Louisiana Law Review

Volume 30 | Number 1
December 1969

Insanity - The Burden of Proof

Herschel E. Richard Jr.

find himself. This leaves the police officer to decide in situations where even judges and attorneys may not agree. Yet, if the "hindsight" of the judiciary disagrees with the officer, he is liable. Although courts may say that they try to consider the situation from the point of view of the officer, this does not alter the fact that the officer must act *first* with the judge deciding *later* whether the officer's conduct was constitutionally proper.

It is submitted that it is unfair to require policemen to evaluate the constitutionality of their conduct except in the most obvious situations, as for example, beating a confession from an accused. The test of willful violation of constitutional rights should be required for findings of personal liability. For situations involving "honest or good faith" violations of constitutional safeguards liability on the employing agency itself would provide an adequate remedy. Expenses incurred for violations of individual rights due to honest mistakes of police officers is certainly a legitimate cost of law enforcement. Society will be paying for its own errors. This will allow the vigorous law enforcement officer freedom to act quickly without fear of financial reprisal for his honest attempts to enforce the law.

Cheney C. Joseph, Jr.

INSANITY—THE BURDEN OF PROOF

Article 652 of the Louisiana Code of Criminal Procedure establishes the procedural rule that an accused who claims insanity as a defense has the burden of proving his insanity by a preponderance of the evidence. This rule is followed in twenty-four states.[1] However, in the rest of the states[2] and in federal

1. These are: Alabama, Knight v. State, 273 Ala. 480, 142 So.2d 899 (1962); Alaska, Bowker v. State, 373 P.2d 500 (1962); Arkansas, Kelley v. State, 154 Ark. 246, 242 S.W. 572 (1922); California, People v. Monk, 14 Cal. Rptr. 633, 363 P.2d 865 (1961); Delaware, Longoria v. State, 53 Del. 311, 168 A.2d 695 (1961); Georgia, Ross v. State, 217 Ga. 569, 124 S.E.2d 280 (1962); Iowa, State v. Drosos, 253 Iowa 1152, 114 N.W.2d 526 (1962); Kentucky, Tungent v. Commonwealth, 303 Ky. 834, 198 S.W.2d 785 (1947); Maine, State v. Park, 159 Me. 328, 193 A.2d 1 (1963); Minnesota, State v. Finn, 257 Minn. 138, 100 N.W.2d 508 (1960); Missouri, State v. King, 375 S.W.2d 34 (1964); Montana, State v. DeHann, 88 Mont. 407, 292 P. 1109 (1930); Nevada, State v. Behiter, 55 Nev. 236, 29 P.2d 1000 (1934); New Jersey, State v. Kudzinowski, 106 N.J.L. 155, 147 A. 453 (1929); North Carolina, State v. Swink, 229 N.C. 123, 47 S.E.2d 852 (1948); Ohio, State v. Stewart, 176 Ohio St. 156, 198 N.E.2d 439 (1964); Oregon, 14 ORE. REV. STAT. 136.390 (1960); Pennsylvania, Commonwealth v. Upedgrove, 413 Pa. 599, 198 A.2d 534 (1964); Rhode Island, State v. Gunnites, 91 R.I. 209, 161 A.2d 818 (1960); South Carolina, State v. Tidwell, 100 S.C.

court, the accused need only show some evidence of his insanity. The prosecution must then prove his sanity beyond a reasonable doubt. In light of the United States Supreme Court's decision in *Leland v. Oregon*[3] it seems that the Louisiana rule is not unconstitutional, but this decision was reached more than fifteen years ago. The law in the area of criminal procedure has undergone tremendous change in the ensuing period of time.[4] The purpose of this Comment is to consider not only the constitutional questions, but also to examine the fairness and logical consistency of Louisiana's rule.

