR WILL (1975); L. SCHULTZ, RAPE VICTIMOLOGY (1975); D. NASS, THE RAPE VICTIM (1977); J. MACDONALD, RAPE: OFFENDERS AND THEIR VICTIMS (1971); E. HILBERMAN, THE RAPE VICTIM (1976).

[133] 565 S.W.2d 638 (Ky. Ct. App. 1978).

[134] *Id.* at 639.

[135] *Id.* at 639-40.

[136] This question is critical in determining which statute the defendant will be prosecuted under. Rape in the first degree requires "forcible compulsion," while rape in the third degree is satisfied by "intercourse with another person who is incapable of consenting because [she] is mentally defective." KRS §§ 510.040(1)(a), 510.060(1)(a) (1975). Rape in the first degree is a Class B felony carrying a penalty of ten to twenty years. KRS §§ 510.040(2), 532.060(2)(b) (1975). Rape in the third degree is a Class D felony for which the sentence can range from one to five years. KRS §§ 510.060(2), 532.060(2)(d) (1975). A similar distinction is found between sexual abuse in the first and second degrees. KRS §§ 510.110(1)(a) (1975). The distinction is obviously important to the accused.

[137] KRS § 510.020(1) (1975).

[138] KRS § 510.020(3)(b) (1975).

mental disease or defect which renders [her] incapable of appraising the nature of [her] conduct."[139] The Court of Appeals held that Salsman's victim was not mentally defective within the meaning of this statute, and determined that "[t]he trial court correctly concluded that Salsman could not be guilty of either rape in the third degree or sexual abuse in the second degree on the theory that the prosecutrix was incapable of giving consent."[140]

Trial testimony indicated that: (1) the victim "had the reasoning capacity of a ten-year-old;" (2) "although she had a degree of judgment and self-control, 'she [was] easily threatened and frightened by tasks that [were] difficult for her;'" and (3) "[i]n unusual circumstances, her judgment would be impaired."[141] However, these factors were considered irrelevant by the court because a clinical psychologist testified that she "was capable of understanding that a sexual act was being performed upon her."[142] While the statutory definition requires that the victim be "incapable of appraising the nature of [her] conduct,"[143] the court concluded that "the sole question is whether she is capable of appraising the nature of the sexual act being performed."[144] It is suggested that these standards are not interchangeable and that such construction may prove to be contrary to the purpose of the statute.

The language of the Kentucky statute defining "mentally defective" is drawn from the Model Penal Code.[145] Under that scheme, gross sexual imposition is a lesser degree of rape which may be charged where the victim "suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct."[146] The Commentary to the Model Penal Code explains how this standard is to be applied:

> Conditions affecting only the woman's capacity to "control" herself sexually will not involve criminal liability. Also, by

---

[139] KRS § 510.010(4) (1975).
[140] Salsman v. Commonwealth, 565 S.W.2d 638, 640 (Ky. Ct. App. 1978).
[141] Brief for Appellee at 4, 565 S.W.2d 638 (Ky. Ct. App. 1978) (citations omitted).
[142] 565 S.W.2d at 639.
[143] KRS § 510.010(4) (1975).
[144] 565 S.W.2d at 640.
[145] MODEL PENAL CODE § 213.1(2)(b) (Proposed Official Draft, 1962).
[146] *Id.*

> specifying that the woman must lack capacity to appraise "the nature" of her conduct, we make it clear that we are not talking about appraisals involving value judgments or consideration of remote consequences of the immediate acts. The typical case that remains within the revised clause would be the case of intercourse with a woman known to the defendant to be manifestly and seriously deranged.[147]

Thus, the degree of impairment required to satisfy this section is substantial. This is based on the notion that society is unwilling to criminally sanction a person who had non-violent sexual intercourse with another unless that other person is deemed incapable of giving legal consent.[148] For example, criminal sanctions exist against those who perform sexual acts with young children, who are regarded as incapable of consenting to such acts.[149]

Because rape is traditionally a crime of violence, it is important to determine the proper threshold of mental capacity which vitiates consent. A number of states still employ statutes which require that a victim suffer from a mental disease which renders her incapable of consenting; ability to consent is itself the standard.[150] However, this formulation was rejected by the drafters of the Model Penal Code "because it provides no meaningful guide to decision."[151] The Model Penal Code provision adopted by Kentucky represents an effort to provide such a "meaningful guide."

Under prior Kentucky law, there was no specific provision dealing with this situation. A case such as *Salsman* would have been considered under the general section covering non-consensual intercourse.[152] However, the Kentucky courts had

---

[147] *Id.*

[148] MODEL PENAL CODE § 207.4, Commentary (Tent. Draft No. 4, 1955).

