

5.1: Criminal Defenses

Learning Objectives

1. Distinguish between a denial or failure of proof defense and an affirmative defense.
2. Distinguish between imperfect and perfect defenses.
3. Distinguish between factual and legal defenses.
4. Give examples of factual and legal defenses.
5. Distinguish between defenses based on justification and excuse.

A plethora of criminal defenses exist. Defenses may completely *exonerate* the criminal defendant, resulting in an acquittal, or *reduce the severity* of the offense. Chapter 3 discussed defenses based on the federal Constitution. This chapter reviews the categorization of nonconstitutional criminal defenses, along with the elements of various defenses sanctioning the use of force.

5.1.1 Categorization of Defenses

Defenses can be categorized as denial or failure of proof, affirmative, imperfect, or perfect. Defenses can also be categorized as factual, legal, based on justification, or excuse. Lastly, defenses can be created by a court (**common law**), or created by a state or federal legislature (**statutory**).

5.1.2 Definition of Denial or Failure of Proof and Affirmative Defenses

As stated in Chapter 2, a criminal defendant will be acquitted if the prosecution cannot prove *every element* of the offense beyond a reasonable doubt. In certain cases, the defendant can either *deny* that a criminal element(s) exists or simply sit back and wait for the prosecution to fail in meeting its burden of proof. This legal strategy is sometimes referred to as either a **denial or failure of proof defense**.

An **affirmative defense** is not connected to the prosecution's burden of proof. When the defendant asserts an affirmative defense, the defendant raises a *new* issue that must be proven to a certain evidentiary standard. State statutes often specify whether a defense is affirmative. The Model Penal Code defines an affirmative defense as a defense that is deemed affirmative in the Code or a separate statute, or that "involves a matter of excuse or justification peculiarly within the knowledge of the defendant" (Model Penal Code § 1.12 (3) (c)). Procedurally, the defendant must assert any affirmative defense before or during the trial, or the defense cannot be used as grounds for an appeal.

5.1.3 Example of an Affirmative Defense

A fight breaks out at a party, and Juan is severely injured. Jasmine and Jerome are arrested and charged for battering Juan. Jerome claims that *he* did not touch Juan; *someone else* battered him. Jasmine claims that *she* did not batter Juan because she was legally defending herself against *Juan's* attack. Jerome's claim focuses on the elements of battery and asserts that these elements cannot be proven beyond a reasonable doubt. Technically, Jerome can do nothing and be acquitted if the prosecution fails to prove that he was the criminal actor. Jasmine's self-defense claim is an **affirmative** defense. Jasmine must do something to be acquitted: she must prove that Juan attacked *her* to a certain evidentiary standard.