Procedure in Louisiana

The Louisiana procedure is stated clearly in the Code of Criminal Procedure: "The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence."[5] This rule has been established for many years in the jurisprudence, with *State v. Scott*[6] being the

248, 84 S.E. 778 (1915); Texas, Carrell v. State, 156 Tex. Crim. 50, 283 S.W.2d 793 (1951); Virginia, Christian v. Commonwealth, 202 Va. 311, 117 S.E.2d 72 (1960); Washington, State v. Mays, 65 Wash.2d 58, P.2d 758 (1965); West Virginia, State v. McCauley, 130 W.Va. 401, 43 S.E.2d 454 (1947). *See* 17 A.L.R.3d 146 (1968).

2. Those states following the federal rule are: Arizona, State v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965); Colorado, Castro v. People, 140 Colo. 493, 346 P.2d 1020 (1959); Connecticut, State v. Joseph, 96 Conn. 637, 115 A. 85 (1921); Florida, Farrell v. State, 101 So.2d 130 (Fla. 1958); Hawaii, State v. Moeller, 50 Hawaii 110, 433 P.2d 136 (1967); Idaho, State v. Clokey, 83 Idaho 322, 364 P.2d 159 (1961); Illinois, People v. Robinson, 22 Ill.2d 162, 174 N.E.2d 820 (1961); Indiana, Whitaker v. State, 240 Ind. 676, 168 N.E.2d 212 (1960); Kansas, State v. Penry, 189 Kan. 243, 368 P.2d 60 (1962); Maryland, Jenkins v. State, 238 Md. 451, 209 P.2d 616 (1965); Massachusetts, Commonwealth v. McHoul, 352 Mass. 544, 226 N.E.2d 556 (1967); Michigan, People v. Eggleston, 186 Mich. 510, 152 N.W. 944 (1915); Mississippi, McGarrh v. State, 249 Miss. 247, 148 So.2d 494 (1963); Nebraska, Thompson v. State, 159 Neb. 685, 68 N.W.2d 267 (1955); North Dakota, State v. Barry, 11 N.D. 428, 92 N.W. 809 (1902); New Hampshire, State v. Bartlett, 43 N.H. 224 (1861); New Mexico, State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936); New York, People v. Kelley, 302 N.Y. 512, 99 N.E.2d 552 (1951); Oklahoma, Whisenhunt v. State, 430 Okla. Crim. 407, 279 P.2d 366 (1954); South Dakota, State v. Waugh, 80 S.D. 503, 127 N.W.2d 429 (1964); Tennessee, Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1911); Utah, State v. Green, 78 Utah 580, 40 P.2d 961 (1935); Wisconsin, State v. Esser, 16 Wis. 2d 67, 115 N.W.2d 505 (1962); Wyoming, State v. Pressler, 16 Wyo. 214, 92 P. 806 (1907). The District of Columbia also follows this rule: Jones v. United States, 284 F.2d 245 (D.C. Cir. 1960). *See* 17 A.L.R.3d 146 (1968).

3. 343 U.S. 790 (1952). The United States Supreme Court held an Oregon statute not unconstitutional which forced the accused to prove his insanity beyond a reasonable doubt. *See* text accompanying note 18 *infra*.

4. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Bruton v. United States, 389 U.S. 818 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

5. Art. 652.

6. 49 La. Ann. 253, 21 So. 271 (1897). *See also* State v. Stewart, 238 La. 1036, 117 So.2d 583 (1960); State v. Chinn, 229 La. 983, 87 So.2d 315 (1955).

leading case. An earlier case adopted an even harsher rule in which the accused had to prove his insanity beyond a reasonable doubt,[7] but it was not followed and was not adopted in the present Code of Criminal Procedure.

An interesting question arises in connection with the Louisiana rule when the jury finds that the accused has failed to meet his burden of proof but nevertheless has a reasonable doubt as to the legal sanity of the accused. Ordinarily one would suppose that when the state has failed to prove every element beyond a reasonable doubt, acquittal would follow. This, however, is not the result in Louisiana. In *State v. Surrency*[8] the court considered on appeal the following instructions to the jury:

> "If on the whole testimony, and giving to the presumption of sanity its full operation, you are satisfied the accused was insane when the act was committed, you should acquit. It is sufficient if the evidence on this point raises a reasonable doubt to acquit."[9]

This instruction was found to be erroneous, and the court concluded that the proper instructions in the circumstance should be:

> "If, on the whole, considering all of the evidence as to his mental condition, there is a preponderance of proof in favor of insanity of a character to render the defendant irresponsible, then the accused should be acquitted; if not and the proof *otherwise* convinces the jury of his guilt beyond a reasonable doubt, he should be convicted."[10] (Emphasis added.)