[149] The age established as the cut-off for ability to consent varies among jurisdictions. The Model Penal Code suggests ten years, while the Kentucky statute specifies twelve years. MODEL PENAL CODE, § 213.1(1)(d); KRS § 510.040(1)(b)(21) (1975).

[150] ARIZ. REV. STAT. § 13-1401(5)(b) (1977); D.C. CODE ENCYCL. § 22-2801 (West) (1967); IDAHO CODE § 18-6101(2) (Cum. Supp. 1978); ILL. ANN. STAT. ch. 38, § 11-1(a)(2) (Smith-Hurd) (1978); IND. CODE ANN. § 35-42-4-1(3) (Burns) (Cum. Supp. 1978); IOWA CODE ANN. § 709.1(2) (West) (Special Pamphlet 1978); KAN. STAT. § 21-3502(1)(c) (1974); OKLA. STAT. ANN. tit. 21, § 1111 (West) (1958); 18 PA. CONS. STAT. ANN. § 3121(4) (Purdon) (1973); S.D. COMP. LAWS ANN. § 22-22-1(2) (Special Supp. 1977); CAL. PENAL CODE § 261(1) West (Compact Edition 1978).

[151] MODEL PENAL CODE, § 207.4.

[152] KRS § 435.090 (1944) (repealed 1974).

continued to apply a standard which was derived from a prior statute that provided criminal sanctions for "carnally knowing an idiot."[153] In *Jones v. Commonwealth,* "idiot" is defined as "[a] person destitute of mind from birth, or a person of such weak and feeble mind existing from birth as renders her incapable of knowing right from wrong, or, knowing, has not, by reason of such mental condition, if any, the will power to resist."[154] Long after the statute construed in *Jones* was repealed, this standard was applied to determine whether a person over the statutory age limit was nevertheless incapable of consenting because of mental defect. The Commentary to the Final Draft of the Kentucky Penal Code cites this language from *Jones* and concludes that the new definition of mentally defective "does not substantially change prior Kentucky law but rather states the same abnormality in language employed by contemporary psychiatry."[155] Thus, "destitute of mind from infancy" is equated with "incapable of appraising the nature of [one's] conduct." Common sense rejects this assessment, as do a number of contemporary psychiatrists.

Dr. Cornelia Wilbur, a Lexington psychoanalyst, posits that although both standards require severe impairment, they do not necessarily include persons with similar mental illnesses.[156] While the *Jones* standard requires that a person be an idiot from birth, there are many personality disorders which manifest themselves later in life but which could come within the new standard by rendering the person incapable of appraising her conduct.[157] A Lexington psychiatrist, Dr. Kathleen Riggs, stresses that it is improper to style the two standards as the same, with the newer one couched in the language of contemporary psychiatry.[158] She feels there is a great variance be-

---

[153] Ky. Stat. § 1155 (repealed).

[154] 159 S.W.568, 569 (Ky. 1913). It is interesting to note that this formulation describes a condition very much like that required for the modern insanity defense. *See, e.g.,* the Model Penal Code section discussed in the text accompanying note 168 *infra.*

[155] KENTUCKY PENAL CODE, *supra* note 76, at § 1100(4).

[156] Interview with Cornelia B. Wilbur, M.D., P.S.C., private psycholanalyst, in Lexington, Ky. (Oct. 11, 1978).

[157] *Id.* The *Salsman* court did not mention the birth factor, and it seems safe to assume that courts would recognize an impairment occurring later in life.

[158] Interview with R. Kathleen Riggs, Ph.D., M.D., private psychiatrist, in Lexington, Ky. (Oct. 11, 1978).

tween the two even without the birth aspect, as there are a number of dissociative disorders which affect the ability to appraise one's own conduct, but stop short of causing complete mental destitution.[159] A third psychiatrist, Dr. William Weitzel of the faculty of the University of Kentucky Medical Center, agrees that the standards are far apart in the conditions they describe.[160] He states that many people become psychotic very late in life, have temporary illnesses, or experience acute periods during relatively minor long-term illnesses.[161] All of these are functional disabilities within the new statute, but would fail to qualify under the *Jones* standard.

