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Burden of Proof of Insanity in Criminal Cases - Thomas v. State

Casenotes

BURDEN OF PROOF OF INSANITY IN CRIMINAL CASES

Thomas v. State[1]

Defendant was indicted for first degree murder, rape, robbery, and burglary by the Grand Jury of Baltimore City. At the trial, his sole plea was "not guilty by reason of insanity". He was found guilty by a jury and after a motion for a new trial was denied by the Supreme Bench of Baltimore, he was sentenced to death.

The trial court, in its advisory charge to the jury, had directed the jury to apply the "right-wrong" test as established in *Spencer v. State*,[2] to determine the question of defendant's criminal responsibility and also stated that "the burden is upon the defense to prove insanity by a preponderance of the evidence, not beyond a reasonable doubt".[3] On appeal, defendant objected to both parts of the charge contending that: (1) the "right-wrong" test should be overruled as the test for criminal responsibility and that in its place the broader test as outlined in *Durham v. United States*[4] be adopted; and (2) the burden of proving insanity is not properly upon the defense, but upon the state and requires proof beyond a reasonable doubt. The Court of Appeals affirmed the trial court's charge on both points. The "right-wrong" test[5] is still the test of criminal responsibility and the burden of proof of insanity rests upon the accused.

In order to limit the scope of this note, the only area that it will attempt to cover is the problem raised by the

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[1] 112 A. 2d 913 (Md., 1955).

[2] 69 Md. 28, 13 A. 809 (1888).

[3] *Supra*, n. 1, 918.

[4] 214 F. 2d 862 (D. C. Cir., 1954), noted in 15 Md. L. Rev. 44 (1955). See also Sobeloff, *From McNaghten to Durham and Beyond*, 15 Md. L. Rev. 93 (1955).

[5] For a discussion of the various tests of criminal responsibility and the "right-wrong" test and its application in Maryland, see casenote on Durham v. United States, *ibid*, in 15 Md. L. Rev. 44 (1955). The Court of Appeals, in the instant case, despite appellant's argument based on the Durham case, refused to apply the broader rule although it pointed out in passing that there was no evidence of mental disease or defect to satisfy the Durham rule, "which we do not here adopt". See *supra*, n. 1, 919. Followed in Bryant v. State, 115 A. 2d 502 (Md., 1955).

defendant's second contention, *i.e.*, the burden of proof when insanity is pleaded as a defense to a criminal action.[6]

BURDENS AND PRESUMPTIONS GENERALLY

To understand the divergent views on the question of the burden of proof in insanity cases, it seems necessary at the outset to outline the fundamental rationale of burden of proof and presumptions generally in the law of evidence. Strictly speaking, the burden of proof on a separate issue or on the case as a whole can appropriately be called the *risk of non-persuasion of the jury.*[7] This would mean, that the party upon whom the law places the burden of proof has the ultimate task of persuading the jury. The burden of proof is placed upon the various parties in the several classes of cases for a variety of reasons, none of which fall under a sure or universal test. Primarily, the burden of proof may be seen to be placed where it fits best, resulting in "specific rules for specific classes of cases resting for their ultimate basis upon broad reasons of experience and fairness".[8] Along with this *risk of non-persuasion,* which *never* shifts during the course of the trial,[9] the party with the burden of proof also, at the outset, has a *duty of going forward with the evidence.* But, this duty, unlike the duty of persuasion, is a duty toward the judge and not the jury. If this duty of producing the evidence is not satisfied, the party with the duty loses by a ruling of the judge and the evidence never gets to the jury. If, however, this duty of introducing enough evidence has been satisfied, the proponent of the evidence is left only with the *risk of non-persuasion of the jury.* Then, either party can and does produce evidence, and if the jury is in doubt after hearing

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[6] Since the various tests for criminal responsibility have already been discussed in a previous casenote, *ibid,* it is felt that by ignoring that aspect of this case, save an occasional pertinent reference to the aforementioned note, more space can be afforded this interesting and important question of burden of proof.

[7] 9 WIGMORE, EVIDENCE (3rd ed., 1940), Sec. 2485.

