

2.4: The Burden of Proof

Learning Objectives

1. Define the burden of proof.
2. Distinguish between the burden of production and the burden of persuasion.
3. Compare the civil and criminal burden of proof.
4. Compare inference and presumption.
5. Compare circumstantial and direct evidence.

The key to the success of a civil or criminal trial is meeting the **burden of proof**. A *failure* to meet the burden of proof is also a common ground for appeal. In this section, you learn the burden of proof for the plaintiff, prosecution, and defendant. You also are introduced to different classifications of evidence and evidentiary rules that can change the outcome of the trial.

Burden of Proof

Definition: Burden of Proof, in General

The burden of proof "describes the standard that a party seeking to **prove** a **fact** in court must satisfy to have that fact legally established" in specific types of cases and circumstances.¹

The burden of proof has two components: the **burden of production** and the **burden of persuasion**. The **burden of production** is the obligation to *present* evidence to the judge or jury.

The **burden of persuasion** is the duty to *convince* the judge or jury to a certain standard, such as **beyond a reasonable doubt**, which is defined below. This standard is simply a measuring point and is determined by examining the quantity and quality of the evidence presented. "**Meeting the burden of proof**" means that a party has introduced enough compelling evidence to reach the standard defined in the burden of persuasion.

The plaintiff or prosecutor generally has the burden of proving the case, including every element of it. The defendant often has the burden of proving any defense. The trier of fact determines whether a party met the burden of proof at trial. The trier of fact would be a judge in a **bench trial** (trial without a jury). In a *criminal* case, the trier of fact is almost always a jury because of the right to a jury trial in the **Sixth Amendment**. Jurors are not legal experts, so the judge explains the burden of proof in jury instructions, which are a common source of appeal.

Burden of Proof in a Civil Case

Burdens of proof vary, depending on the type of case being tried. The plaintiff's burden of proof in a civil case is called **preponderance of the evidence**. Preponderance of evidence requires the plaintiff to introduce slightly more or slightly better evidence than the defense. When preponderance of evidence is the burden of proof, the judge or jury must be convinced that it is "**more likely than not**" (i.e., more than a 50% chance) that the defendant is liable for the plaintiff's injuries. Courts have also described this burden in other ways, including:

- Wisconsin: "the greater weight of the credible evidence."²
- Michigan: "such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth."³
- Pennsylvania: "such evidence as leads a fact-finder to find a contested fact to be more probable than its nonexistence."⁴

The defendant's burden of proof when proving a defense in a civil case is also preponderance of evidence. For example, in the O. J. Simpson civil case discussed in **Chapter 1**, O. J. Simpson failed to meet the burden of proving the defense of **alibi**. The defendant does not always have to prove a defense in a civil case. If the plaintiff does not meet the burden of proof, the defendant is victorious without having to present *any evidence at all*.

Burden of Proof in a Criminal Prosecution

The prosecution's burden of proof in a criminal case is the most challenging burden of proof in law; it is **beyond a reasonable doubt**. Judges have struggled with a definition for this burden of proof. As Pennsylvania Commonwealth Court Chief Justice Shaw

stated in 1850:

What is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.⁵

In general, the prosecution's evidence must overcome the defendant's **presumption of innocence**, which the Constitution guarantees as due process of law.⁶ This fulfills the policy of criminal prosecutions, which is to punish the guilty, not the innocent. If even a slight chance exists that the defendant is innocent, the case most likely lacks convincing and credible evidence, and the trier of fact should acquit the defendant.

Modern Definitions & Explanations of the Beyond a Reasonable Doubt Standard and the Presumption of Innocence

Given that **beyond a reasonable doubt** is a high standard of proof, courts may take extra care in explaining this burden to a jury. For example, in Wisconsin, [jurors receive these instructions](#):

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

Presumption of Innocence

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.

State's Burden of Proof

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

Reasonable Hypothesis

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.