Further, the Commentary provides that the new definition "means that the person does not know that a sexual act is being performed."[162] This is the language relied upon by the *Salsman* court,[163] although such a construction seems to be unsupported. For example, the statute requires inquiry into whether the victim can appraise *her own* conduct. The Commentary, and subsequently the court, have turned this around to require that the victim not understand the act being performed upon her, *i.e.*, asking whether she can appraise *her assailant's* conduct. The operative distinction is one between an awareness of what is happening and an ability to decide what to do about it. Dr. Wilbur feels it is inappropriate to apply the standard to the victim's perception of the assailant's conduct, as a woman would have to be almost unconscious before she would fail to perceive that a sexual act is being performed.[164] Dr. Riggs adds that it is really irrelevant in determining whether a person can properly understand her own actions to consider whether she understands that a sexual act is being performed upon her.[165] According to Dr. Weitzel, even a very young child would be aware that a sexual act was being performed, but probably would not be capable of determining what her own responsive

---

[159] *Id.*

[160] Interview with William Weitzel, M.D., psychiatrist and professor, University of Kentucky Medical Center, in Lexington, Ky. (Oct. 18, 1978).

[161] *Id.*

[162] KENTUCKY PENAL CODE, *supra* note 76, at § 1100(4).

[163] 565 S.W.2d at 640.

[164] Interview with Dr. Wilbur, *supra* note 156.

[165] Interview with Dr. Riggs, *supra* note 158.

conduct should be.[166] In the same way, a mentally retarded woman may not be destitute of mind or unaware that a sexual act is being performed. But this does not insure that she does not suffer from a disease which renders her incapable of making a reasoned response to unwanted sexual advances. The victim in *Salsman* appeared to be such a woman.

It is interesting to note that this distinction between mere awareness and the ability to rationally respond was drawn by the Model Penal Code in the section dealing with the mental state of the accused. An accused is considered "not responsible for criminal conduct" where the ability "either to appreciate the criminality of [the] conduct or to conform [the] conduct to the requirements of law" is lacking.[167] Thus, the drafters realized that "cognitive factors are not the only ones that preclude inhibition; that even though cognition obtains, mental disorder may produce a total incapacity for self-control."[168] It is not apparent why the drafters failed to characterize mentally defective victims of sexual abuse in the same way. The drafters of the Kentucky Penal Code, however, apparently recognized the analogy. Immediately after the language relied upon by the *Salsman* court, the Commentary states that "[i]n cases of the mentally ill, there must be a substantially complete loss of judgment *and* self control."[169] It follows that something more than a mere awareness that a sexual act is being performed is necessary to allow the defendant to raise the defense of consent. It is unclear why this approach, which would be a far more meaningful construction of the statute, was not adopted by the court.

A majority of states, including Kentucky, now have statutes dealing with the mentally defective victim of a sexual offense[170] that are styled after the Model Penal Code. Only ten

---

[166] Interview with Dr. Weitzel, *supra* note 160.

[167] MODEL PENAL CODE, § 4.01(1).

[168] MODEL PENAL CODE, § 4.01.

[169] KENTUCKY PENAL CODE, *supra* note 76, at § 1100(4) (emphasis added).

[170] ALA. CODE tit. 13A, § 6-60 (1977); ARK. STAT. ANN. § 41-1801(3) (1976); COLO. REV. STAT. § 18-3-403(1)(c) (Cum. Supp. 1976); CONN. GEN. STAT. § 53a-65(5) (1975); DEL. CODE tit. 11, § 767(5) (1974); FLA. STAT. ANN. § 794.011(1)(b) (1976); HAW. REV. STAT. § 26-2001 (1978); LA. REV. STAT. ANN. § 14:43(2) (West) (1978); ME. REV. STAT. tit. 17-A, § 253(2)(c) (Pamphlet 1978); MD. CRIM. LAW CODE ANN. Art. 27, § 461(b) (Cum. Supp. 1977); MICH. COMP. LAWS ANN. § 750.520a(c) (Supp. 1978-1979); MINN.

states have common-law rape statutes with no specific provision on the subject,[171] while eleven have statutes focusing on the ability of the victim to consent, considering her mental disease.[172] As most of the statutes are relatively new, there is little interpretive law in the area. However, the New York Court of Appeals recently had occasion to construe the definition of "mentally defective" for purposes of a third degree rape statute similar to Kentucky's.[173] In *People v. Easley,* the defendant challenged the moral issue raised by the trial court's instruction as to the definition of "mentally defective." In response, the court stressed that it must be determined whether the victim was "substantially able to understand what *she* was doing."[174] Further, the court elaborated on the indicia of such an understanding:

> Whether there is an awareness of the social or other cost of one's conduct is a legitimate area of inquiry in determining whether one is so mentally defective that the protective shield of section 130.05 of the Penal Law is invoked. Such inquiry should of course include the question of whether the person whose mentality is being judged has insight into the "consequences" or conduct for which the law exacts criminal penalties.
>
> But that is not enough. The law does not mirror all prevailing moral standards. . . . Therefore, there also needs to be inquiry as to whether there is a capacity to appraise the