Two notions that serve to buttress this procedure are the presumption of sanity and the idea that sanity is not an element of the crime and therefore need not be proved.[11] The effect of the presumption of sanity is to force the accused to prove his insanity if he is to succeed in his defense. Insanity is considered to be an "affirmative defense," and this defense must be proved by a preponderance of the evidence. The other factor used to defend the Louisiana rule and the only possible way of justifying the decision in the *Surrency*[12] case is that sanity is not an element of

7. State v. DeRancé, 34 La. Ann. 186 (1882).
8. 148 La. 983, 88 So. 240 (1921).
9. *Id.* at 993, 88 So. at 243.
10. *Id.* at 994, 88 So. at 244.
11. Note, 20 LA. L. REV. 749 (1960). This Note is cited by the reporter of LA. CODE CRIM. P. art. 652, comment (a).
12. 148 La. 983, 88 So. 240 (1921).

the crime and therefore need not be proved beyond a reasonable doubt. One writer has suggested that criminal intent deals with the question of whether the defendant actively desired (specific intent) or could have been expected to know (general intent) that certain consequences would follow from his act, whereas the question of sanity is concerned with whether the accused should be held responsible for his act and whether he knew his conduct to be wrong.[13]

In explanation and justification of the Louisiana rule emphasis has been placed on the practicality of the procedure. It has been suggested that the state should not be forced to prove sanity beyond a reasonable doubt since the burden would be too great in having to prove "something which is not usually susceptible of such conclusive proof, especially where the insanity is not continuing."[14] Proponents of this position also note that the defendant is in a much better position to prove *insanity* than the state is to prove *sanity*.[15]

Procedure in Other Jurisdictions

There are two additional procedural methods that have been used in other jurisdictions when the defendant pleads insanity. The first of these is similar to the Louisiana rule except that the accused must prove his insanity beyond a reasonable doubt. Despite the fact that this rule places an unusually heavy burden on the accused it was used in Oregon for almost one hundred years.[16] Fortunately it is no longer the law in any United States jurisdiction. It was apparently reasoned that since the state had to rebut the presentation of innocence beyond a reasonable doubt, the accused who claimed insanity would also have to rebut the presumption of sanity beyond a reasonable doubt. The rule was held constitutional in *Leland v. Oregon*,[17] but it is clearly an unfair burden to place upon the accused and directly contrary to the notion that the state is charged with proving guilt beyond a reasonable doubt. Justice Frankfurter in his dissent to *Leland* made it perfectly clear that he felt such a procedural rule was in conflict with the due process requirements of the Constitution.[18]

13. Note, 20 LA. L. REV. 749, 752 (1960).
14. *Id.* at 751. This same idea is expressed in Bennett, *Criminal Law and Procedure*, 21 LA. L. REV. 366, 367-68 (1961)).
15. Note, 20 LA. L. REV. 749, 752 (1960).
16. This statute has been repealed and Oregon now operates under the same rule as Louisiana. See 14 ORE. REV. STAT. 136.390 (1960).
17. 343 U.S. 790 (1952).
18. *Id.* at 802-03.

Another procedural rule is used in the federal courts and in about one-half of the states. Briefly stated, it is that if upon the whole evidence there is reasonable doubt of the defendant's sanity, he should be acquitted. This procedure was set forth in *Davis v. United States*[19] in an opinion written by the late Justice Harlan. The principal basis for this view is that the due process clause requires the defendant to prove nothing and places upon the state the burden of proving all the elements of the crime beyond a reasonable doubt.[20] Under this rule the defendant is in no way forced to prove his innocence. This is as it should be since traditionally the *state* must prove the guilt of the defendant. Thus when sanity is put at issue the prosecution must prove it like every other element of the crime, beyond a reasonable doubt.