[8] *Ibid,* Sec. 2486, p. 278. Morgan, in his article, *Some Observations Concerning Presumptions,* 44 Harv. L. Rev. 906, 911 (1931), lists:

> ". . . at least four *a priori* tests for placing this burden . . . upon . . . (1) the party having the affirmative of the issue, (2) the party to whose case the fact in question is essential, (3) the party having peculiar means of knowing the facts, and (4) the party who has the burden of pleading it." (But then says) "the real decision is made upon the judicial judgment based upon experience as to what is convenient, fair, and good policy; and some opinions frankly so declare."

[9] WIGMORE, *op. cit., supra,* n. 7, Sec. 2489.

all the evidence, the party with the *risk of non-persuasion* must lose.[10]

A presumption, in its strictest sense, is a rule of law created by the courts primarily as a device to shorten the inquiry and hasten judicial proceedings.[11] The way presumptions arise and the purposes they serve are various, but the effect of a true presumption when strictly applied is limited. A true presumption in favor of one party operates to cast the *duty of producing the evidence* on his opponent, though the party favored by the presumption may, himself, have the ultimate burden of proof in the sense of the *risk of non-persuasion of the jury*. Thus, the party against whom the presumption operates becomes the proponent of the evidence at the outset. If the proponent does not produce the amount of evidence sufficient to convince the judge that there is a triable question of fact for the jury, the presumption will defeat the proponent on the basis of a ruling by the judge. But, when the proponent has met the burden of producing the evidence, and the judge so rules, the presumption should disappear since it has served its full purpose, and the issue should go to the jury free from any rule, with the original party still bearing the *risk of non-persuasion of the jury*. Thus, following this view of presumptions, a presumption should never go to the jury[12] or be weighed as evidence,[13] and when the proper evidence has been introduced, the presumption should disappear and the jury should decide the case on the basis of all the evidence introduced, with the original party bearing the burden of proof, no longer being favored by *any* presumption. Thus, it can be seen that presumptions only bear on the *duty of producing the evidence* and not on the ultimate *risk of non-persuasion of the jury*.[14]

[10] WIGMORE, *op. cit., supra*, n. 7, Secs. 2487 and 2488. See also, Thomsen, *Presumptions and Burden of Proof in Res Ipsa Loquitor Cases in Maryland*, 3 Md. L. Rev. 288 (1939).

[11] THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898), 315.

[12] Alexander, *Presumptions, Their Use and Abuse*, 17 Miss. L. J. 1 (1945).

[13] It seems well agreed under this view that presumptions as a rule of law can have no probative weight as evidence. THAYER, *op. cit., supra*, n. 11, 576, says:

> "A presumption itself contributes no evidence and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence and a presumption — being a legal rule or a legal conclusion — is not evidence."

See also: McBaine, *Presumptions, Are They Evidence?*, 26 Cal. L. Rev. 519, 545 (1938).

[14] This view of presumptions seems to be theoretically sound. Some courts have confused legal presumptions with *inferences of fact*, which do have weight as evidence, and have given presumptions definite evidencial weight.

PRESUMPTION OF SANITY

All American jurisdictions agree to the initial proposition that there exists a presumption that all men are sane and responsible at the time of a criminal act was committed.[15] This presumption of sanity is a creature of necessity and obtains principally to save time in the trial of issues made by the pleadings, since a great deal of time and effort would be wasted if in every case the state had to put in full evidence of sanity as it does of all other material facts.[16] This reasoning was well expressed by the United States Supreme Court in *Davis v. United States:*

> "If that presumption were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary."[17]

Thus, at the outset, the accused is presumed sane, until the issue of insanity is raised by the accused himself as a defense in his pleadings. Unless this be done, the presumption relieves the state from introducing any evidence of the sanity of the accused in relation to his responsibility for the act committed.