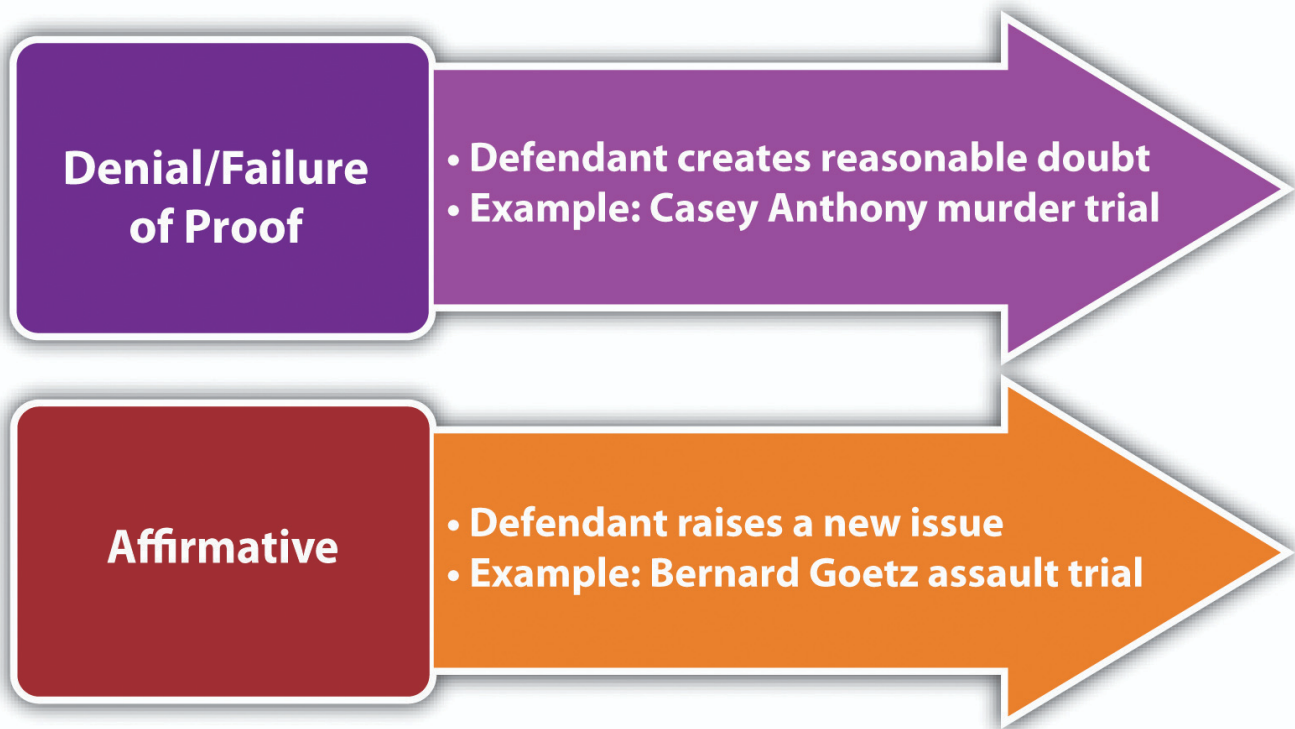


Figure 5.1 Denial and Affirmative Defenses

5.1.4 Burden of Proof for Affirmative Defenses

As stated in Chapter 2, states vary as to their requirements for the defendant's burden of proof when asserting an affirmative defense. Findlaw.com, "The Insanity Defense among the States," findlaw.com website, accessed October 11, 2010, <http://criminal.findlaw.com/crimes/more-criminal-topics/insanity-defense/the-insanity-defense-among-the-states.html>. Different defenses also have different burdens of proof. 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 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 such states, the defendant's evidentiary standard is preponderance of evidence, *not* beyond a reasonable doubt. In the example given in [Section 5](#), for Jasmine's self-defense claim, Jasmine must prove she was defending herself by meeting either the burden of production or the burden of production and persuasion to a preponderance of evidence, depending on the jurisdiction.