The presumption of sanity is by no means discarded under this rule. It serves a very practical purpose in that it protects the prosecution from being forced to prove sanity in every case. If the defendant does not raise the issue of his sanity, he is presumed to be sane, and the issue of sanity is not considered. But should the accused raise the defense of insanity, he must proceed, according to *Davis,* to show "some evidence" of insanity. Thus there is a burden to raise some evidence, but there is no necessity to meet any burden of persuasion as is required under the Louisiana rule. In defining "some evidence" the cases reveal that the accused must present more than a mere scintilla[21] and do more than raise the issue of sanity.[22] In *Tatum v. United States,*[23] the court found that the defendant's lack of memory plus testimony to the effect that the defendant was abnormal was sufficient to put the question of sanity at issue.[24] Such decisions demonstrate that the question of "some evidence" must be decided on a case by case basis.

The whole concept of this federal rule is based on fairness and consistency with the constitutional principle that the defendant is free from any burden of proof. At the close of the *Davis* case this notion is succinctly stated:

19. 160 U.S. 469 (1895).

20. *Id.* at 488. Justice Harlan explains this rule in the *Davis* case: "If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond a reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged."

21. *E.g.,* McDonald v. United States, 312 F.2d 847, 849 (D.C. Cir. 1962).

22. Smith v. United States, 353 F.2d 838, 843 (D.C. Cir. 1965).

23. 190 F.2d 612 (D.C. Cir. 1951).

24. *Id.* at 615.

> "No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show *beyond a reasonable doubt* the existence of *every fact necessary* to constitute the crime charged."[25] (Emphasis added.)

The Louisiana Rule—An Analysis

The Louisiana rule runs afoul of two concepts which are basic to criminal procedure: the presumption of innocence of the accused and the burden of the prosecution to prove all elements of the crime beyond a reasonable doubt.

The Code of Criminal Procedure adopts the rule that "a person accused of crime is presumed by law to be innocent until his guilt is proven beyond a reasonable doubt."[26] The presumption of innocence, as explained by Wigmore, implies "[T]hat the accused . . . may remain inactive and secure, until the prosecution has taken up its burden and produced evidence. . . ."[27] Yet in Louisiana if the accused pleads insanity he cannot remain inactive but must prove his defense by a preponderance of the evidence. This is an improper shifting of the burden of proof to the accused and is contrary to the presumption of innocence.

The federal rule avoids this result. This can be explained by the fact there are two components of the burden of proof. First there is the duty of producing evidence, and additionally there is the burden of persuasion.[28] Under the federal rule the accused must merely present some evidence of his insanity; he is not forced to prove anything, and thus there is no improper shifting of the burden of proof. However, in Louisiana, the accused bears the burden of persuasion, since he must prove his insanity by a preponderance of the evidence.

Another example of the inconsistency of the Louisiana rule arises in connection with the rule that the state must prove "beyond a reasonable doubt every fact and circumstance necessary to constitute defendant's guilt."[29] As has been noted from

25. 160 U.S. 469, 493 (1895).

26. LA. CODE CRIM. P. art. 804A.

27. 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 2511 (3d ed. 1940).

28. *Id.* § 2489.

29. LA. R.S. 15:271 (1950). The Louisiana Criminal Code indicates that there are three elements which must be shown before the accused is held

an examination of the cases, the courts will instruct the jury that despite the fact that there may be a reasonable doubt of defendant's sanity, if the latter fails to prove his insanity by a preponderance of the evidence he must be determined sane.[30] This is the most glaring shortcoming of the Louisiana rule and is severely criticized by McCormick.

> "Thus it seems inconsistent to demand as to some elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress or *capacity to know right from wrong*, the jury may convict though they have such doubt."[31] (Emphasis added.)