Though all the courts agree to this view, they split as to the weight and effect the presumption will have when the accused does introduce the plea of insanity into the case. As will be seen, the jurisdictions placing the burden on the state more closely follow the normal rule concerning presumptions and dismiss the presumption of sanity when the defendant has introduced enough evidence to take the case to the jury. On the other hand, the jurisdictions placing the burden of proof on the accused depart from the normal

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This results in confusion and anomalies and should be discouraged. The above view was first advanced by THAYER, *op. cit., supra*, n. 11, and was later adopted by WIGMORE, *op. cit., supra*, n. 7, Sec. 2491. It apparently has the support of Morgan and has been adopted by the AMERICAN LAW INSTITUTE'S MODEL CODE OF EVIDENCE (1942), Rule 704. See also: Gausewitz, *Presumptions in a One Rule World*, 5 Vand. L. Rev. 324 (1952); *McBaine, Presumptions; Are They Evidence?*, 26 Cal. L. Rev. 519 (1938); Morgan, *Techniques in the Use of Presumptions*, 24 Iowa L. Rev. 413 (1939); Morgan, *Further Observations on Presumptions*, 16 So. Cal. L. Rev. 245 (1943); Thomsen, *Presumptions and Burden of Proof in Res Ipsa Loquitor Cases in Maryland, supra*, n. 10.

[15] For a list of cases in all American jurisdictions, see WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954), 214.

[16] Morgan, *Techniques In The Use of Presumptions, supra*, n. 14, 416.

[17] 160 U. S. 469, 486 (1895).

rule and allow the presumption of sanity to persist throughout the trial as an *inference of fact* and consequently attach some weight to it as evidence in favor of the state.[18]

Burden of Proof on the Prosecution

The view that the prosecution has the burden of proving the sanity of accused, once it has been raised as an issue, has the favor of the Federal courts and approximately one-half of the state courts.[19] These jurisdictions take the sounder theoretical approach, essentially holding that since a sound mind is necessary to have criminal intent, which is a definite element of a crime, the prosecution must bear the burden of proof in the sense of the *risk of non-persuasion of the jury* as to this element of a crime as it must to all other material facts.[20] True, the prosecution will benefit at the outset by the presumption in its favor of the defendant's sanity, but this presumption puts upon the defendant only the duty of producing the evidence of insanity in the first instance, so that once the defendant has introduced enough evidence, the presumption should disappear as a rule of law and the case goes to the jury with the *risk of non-persuasion of the jury* upon the prosecution.[21] The Illinois Court expressed this view when it said in reference to criminal acts and intent:

> "These are . . . affirmative facts, and must be proved by the prosecution. The State avers their existence — they are all essential to constitute the crime, and the State must prove them — the burden of proof is on the State. But, it is said, the State is relieved of the burden by proving the prisoner did the act, the law implying

[18] Weihofen, *op. cit., supra*, n. 15, 216.

[19] For a complete digest of the burden of proof in insanity cases in all courts in the United States, see Weihofen, *op. cit., supra*, n. 15, 241 *et seq.* Weihofen feels that the increasing tendency in the American courts is to put the burden of proof on the state (238), as does Glueck. (Glueck, Mental Disorder and Criminal Law (1925), 41.) Wigmore, however, feels that this view is losing favor; *op. cit., supra*, n. 7, Sec. 2501.

[20] Glueck, *ibid*, 41. See also Davis v. U. S., *supra*, n. 17; State v. Shuff, 9 Ida. 115, 72 Pac. 664 (1903); Hopps v. the People, 31 Ill. 385 (1863); The People v. Garbutt, 17 Mich. 9 (1868); The People v. McCann, 16 N. Y. 58 (1857).

[21] Wigmore, *op. cit., supra*, n. 7, Sec. 2501; Morgan, *Further Observations on Presumptions*, 16 So. Cal. L. Rev. 245, 251 (1943); Underhill, Criminal Evidence (4th ed., 1935), Sec. 304. As to how much evidence is "enough evidence" to take the question of sanity to the jury, all states save Nebraska that put the burden of proof on the state require sufficient evidence to raise a reasonable doubt of defendant's responsibility. Nebraska's rule is less strict and holds that the presumption prevails only in the absence of evidence of insanity, and if "any evidence" is introduced it becomes a jury question. See Weihofen, *op. cit., supra*, n. 15, 227.