Meaning of Reasonable Doubt

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

When asserting a defense in a criminal prosecution, states vary as to their requirements for the defendant's burden of proof.⁷ Different defenses also have different burdens of proof, as is discussed in detail in [Chapter 5](#) and [Chapter 6](#). Some states require the defendant to meet the burden of production but require the prosecution to thereafter meet the burden of persuasion, *disproving* the defense to a preponderance of the evidence or, in some states, beyond a reasonable doubt. Other states require the defendant to meet the burden of production *and* the burden of persuasion. In these states, the defendant's standard is typically preponderance of the evidence, *not* beyond a reasonable doubt. The defendant does not always have to prove a defense in a criminal prosecution. If the prosecution does not meet the burden of proof, the defendant is acquitted without having to present any evidence at all.

✓ Example 2.4.1: Burden of Proof

Ann is on trial for first-degree murder. The only key piece of evidence in Ann's trial is the murder weapon, which was discovered in Ann's dresser drawer during a law enforcement search. Before Ann's trial, the defense makes a motion to suppress the murder weapon evidence because the search warrant in Ann's case was signed by a judge who was inebriated and mentally incompetent. The defense is successful with this motion, and the judge rules that the murder weapon is *inadmissible* at trial. The prosecution decides to proceed anyway.

Did the prosecution fail to meet the burden of proof?

Solution

If there is no other convincing and credible evidence of Ann's guilt, Ann does not need to put on a defense in this case. The prosecution will fail to meet the burden of proof, and Ann will be acquitted.