The inconsistency between the Louisiana rule concerning presumption of innocence and the principle that the state must prove all elements of the crime beyond a reasonable doubt raises the question of the constitutionality of the Louisiana procedure. The United States Supreme Court dealt with a rule analogous to the Louisiana rule in *Leland v. Oregon*,[32] in which the court upheld an Oregon statute that required the defendant to prove insanity beyond a reasonable doubt. The court stated that there was no denial of due process merely because there might be some fairer method of dealing with the defendant. The majority opinion concluded: "We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of insanity since we cannot say that policy violates generally accepted concepts of basic standards of justice."[33]

Justice Frankfurter, in his vigorous dissent, reacted strongly to the majority opinion and pointed out several shortcomings of its reasoning. He felt that the Oregon statute went too far in attempting to penalize those persons who commit crimes by

---

criminally responsible. Article 8(1) explains that an act or failure to act plus criminal intent is necessary to produce criminal conduct. Article 14 explains that one will not be held criminally responsible for his acts if he is insane. Thus act, intent, and sanity must be established to prove guilt. LA. R.S. 14:8, 14.

30. *E.g.*, State v. Surrency, 148 La. 983, 88 So. 240 (1921). *See* text accompanying note 9 *supra*.

31. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321 (2d ed. 1954). Additionally McCormick notes that the recent trend in both the English and American courts is to follow the rule used by the federal courts. *Id.*

32. 343 U.S. 790 (1952).

33. *Id.* at 799.

casting upon them the burden of proving their defense.[34] He argued that since insanity is an unusual situation, the courts may take unusual measures in dealing with it. He accepted the presumption of sanity and agreed that the defendant should have the duty of raising the defense of insanity. But he did not feel that the accused should be forced to meet any such burden of proof.

It has been widely accepted as a cornerstone of criminal justice that the accused is presumed innocent and that the prosecution is burdened with proving all elements of the crime beyond a reasonable doubt.[35] *Spieser v. Randall*[36] implies that it is a constitutional requirement that the defendant be free of any burden of proof: "Due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the fact finder of his guilt."[37] A recent holding by the United States Court of Appeals for the Eighth Circuit reinforces the *Spieser* decision. *Stump v. Bennett*[38] held that the procedural rule requiring the defendant to prove his alibi by a preponderance of the evidence fell short of the minimal standards of fairness and constituted denial of fourteenth amendment rights. The *Stump* decision, however, left open the question of whether the presumption of innocence is of constitutional status.[39] But the court did say: "[T]his much is clear: when the burden of persuasion is shifted to the defendant to disprove essential elements of a crime, as it was in the instant case, then it is certain that the due process clause of the Fourteenth Amendment has been

34. *Id.* at 802: "[T]he conception of justice which has dominated our criminal law refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of the jurors. It is the duty of the government to establish his guilt beyond a reasonable doubt."

35. This notion is pointed out in Deutch v. United States, 367 U.S. 456, 471 (1961): "One of the rightful boasts of western Civilization is that the . . . [prosecution] . . . has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." *See also* Coffin v. United States, 156 U.S. 432 (1895); and Morrison v. California, 291 U.S. 82, 93 (1934): "In such circumstances the conviction of Morrison because he failed to assume the burden of disproving a conspiracy was a denial of due process that vitiates the judgment as to him."

36. 357 U.S. 513 (1958).

37. *Id.* at 526.

38. 398 F.2d 111 (8th Cir. 1968), *cert. denied*, 393 U.S. 1001 (1968).

39. *Cf.* 398 F.2d 111, 118 (8th Cir. 1968). The court actually questioned the validity of the *Leland* decision on this point. In *Leland* the Supreme Court seemed to deny constitutional status to the presumption of innocence. This apparent denial was accomplished through the court's treatment of the *Davis* case.

violated."[40] This statement is in direct conflict with the *Leland* decision since in *Leland* the accused was faced with a burden of proof, and the prosecution was relieved of its responsibility of proving all elements of the crime. It matters not that one might say that sanity is not an issue to be proved by the prosecution. When the presumption of sanity is put at issue, it is in reality impossible to prove intent without first proving sanity. Thus the state would be required to prove sanity, like all other elements of the crime, beyond a reasonable doubt.