> that he intended to do it, and that the presumption is, every man is of sound mind. These are but presumptions, and when they are rebutted by proof of absence of criminal intention, by reason of unsoundness of mind, or a reasonable doubt is raised on the point, the doubt must avail the prisoner. . . . The prosecution is bound, on every principle of correct pleading, and of justice to maintain their allegations, and it is not in their power to shift the burden on to the defendant. . . . The burden of proof must, therefore, always remain with the prosecution to prove guilt beyond a reasonable doubt. . . ."[22]

Thus, under this view, the defendant need only introduce the initial evidence of insanity, enough to meet the burden of producing the evidence in order to overcome the presumption of sanity. Once this duty has been met by the defendant, the state must prove sanity beyond a reasonable doubt, as it must prove all other elements of a crime. The presumption of sanity should disappear and should have no probative weight as evidence. Furthermore, no mention of the presumption of sanity should be made to the jury.[23] If the defendant fails to meet this initial burden of producing enough evidence of insanity, the defendant should lose on a legal ruling of the judge and the case should never get to the jury on the question of insanity.

BURDEN OF PROOF ON THE ACCUSED

The other one-half of the American jurisdictions place the burden of proof upon the defendant who pleads insanity in a criminal case.[24] These jurisdictions place the burden of proof on the defendant essentially for practical, though perhaps not theoretically sound, reasons. Wigmore opines that this view was an outgrowth of the abuses of the opposing view which puts the burden of proof on the prosecution.[25] The language of the courts in these cases give Wigmore's conclusion some support.[26] In *Ortwein v. Commonwealth,* the Pennsylvania Court stated:

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[22] Hopps v. People, *supra,* n. 20, 394.

[23] Unfortunately, some courts that do put the burden of proof upon the prosecution, though perhaps inadvertently, do give the presumption of sanity weight as evidence and allow mention of it to the jury. These courts fail to recognize the true effect of a legal presumption as a legal rule only which cannot be evidence. See WEIHOFEN, *op. cit., supra,* n. 15, 216 *et seq.*

[24] See n. 19.

[25] WIGMORE, *op. cit., supra,* n. 7, Sec. 2485.

[26] Though some courts support this view with other reasoning, the language in most cases points to public policy reasons for placing the burden

> "Merely doubtful evidence of insanity would fill the land with acquitted criminals. The moment a great crime would be committed, in the same instant, indeed, often before, would preparation begin to lay ground to doubt the sanity of the perpetrator. The more enormous and horrible the crime, the less credible, by reason of its enormity, would be the evidence in support of it; and proportionately weak would the required proof of insanity to acquit of it. . . . The danger to society from acquittals on the ground of a doubtful insanity demands a strict rule. It requires that the minds of the triers should be satisfied of the fact of insanity."[27]

The defendant in these jurisdictions, however, is required to establish his defense of insanity by the preponderance of evidence.[28] Only Oregon, by statute,[29] requires that the defendant establish his insanity beyond a reasonable doubt.[30]

In the jurisdictions where the defendant has the burden of proof, it is clear that along with the *duty of producing the evidence,* he also has the ultimate *risk of non-persuasion of the jury.* The presumption of sanity favoring the prosecution here, is more than a legal presumption which is dispelled by a ruling by the judge, but is instead more an *inference of fact* from which the jury can draw conclusions of fact. The probability that all men are sane is looked upon as being so strong, that the presumption of sanity operates to place the entire burden of proof upon the defendant and prevails until the defendant has satisfied the jury on all the evidence, including the presumption of sanity, that he is insane. Thus, in these cases, where the defendant has the total burden of proof *(i.e.,* the *duty of producing the evidence* and the *risk of non-persuasion of the jury)* the pre-

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upon the defendant. See leading cases: State v. Barton, 361 Mo. 780, 236 S. W. 2d 596 (1951); State v. Lewis, 20 Nev. 333, 22 Pac. 241 (1889); Kelch v. State, 55 Ohio St. 146, 45 N. E. 6 (1896); Ortwein v. Commonwealth, 76 Pa. 414 (1874); State v. Quigley, 26 R. I. 263, 58 A. 905 (1904); State v. Klinger, 43 Mo. 127 (1868); Boswell v. The Commonwealth, 20 Grat. (Va.) 860 (1871); Holober v. Commonwealth, 191 Va. 826, 62 S. E. 2d 816 (1951); State v. Clark, 34 Wash. 485, 76 Pac. 98 (1904).

[27] 76 Pa. 414, 425 (1874).

[28] See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954), 212.