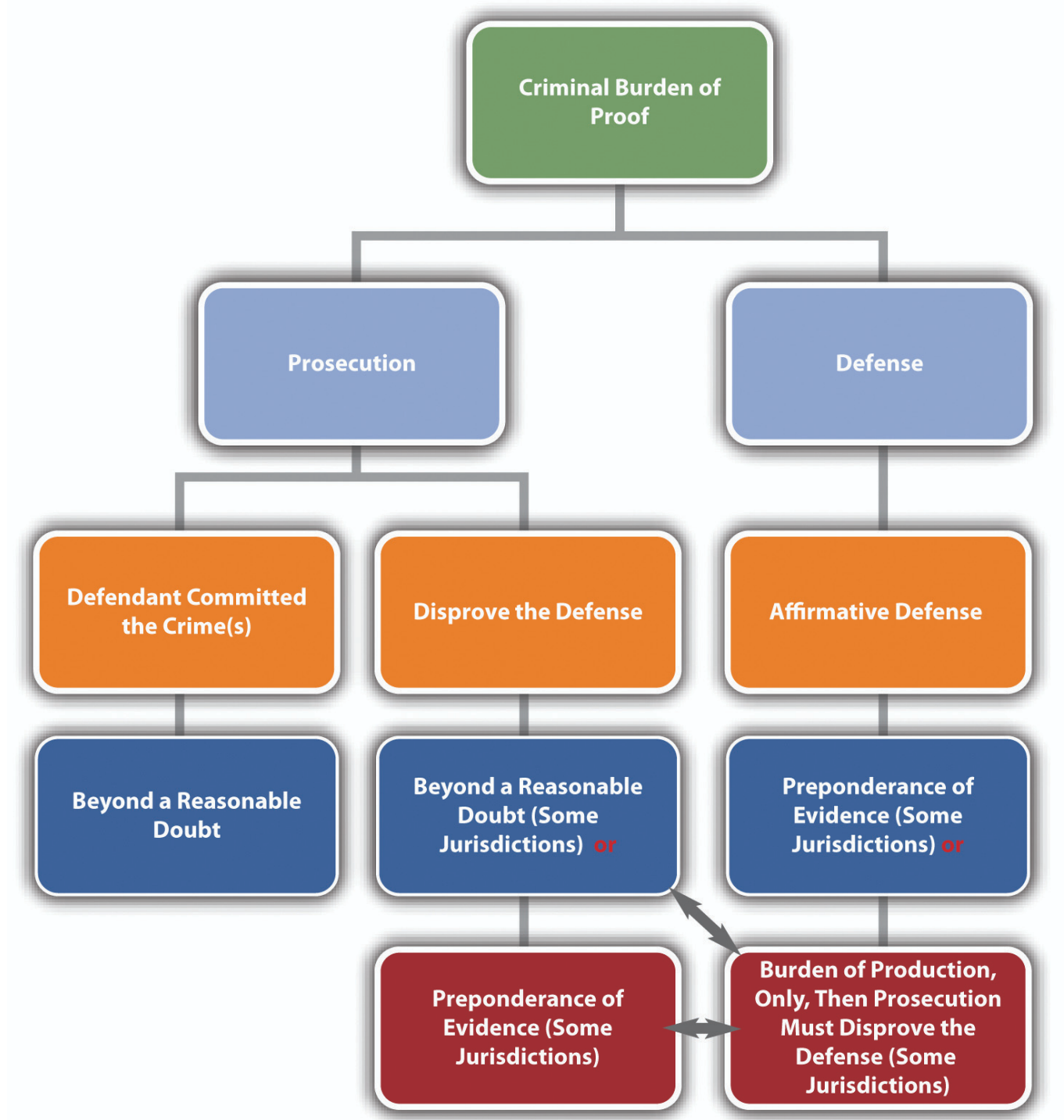


Figure 5.2 Diagram of the Criminal Burden of Proof

5.1.5 Definition of Imperfect and Perfect Defenses

As stated previously, a defense can reduce the severity of the offense, or completely exonerate the defendant from criminal responsibility. If a defense reduces the severity of the offense, it is called an **imperfect defense**. If a defense results in an acquittal, it is called a **perfect defense**. The difference between the two is significant. A defendant who is successful with an imperfect defense is still *guilty* of a crime; a defendant who is successful with a perfect defense is *innocent*.

5.1.6 Example of Imperfect and Perfect Defenses

LuLu flies into a rage and kills her sister Lola after she catches Lola sleeping with her fiancé. LuLu is thereafter charged with first-degree murder. LuLu decides to pursue two defenses. First, LuLu claims that the killing should be *manslaughter* rather than first-degree murder because she honestly but unreasonably believed Lola was going to attack *her*, so she thought she was acting in self-defense. Second, LuLu claims she was insane at the time the killing occurred. The claim of manslaughter is an **imperfect** defense that will reduce LuLu's sentence, but will not acquit her of criminal homicide. The claim of insanity is a **perfect** defense that will result in an acquittal.

5.1.7 Definition of Factual and Legal Defenses

A defense must be based on specific *grounds*. If a defense is based on an issue of **fact**, it is a **factual defense**. If a defense is based on an issue of **law**, it is a **legal defense**.