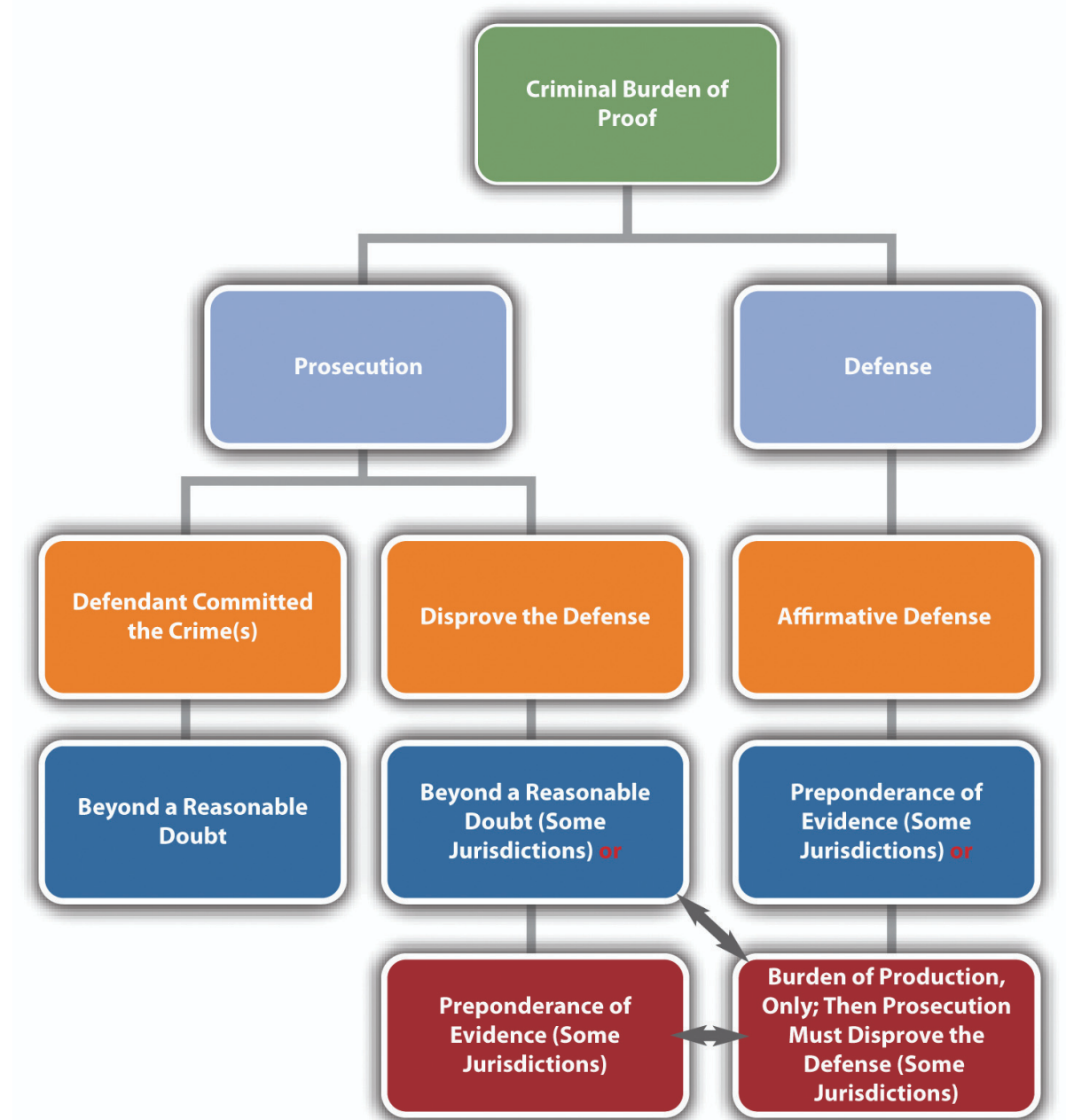


Figure 2.4 Diagram of the Criminal Burden of Proof

Inference and Presumption

Parties can use two tools to help meet the burden of proof: **inference** and **presumption**. Jury instructions can include inferences and presumptions and are often instrumental in the successful outcome of a case.

An inference is a conclusion that the judge or jury *may* make under the circumstances. An inference is never mandatory but is a choice. For example, if the prosecution proves that the defendant punched the victim in the face after screaming, "I hate you!" the judge or jury can infer that the punch was thrown intentionally.

A presumption is a conclusion that the judge or jury *must* make under the circumstances. As stated previously, all criminal defendants are presumed innocent. Thus the judge or jury *must* begin any criminal trial concluding that the defendant is not guilty.

Presumptions can be **rebuttable** or **irrebuttable**. A party can disprove a **rebuttable presumption**. The prosecution can rebut the presumption of innocence with evidence proving beyond a reasonable doubt that the defendant is guilty. An irrebuttable presumption is irrefutable and *cannot* be disproved. In some jurisdictions, it is an irrebuttable presumption that children under the age of seven are incapable of forming criminal intent. Thus, in these jurisdictions children under the age of seven cannot be criminally prosecuted (although they may be subject to a juvenile adjudication proceeding).

Circumstantial and Direct Evidence

Two primary classifications are used for evidence: **circumstantial evidence** or **direct evidence**.

Circumstantial evidence is "indirect **evidence** that does not, on its face, prove a **fact in issue** but gives rise to a logical inference that the fact exists. Circumstantial evidence requires drawing additional **reasonable** inferences in order to support the claim."⁸ For example, a prosecution would use fingerprint evidence to convince a jury to infer that the defendant's guilt in committing a crime. Although fingerprints may be **direct evidence** that someone *was at a specific location or touched a particular object*, a jury can only use this evidence for the purpose of inferring that the defendant committed the crime.

Other common examples of circumstantial evidence include **motive**, DNA evidence and blood evidence (as in the **O. J. Simpson case**). Criminal cases relying on circumstantial evidence are more difficult for the prosecution because circumstantial evidence leaves room for doubt in a judge's or juror's mind. However, circumstantial evidence such as DNA evidence can be very reliable and compelling, so the prosecution can and often does meet the burden of proof using *only* circumstantial evidence.

Direct evidence "directly links a person to a crime; it demonstrates the ultimate fact to be proved."⁹ For example, eyewitness testimony is often direct evidence. An eyewitness testifying that he or she saw the defendant commit the crime *directly* proves that the defendant committed the crime. Common examples of direct evidence include eyewitness testimony, a defendant's confession, or a video or photograph of the defendant committing the crime. Criminal cases relying on direct evidence are easier to prove because there is less potential for reasonable doubt. However, direct evidence can be unreliable and is not necessarily preferable to circumstantial evidence. If an eyewitness is **impeached**, which means he or she loses credibility, the witness's testimony lacks the evidentiary value of reliable circumstantial evidence such as DNA evidence.