[29] Ore. Comp. Laws Ann. (1940), Sec. 26-929.

[30] The United States Supreme Court in Leland v. Oregon, 343 U. S. 790 (1952), by a split decision, held that this statute does not deprive the defendant of due process of law and is constitutional.

sumption of sanity does have weight as evidence[31] and is mentioned to the jury, and perhaps logically so.[32]

MARYLAND RULES

No cases have been found in Maryland, prior to the decision in the *Thomas* case, dealing with the question of the burden of proof where the defendant pleads insanity. Thus, this case, becomes the first Maryland authority in this area and as such requires close scrutiny in order to determine Maryland's position and the logical or possible consequences as a result of the opinion.

To begin with, the factual basis for defendant's plea of insanity was a poor one, supported by little evidence of insanity. The defendant was a habitual criminal offender, having spent part of his youth in the Cheltenham Reformatory. Just prior to the commission of the alleged offenses he had been released from the Maryland Penitentiary after apparently serving a full fifteen year term for robbery. He had left school in the third grade and could neither read or write.[33] The defendant's only evidence of insanity was the testimony of witnesses to the effect that he had been drinking just prior to committing the acts charged and that he was hostile while under the influence of alcohol, plus testimony of the Chief Medical Officer of the Supreme Bench of Baltimore, a psychiatrist, part of which follows:

> ". . . poor intellectual endowments, but not clearly mentally defective. Cannot read or write. Certainly could conclude from these examinations that the pa-

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[31] WEIHOFEN, *op. cit., supra*, n. 28, 216. Though the courts that do put the burden of proof on the defendant do consistently give the presumption of sanity weight as evidence, their position can be justified if the presumption is looked upon not as a presumption at all, but instead as a *factual inference* from which the jury can draw conclusions of fact. But, even here, McBaine argues that this position is unfair to the defendant. In *Presumptions, Are They Evidence?*, 26 Cal. L. Rev. 519, 544 (1938), he states:

> "A jury empaneled to determine insanity may weigh the testimony of witnesses and other evidence and if the testimony of the witnesses and the other evidence does not convince them of the defendant's 'defense' of insanity, they may reject the defense. They can rationally do this and only this. They cannot rationally weigh a rule of law against the testimony of witnesses. To tell a jury to weigh a rule of law is to command them to do the impossible — to employ sophistry of the rankest kind. Further, such an instruction is highly unfair to a defendant because the jury may give the legal presumption any weight they so desire. They may conclude that it outweighs the testimony of forty — any number — of witnesses of the highest character and the utmost knowledge possessed upon the subject by any living person."

[32] See Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59 (1933).

[33] *Supra*, n. 1, 914.

> tient is not so defective that he would not realize that it was wrong and illegal to rob, rape, and murder. . . . I felt that the patient had sufficient intellectual capacity to know that it was morally and legally wrong to rape, murder, rob, or any of the acts of which he is accused, . . ."[34]

Clearly, the psychiatric testimony did more to support the proposition of sanity than insanity.

The Court of Appeals, in reviewing the burden of proof aspect of the case, first quoted some textbook authority[35] to the effect that the burden of proof is upon the accused in the majority of jurisdictions. Without more, the Court then said:

> "Even in the Durham case, supra, upon which the appellant so strongly relies, the following is quoted from Tatum v. United States, 1951, 88 U. S. App. D. C. 386, 190 F. 2d 612: 'When lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of mankind and presumes that all people, including those accused of crime are sane.' So long as this presumption prevails, the prosecution is not required to prove the defendant's sanity. But 'as soon as "some evidence of mental disorder is introduced, . . . sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt".' "[36]

And concluded:

> ". . . there is no evidence here of any mental disorder to shift the burden of proof to the state, as in the Durham and Stewart cases, supra, even if we decided to follow the rule laid down in these cases as to the burden of proof, which we do not decide. The charge of the trial judge was correct."[37]

Thus, the Court, after briefly quoting some law applicable to one side of the case, affirmed the trial court's charge

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[34] *Supra*, n. 1, 915.