The United States Supreme Court has not spoken directly on the *Stump* decision, but the Court in *Johnson v. Bennett*[41] vacated and remanded an Eighth Circuit ruling which had upheld the constitutionality of an identical Iowa statute. The Supreme Court's action came after the circuit court had reversed itself and in *Stump* ruled the statute unconstitutional. It is notable that the Supreme Court ordered the lower court to reconsider the *Johnson* case in light of its later decision that the statute was unconstitutional.

The rule of procedure in Louisiana is certainly contrary to the constitutional requirements expressed in *Stump*. In *State v. Surrency*[42] the court noted that if the defendant failed to establish his insanity by a preponderance of the evidence, the defense of insanity would fail despite the fact that there might be a reasonable doubt as to his sanity. This is clearly in opposition to the requirements of the due process clause of the fourteenth amendment, as is explicitly noted in the *Stump* decision.[43]

There are other problems raised with reference to the Louisiana rule.[44] For instance, it is questionable if the great

40. *Id.* at 118.
41. 393 U.S. 253 (1968).
42. 148 La. 93, 88 So. 240 (1921).
43. There is the additional question of whether forcing the accused to prove his insanity is a violation of the fifth amendment of the United States Constitution. This area is outside the scope of this Comment, but it is suggested that the Louisiana rule might also violate the fifth amendment. Circumstances can be easily imagined in which the accused would have no one to testify to his insanity (*e.g.*, he is an indigent and cannot afford medical examinations and medical witnesses) at the time of the crime. Without such testimony defendant would be compelled to take the stand in order to offer proof of his insanity. This would be particularly damaging in light of Louisiana's broad rule on cross examination. *See* LA. R.S. 15:376 (1950).
44. Another related area that causes much difficulty is the fact the Louisiana courts refuse to allow any mental defect short of legal insanity to negate specific intent. State v. Rideau, 249 La. 1111, 193 So.2d 264 (1967). This area is outside the scope of this Comment. However, *see generally* Comment, 22 LA. L. REV. 664 (1962).

importance placed on the presumption of sanity is justified. First it is necessary to examine the validity of the presumption that all men are sane. Generally, a presumption must meet the test of the due process clause of the fourteenth amendment that there be a rational relation or connection between the fact proved and the ultimate fact presumed and that the presumption must not be arbitrary.[45] The limit concerning presumptions established by the legislature is stated in *United States v. Tot*:[46]

> "But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of the courts."[47]

It is clear that the presumption of sanity is certainly not arbitrary and that from "the circumstances of life as we know them" it is certainly not unreasonable that men should be presumed sane. However, it is open to the very serious question of exactly what this presumption should mean as far as the jury is concerned. Under the Louisiana rule, the presumption of sanity forces the defendant to carry a burden of persuasion and prove his innocence. The United States Supreme Court has been unwilling to allow presumptions to have such force. The Court has pointed out: "The power to create presumptions is not a means of escape from constitutional restrictions."[48]

All of this is not to say that the presumption of sanity cannot serve a useful purpose. The federal courts and the states operating under a similar rule use the presumption of sanity to prevent the prosecution from being forced to prove sanity in cases where the defense of insanity is not raised. In cases where the question is raised, sanity must be proved beyond a reasonable doubt. This procedure simply places a limited importance on the presumption of sanity.

---

45. *See, e.g.*, Minski v. United States, 131 F.2d 614 (6th Cir. 1943).

46. 319 U.S. 463 (1943). The presumption involved here was that if one had a prior conviction of a crime of violence and present possession of a firearm that it was presumed the weapon was obtained through interstate or foreign commerce.

47. *Id.* at 468.

48. Bailey v. Alabama, 219 U.S. 219, 239 (1911). Justice Black used this case as basis for his dissent in United States v. Gainey, 380 U.S. 63 (1965), in which he noted that as presumptions become more important to litigants and to the administration of justice, ". . . a more careful scrutiny is necessary." *Id.* at 78. This dissent was followed by the Court in limiting the validity of presumptions. United States v. Romano, 382 U.S. 136 (1965).