Table 2.2 Comparison of Circumstantial and Direct Evidence in a Burglary Case

Evidence	Circumstantial	Direct
Fiber from the defendant's coat found in a residence that has been burglarized	Yes	No—directly proves presence at the scene , not that the defendant committed burglary
GPS evidence indicating the defendant drove to the burglarized residence	Yes	No—same explanation as fiber evidence
Testimony from an eyewitness that she saw the defendant go into the backyard of the burglarized residence	Yes	No—could prove trespassing because it directly proves presence at the scene , but it does not directly prove burglary
Surveillance camera footage of the defendant purchasing burglar tools	Yes	No—does not directly prove they were used on the residence
Cell phone photograph of the defendant burglarizing the residence	No	Yes—directly proves that the defendant committed the crime

Evidence	Circumstantial	Direct
Witness testimony that the defendant confessed to burglarizing the residence	No	Yes—directly proves that the defendant committed the crime
Pawn shop receipt found in the defendant's pocket for items stolen from the residence	Yes	No—directly proves that the items were pawned, not stolen

✓ Example: 2.4.2: Two Circumstantial Cases, Two Different Results

Casey Anthony

In 2011, Casey Anthony was found not guilty of murdering her two-year-old daughter, Caylee. Prior to skeletal remains being discovered in December 2008 in the woods near the home, Caylee was last seen six months earlier.¹⁰ Other examples of circumstantial evidence admitted at trial included:

- Anthony's failure to tell anything that Caylee was missing until a month after the date Caylee was last seen;
- Lies Anthony told others about Caylee's whereabouts during that month, including a claim that a non-existent nanny kidnapped Caylee;
- The Google search history on the Anthony family's computer, which included "how to make chloroform"; and
- A strand of hair and an offensive odor in the trunk of Anthony's car.¹¹

What was the jury's verdict? [See here.](#)

Alex Murdaugh

Like in the Casey Anthony case, Alex Murdaugh was prosecuted for murder without direct evidence. In June 2021, Maggie and Paul Murdaugh (Murdaugh's wife and son, respectively) were found dead at the family's hunting estate's dog kennels.¹² No murder weapon was ever found, no eyewitnesses or security camera footage, and no admission of guilt by Murdaugh. But, there was circumstantial evidence, including:

- Blood spatter and bloody footprints;
- Shotgun shells;
- The types of guns and ammunition kept at the estate;
- Autopsy and shotgun wounds;
- Location and "steps" [data from cellphones](#) (the phones of Maggie, Paul, and Alex);
- Photo/video cellphone content; and
- Murdaugh's testimony admitting that he embezzled from his law firm, deceived his clients, and experienced paranoia from a long-standing opioid addiction about which he had been lying to his family.¹³

What was the jury's verdict? [See here.](#)

Key Takeaways

- The burden of proof is a party's obligation to prove a charge, allegation, or defense.
- The burden of production is the duty to present evidence to the trier of fact. The burden of persuasion is the duty to convince the trier of fact to a certain standard, such as preponderance of the evidence or beyond a reasonable doubt.
- The civil burden of proof is the preponderance of the evidence, for both the plaintiff and the defendant. The criminal burden of proof for the prosecution is beyond a reasonable doubt.
 - The criminal burden of proof for the defense is generally preponderance of the evidence. States vary on whether they require the criminal defendant to meet both the burden of production and persuasion or just the burden of production. Different defenses also require different burdens of proof.
 - In states that require the defendant to meet only the burden of production, the prosecution must disprove the defense to a preponderance of evidence or beyond a reasonable doubt, depending on the state and on the defense.
- An inference is a conclusion the trier of fact may make, if it chooses to. A presumption is a conclusion the trier of fact must make. A rebuttable presumption can be disproved; an irrebuttable presumption cannot.