[35] *Supra*, n. 1, 918. The court quoted sections of the following texts, all to the effect that the prevailing view is to place the burden of proof upon the defendant: WHARTON'S CRIMINAL LAW, Vol. 1 (12th ed.), Sec. 78; UNDERHILL'S CRIMINAL EVIDENCE (4th ed.), Sec. 304; 40 C. J. S., HOMICIDE, Sec. 194, subd. a, Insanity.

[36] *Supra*, n. 1, 919. Both the Durham case, see *supra*, n. 4, and the Tatum case (citation in above quote) mentioned by the court take the position that the burden of proof is on the state to prove sanity when some evidence of mental disorder is introduced by the defendant, and maintain that this is the prevailing view.

[37] *Supra*, n. 1, 919.

placing the burden of proof upon the defendant, and discounted a decision on the opposite view, because of the little evidence produced by the defendant at the trial. In other words, the Court refused to give consideration to the view that places the burden of proof on the state because the defendant did not introduce the "some evidence of mental disorder" necessary, under that view, to make sanity a part of the state's case.

It must be said that the Court was probably right in deciding that there was not enough evidence of insanity produced by the defendant even in a jurisdiction that puts the burden of proof on the state, (*i.e.*, not enough evidence under that theory to satisfy the defendant's duty of producing the evidence at the outset, so as to dispel the presumption of sanity and to put the state upon its ultimate task of persuading the jury) since even the Chief Medical Officer's testimony did little to support a plea of insanity. Though that aspect of the opinion may have been correct, it nevertheless seems unfortunate that the Court, when adopting the view placing the burden of proof on the defendant, refused to take a more decisive stand on Maryland's position on the view placing the burden on the state, regardless of whether there was enough evidence to support that view. Clearly, the question is one that can be decided in but one of two possible ways, since the burden of proof can ultimately be placed upon one party, either the defendant or the state, resulting in a situation where the adoption of one view necessarily requires the rejection of the competing view. Thus, any clear decision on the issue would have considered both views, but would have adopted one view for good reasons and would have rejected the other completely. To attempt to so otherwise would be to avoid the question — to decide nothing.

The Court of Appeals, in the instant case, apparently attempted to avoid taking such a decisive stand, thus leaving the question in a somewhat ambiguous state in Maryland. While it was obviously in favor of placing the burden on the defendant, it was reluctant to openly reject the position placing the burden upon the state.[38] To avoid the obvious problem, the Court simply affirmed the trial court's charge which placed the burden of proof upon the defendant, and dismissed any real decision on the opposite view because there was too little evidence introduced in the case

[38] The language in the opinion leads one to this conclusion. If the court meant to reject completely the view placing the burden upon the state, could it not have said in reference to this rule, "which we do not adopt" rather than ". . . which we do not decide?" See, *supra*, n. 1, 919.

to support it, thus, leaving the Court's attitude toward the latter view open to conjecture. So uncertain is the Court's language in this part of the opinion, that one cannot help wonder whether, if the defendant had introduced enough evidence to meet the requirements of the view placing the burden on the state, the Court might not have adopted that view, despite the fact that the decision does affirm the trial court's charge embodying the opposite view. It would seem that the nature of the problem and the significance of both views in American law today,[39] should have warranted a much more clearcut and expository decision, regardless of which position the Court chose to take, than is found in the instant case.

But, even if one dismisses the above uncertainties in the opinion and accepts the case solely as one supporting the view placing the burden of proof upon the accused, the decision still leaves much to be desired. The discussion of the position adopted was scanty, the Court quoting only textbook authority to support its viewpoint, without even considering the public policy reasons usually motivating the adoption of this rule.[40] No mention was made of the presumption of sanity, though it must be assumed to obtain in Maryland following the general usage in the other jurisdictions that have decided this question.[41] Assuming the presumption does exist, should it be mentioned to the jury or have weight as evidence?[42] Nothing was said in relation to any of these matters. In short, the Court merely adopted a rule of law, no more, leaving all problems and reasoning attendant to it to conjecture.

It seems regrettable that this important question should have been put to the Court of Appeals on such a poor factual situation. Perhaps, if the case had been closer and the defendant's evidence of insanity greater, the Court would have been required to take a more definite stand on this important, though controversial question. It is believed, however, that the instant case does not bar a more decisive opinion on the question in the future.