Furthermore, it seems exceedingly impractical for the jury to have to juggle with two burdens of proof in order to determine the question of sanity and the question of guilt or innocence. The concept of the burden of proof is an extremely slippery notion that is not easily explained by even the best legal writers. The jury is ordinarily charged that the state must prove the guilt of the accused beyond a reasonable doubt. It is unlikely that this is ever completely understood by the jurors, much less when they have the additional burden of finding insanity proved by a preponderance of the evidence. It is inevitable that confusion and misunderstanding will result. The comments to the Code of Criminal Procedure[49] emphasize that the rule is practical, yet it is not nearly so easily understood by the jury as the simple charge that the prosecution must prove all elements of the crime beyond a reasonable doubt.

Proponents of the present Louisiana rule emphasize that the "defendant is in a better position to prove insanity than is the State to prove sanity."[50] This reasoning is not persuasive, because the defendant is certainly in no better position to gain needed medical testimony. One might just as easily say it would be more "practical" for the accused in any criminal case to prove he did not commit the crime, than to force upon the state the burden of proof. Mere practicality should not prevail when the procedures are offensive to our notions of justice and fair play.

Although it is not generally stated in the opinions of the courts, proponents of the Louisiana rule suggest that underlying it is the notion that it is simply too great a burden for any party, either defendant or prosecution, to prove insanity or sanity beyond a reasonable doubt.[51] While this might be a valid argument it must be noted that the federal courts have been operating under the *Davis* rule since 1895 and have not found it unmanageable. The same can be said for the twenty-four state courts that follow the same rule. It would seem that fairness to the accused should outweigh any possible difficulty of proof that may be associated with the federal rule.

Finally, it is important to note that a great deal of confusion results when rules (such as the Louisiana rule) from

49. LA. CODE CRIM. P. art. 652, comment (a).
50. Note, 20 LA. L. REV. 749, 752 (1960).
51. *The Work of the Louisiana Appellate Courts for the 1959-1960 Term—Criminal Law and Procedure*, 21 LA. L. REV. 366, 367 (1961).

civil practice are used in criminal law. This problem has been evident in many jurisdictions because defenses of duress, insanity, self-defense, and alibi are often known as "affirmative defenses," and when asserted must be proved by a preponderance of the evidence just as an affirmative defense must be proved in a civil case. This is a typical example of civil procedure terms being used in the criminal law with confusion resulting. Actually these "affirmative defenses" are misnomers and should be treated no differently from other defenses in a criminal prosecution.

Conclusion

The rule followed in Louisiana which forces the accused to prove his insanity by a preponderance of the evidence is a denial of due process under the fourteenth amendment. Considering the Supreme Court's concern with criminal procedure,[52] it is not unlikely that the Court will be faced with this question.

The writer suggests that Louisiana should follow the procedure used by the federal courts and avoid this constitutional problem. By following the federal rule Louisiana would also be uniform in its dealings with the so-called affirmative defenses. In both the alibi[53] and self-defense[54] situations the accused is required to prove nothing, and the state is forced to prove the elements of the crime beyond a reasonable doubt. This certainly should be the case with insanity since the situations are fundamentally the same. In addition, the federal rule decreases the chances of confusion concerning the burden of proof, because the prosecution is required to prove all elements beyond a reasonable doubt; whereas, under the Louisiana rule the jurors must also consider the accused's burden of proving his insanity. The foregoing reasons weigh against the continued use of the present Louisiana rule; but more importantly, the United States Constitution compels that the rule be changed.

Herschel E. Richard, Jr.

52. *See, e.g.*, Bruton v. United States, 389 U.S. 818 (1968); Wade v. United States, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963).

53. State v. Ardoin, 49 La. Ann. 1145, 22 So. 620 (1897).

54. State v. Carter, 227 La. 820, 80 So.2d 420 (1955); State v. Conda, 156 La. 679, 101 So. 19 (1924).