---

STAT. ANN. § 609.341(6) (West) (Supp. 1978); MO. STAT. ANN. § 566.040(1) (Vernon) (Supp. 1977); MONT. REV. CODES ANN. § 94-2-101(28) (Supp. 1977); NEB. REV. STAT. § 28-319 (Supp. 1977); NEV. REV. STAT. § 200.366 (1973); N.C. REV. STAT. ANN. § 632.1(I)(d) (Supp. 1973); N.M. STAT. ANN. § 40A-9-20(A)(4) (Supp. 1975); N.Y. PENAL LAW § 130.00(5) (McKinney) (1975); N.D. CENT. CODE § 12.1-20-03(1)(e) (Supp. 1977); OHIO REV. CODE ANN. § 2907.03(2) (Page) (1975); OR. REV. STAT. § 163.305(3) (1977); S.C. CODE § 16-3-651(e) (Cum. Supp. 1977); TEX. PENAL CODE ANN. tit. 5, § 21.02(b)(4) (Vernon) (Supp. 1978); VT. STAT. ANN. tit. 13, § 3254(2)(A) (Supp. 1978); WASH. REV. CODE § 9.79.40(3) (1976); W.VA. CODE § 61-8B-1(3) (1977); WIS. STAT. ANN. § 940.225(2)(c) (Supp. 1978-1979); WYO. STAT. § 6-63.2(a)(iv) (Interim Supp. 1977).

[171] ALASKA STAT. § 11.15.120 (1970); GA. CODE ANN. § 26-2001 (1978); MASS. ANN. LAWS ch. 265, § 22 (Michie/Law Co-op) (Cum. Supp. 1978); MISS. CODE ANN. § 97-3-65 (Cum. Supp. 1977); N.J. STAT. ANN. § 2A:138-1 (West) (1969); N.C. GEN. STAT. § 14-21 (Cum. Supp. 1977); R.I. GEN. LAWS § 11-37-1 (1973); TENN. CODE ANN. § 39-3701 (1975); UTAH CODE ANN. § 76-5-402 (1977); VA. CODE § 18.261 (1975).

[172] *See* note 150 *supra* for a list of jurisdictions with statutes of this kind.

[173] People v. Easley, 364 N.E.2d 1328 (N.Y. Ct. App. 1977).

[174] *See* note 136 *supra* for the operative language of the statute.

> nature of the stigma, the ostracism or other noncriminal sanctions which society levies for conduct it labels only as immoral even while it "struggles to make itself articulate in law." . . . . Put in terms of this case, in its determination of [the victim's] capacity to appraise the sexual act, its significance and its consequences, the jury may very well have been required to consider the "moral quality" of the act as it would be measured by society and to assess as well her ability to appreciate that fact. . . .[175]

The New York court recognized that such a statute cannot be meaningfully implemented by limiting its application to the single consideration of whether the victim is aware that an unlawful act is being performed. It is the victim's ability to appreciate the quality of her own actions which is at issue, and this demands inquiry into a broad range of physiological as well as more subtle psychological factors. If the law is to presume some persons incapable of consenting to sexual intercourse, it must be on the basis of that person's inability to evaluate the situation and make a reasoned response. The defense of consent should not be allowed merely because the victim recognizes that a sexual act is being performed. There are many factors which must be considered to determine whether there is a "substantially complete loss of judgment and self-control."[176]

The victim in *Salsman* was found to be free from mental defect as a matter of law. As a result, the jury was instructed only on rape in the first degree and sexual abuse in the first degree, and found the defendant guilty of the lesser crime.[177] This occurred in spite of the fact that the intercourse was admitted. Because the jury found forcible compulsion, the third degree rape crime was clearly proved.[178] The jury was apparently reluctant to find this defendant guilty of first degree rape where the force used was minimal and the victim's mental

---

[175] 364 N.E.2d at 1332-33.

[176] See text accompanying note 169 *supra* for a discussion of this standard.

[177] 565 S.W.2d at 639.

[178] The defendant argued on appeal that the sexual abuse instruction constituted reversible error. Appellant's Brief at 7-8, 565 S.W.2d 638 (Ky. Ct. App. 1978). The defendant's argument would have left the jury in the position of either finding the defendant guilty of first degree rape or not guilty of any crime. This would be a clearly unsatisfactory result in the instant case.

state was at issue. The proper decision would have been reached if the court had instructed the jury as to third degree rape and allowed it to determine whether or not the victim was able to respond rationally to the defendant's sexual advances.[179]

[179] Both rape in the third degree and sexual abuse in the first degree are Class D felonies, so the potential penalty would be identical. KRS §§ 510.060(2), .110(1)(a) (1975).