- Circumstantial evidence indirectly proves a fact. A fingerprint at the scene of the crime, for example, indirectly proves that because the defendant was present at the scene, the defendant committed the crime. Direct evidence directly proves a fact. If the defendant confesses to a crime, for example, this is direct evidence that the defendant committed the crime.

Exercises

? Exercise 2.4.1

Bria is asserting the insanity defense in her criminal prosecution for murder. In Bria's state, defendants have the burden of production and persuasion to a preponderance of the evidence when proving the insanity defense. Bria offers her own testimony that she is insane and incapable of forming criminal intent. Will Bria be successful with her defense? Why or why not?

Answer

Bria will not be successful with the insanity defense because she cannot meet the burden of proof, which is **preponderance of the evidence**. Preponderance of evidence is a fairly low standard, but Bria must still convince the trier of fact that it is more likely than not she is insane. She cannot do this with her testimony, standing alone. Clearly, Bria has an important *self-interest* in eliminating her criminal responsibility in this case. Thus her *subjective* testimony regarding her own mental state is not compelling enough to meet the 51 percent to 49 percent standard.

? Exercise 2.4.2

Read [Patterson v. New York](#), 432 U.S. 197 (1977). In *Patterson*, the defendant was on trial for murder. New York law reduced murder to manslaughter if the defendant proved extreme emotional disturbance to a **preponderance of evidence**. Did the US Supreme Court hold that it is *constitutional* to put this burden on the defense, rather than forcing the prosecution to disprove extreme emotional disturbance beyond a reasonable doubt? Which part of the Constitution did the Court analyze to justify its holding?

Answer

The U.S. Supreme Court held that it is *constitutional* to put the burden of proving extreme emotional disturbance on the defendant, reducing murder to manslaughter. The Court held that this did not relieve the prosecution of the burden of proving every element of murder beyond a reasonable doubt and thus was in compliance with the **due process clause** of the Constitution.

? Exercise 2.4.3

Read [Sullivan v. Louisiana](#), 508 U.S. 275 (1993). In *Sullivan*, the jury was given a constitutionally deficient jury instruction on beyond a reasonable doubt. Did the US Supreme Court hold that this was a prejudicial error requiring a reversal of the defendant's conviction for murder? Which part of the Constitution did the Court rely on in its holding?

Answer

The U.S. Supreme Court held that a constitutionally deficient jury instruction on the definition of beyond a reasonable doubt was a *prejudicial error* and required a reversal of the defendant's conviction for murder. The Court determined that the improper jury instruction deprived the defendant of his Sixth Amendment right to a jury trial.

Footnotes

1. [Wex](#) legal dictionary and encyclopedia. ↩
2. [State v. Armstrong](#), 588 N.W.2d 606, ¶ 26, n.22 (Wis. 1999). ↩
3. [People v. Cross](#), 760 N.W.2d 314, 316 (Mich. App. 2008). ↩
4. [Barbour v. Mun. Police Officers' Educ. and Training Comm'n](#), 52 A.3d 392, 407 (Pa. Commw. Ct. 2012). ↩
5. [Commonwealth v. Webster](#), 59 Mass. 295, 320 (1850). ↩

6. *In re Winship*, 397 U.S. 358 (1970). ↩
7. For example, see Findlaw, *The Insanity Defense among the States* (2019). ↩
8. *Circumstantial Evidence*, Wex. ↩
9. *Direct Evidence*, Wex. ↩
10. Jennifer Dearborn, *The Case of Casey Anthony: Defending the American Jury System*, Rutgers Law Record (Aug. 11, 2011). ↩
11. Id.; Crime Museum, *Case Anthony Trial*. ↩
12. Emma Steele, *The crime scene evidence that convicted Alex Murdaugh*, CBS News (Mar. 4, 2023, 5:49 PM); Nikki Battiste, *How Paul Murdaugh testified "from the grave" to help convict his father*, CBS News (Mar. 15, 2023, 2:17 PM); Jeffrey Collins, *Both sides use trove of cell data at Alex Murdaugh trial*, The Associated Press (Feb. 1, 2023, 5:34 PM). ↩
13. Id. ↩

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