CONCLUSION

The *Thomas* decision probably puts the rule placing the burden of proof on the defendant in the slight majority in

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[39] *Supra*, n. 19.
[40] *Supra*, n. 26.
[41] *Supra*, n. 15.
[42] See *supra*, ns. 13, 14, 31.

American jurisdictions today.[43] The other rule, however, placing the burden upon the state, both from a theoretical and public policy standpoint, seems to be the better one.[44] Clearly, from a theoretical standpoint alone, the latter view is correct. It is elementary that in each criminal case the state must prove the accused's guilt of crime beyond a reasonable doubt.[45] The state bears this burden both in the sense of the *duty of producing the evidence* and *risk of non-persuasion of the jury*. It is generally agreed, that to have a punishable crime the state must prove the concurrence of two factors: (1) the criminal act itself; (2) intent, or *mens rea*, on the part of the actor to commit crime.[46] A plea of "not guilty by reason of insanity" essentially is a plea whereby the accused admits committing the act alleged, but because of his insanity denies he had the necessary intent to commit a criminal act. It is only logical then, that the state bear the burden of proving this element of a crime, as it does the other elements, *i.e.*, the *corpus delicti* and the criminal act. By putting the burden of proof upon the state to prove the accused's sanity, the law thus requires the state to prove that the accused had the necessary mental faculties to formulate a criminal intent, without which no crime could result from the act committed. Even the presumption of sanity is more favorably handled under this rule. Here, it can take its place as a normal presumption bearing only on the defendant's duty of producing the initial evidence of insanity, being dispelled when this duty is fulfilled, instead of persisting throughout the trial as evidence in favor of the state, as it does in jurisdictions placing the burden of proof upon the accused.[47]

The jurisdictions that place the burden of proof on the accused, while probably recognizing the above rule as adhering closer to sound legal principles, take their position essentially from fear that such a rule would encourage abuse of the defense of insanity and would lead to malingering in cases where this defense would be strictly unjus-

[43] Before the decision in the instant case, the jurisdictions were about evenly split on this question, with the different authorities claiming either side to be the prevailing view. See *supra*, n. 19.

[44] See UNDERHILL, CRIMINAL EVIDENCE (4th ed., 1935), 597; 2 JONES ON EVIDENCE (2nd ed., 1926), Sec. 535; GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925), 41; THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898), 382. THE AMERICAN LAW INSTITUTE acting on Tentative Draft No. 4 (1955) of THE MODEL PENAL CODE voted to strike from Sec. 4.03(1) the bracketed language which would have placed the burden on the defendant.

[45] UNDERHILL'S CRIMINAL EVIDENCE (4th ed., 1935), Sec. 51.

[46] CLARK AND MARSHALL, CRIMES (5th ed., 1952), Sec. 38.

[47] See *supra*, ns. 13, 14, 23.

tified.[48] It is felt that this fear can be largely minimized, however, since psychiatrists, appearing as witnesses, in most cases can easily detect malingering, as can the average judge or jury, who do not seem to be prone to accept a plea of insanity too readily, especially in the more serious crimes such as homicide.[49] But, even supposing these fears be justified, they would not seem to warrant a rule departing from accepted principles of criminal law, since the danger of abuse is inherent in our system of criminal justice, which while attempting to detect and punish crime, keeps as of paramount importance the protection of the innocent man.[50] As Mr. Justice Harlan put it in *Davis v. United States:*

> "It seems to us that undue stress is placed . . . upon the fact that, in prosecutions for murder, the defense of insanity is frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice."[51]

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[48] See *supra*, ns. 25, 26, 27.

[49] See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954), 220, footnotes 3 and 4.

[50] See JONES ON EVIDENCE (2nd ed., 1926), 622, fn. 7, where it is said:

> "It would be a reproach to justice if a guilty man escaped the penalty for a crime upon a feigned mental irresponsibility, or postponed his trial upon a feigned condition of the mind, such as to his alleged inability to aid in his defense. It would be likewise a reproach to justice and to our institutions if a human being, 'made in God's own image', while suffering, as the old books put it, 'under a visitation of God', were compelled to go to trial at a time when he is not sufficiently in possession of his mental facilities to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity."

[51] 160 U. S. 469, 492 (1895).