5.1.8 Example of Factual and Legal Defenses

Armando is charged with the burglary of Roman's residence. Armando decides to pursue two defenses. First, Armando claims that he was with Phil on the date and time of the burglary. This is called an **alibi defense**. Second, Armando claims that it is too late to prosecute him for burglary because of the **expiration of the statute of limitations**. Armando's alibi defense is a **factual** defense; it is based on the *fact* that Armando could not have committed the burglary because he was somewhere else at the time it occurred. Armando's statute of limitations defense is a **legal** defense because it is based on a *statute* that limits the amount of time the government has to prosecute Armando for burglary.

5.1.9 Definition of Justification and Excuse

With the exception of alibi, most affirmative defenses are based on either **justification** or **excuse**. Typically, justification and excuse defenses admit that the defendant committed the criminal act with the requisite intent, but insist that the conduct should not be criminal.

A defense based on justification focuses on the *offense*. A justification defense claims that the defendant's conduct should be legal rather than criminal because it supports a principle valued by society. A defense based on excuse focuses on the *defendant*. An excuse defense claims that even though the defendant committed the criminal act with criminal intent, the defendant should not be responsible for his or her behavior.

5.1.10 Example of Justification and Excuse

Review the examples of affirmative, imperfect, and perfect defenses given in [Section 5.1.1 "Categorization of Defenses"](#). Jasmine's self-defense claim is based on **justification**. Society believes that individuals should be able to protect themselves from harm, so actions taken in self-defense are justified and noncriminal. Note that a self-defense claim focuses on the *offense* (battery) in light of the circumstances (to prevent imminent harm). LuLu's insanity claim is based on **excuse**. Although LuLu killed Lola with criminal intent, if LuLu is truly insane it is not be fair or just to punish her for her behavior. Note that an insanity claim focuses on the *defendant* (a legally insane individual) and whether he or she should be criminally responsible for his or her conduct.

Table 5.1 Categorization of Defenses

Defense Type	Characteristics
Common-law	Created by a court
Statutory	Created by a state or federal legislature
Denial or failure of proof	Creates doubt in one or more elements of the offense and prevents the prosecution from meeting its burden of proof
Affirmative	Raises an issue separate from the elements of the offense
Imperfect	Reduces the severity of the offense
Perfect	Results in an acquittal
Factual	Based on an issue of fact

Defense Type	Characteristics
Legal	Based on an issue of law
Alibi	Asserts that the defendant was somewhere else when the crime was committed
Expiration of the statute of limitations	Asserts that it is too late for the government to prosecute the defendant for the crime
Justification	Claims that the criminal conduct is justified under the circumstances
Excuse	Claims that the defendant should be excused for his or her conduct

5.1.11 Exercises

- A denial or failure of proof defense focuses on the elements of the crime and prevents the prosecution from meeting its burden of proof. An affirmative defense is a defense that raises an issue separate from the elements of the crime. Most affirmative defenses are based on justification or excuse and must be raised before or during the trial to preserve the issue for appeal.
- An imperfect defense reduces the severity of the offense; a perfect defense results in an acquittal.
- If the basis for a defense is an issue of fact, it is called a factual defense. If the basis for a defense is an issue of law, it is called a legal defense.
- An example of a factual defense is an alibi defense, which asserts that the defendant could not have committed the crime because he or she was somewhere else when the crime occurred. An example of a legal defense is a claim that the statute of limitations has expired, which asserts that it is too late for the government to prosecute the defendant for the crime.
- An affirmative defense is based on justification when it claims that criminal conduct is justified under the circumstances. An affirmative defense is based on excuse when it claims that the criminal defendant should be excused for his or her conduct.

5.1.12 Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Carol is on trial for battery, a general intent crime. Carol puts on a defense that proves her conduct was accidental, *not* intentional. Is this an affirmative defense? Why or why not?
2. Read *State v. Burkhardt*, 565 S.E.2d 298 (2002). In *Burkhardt*, the defendant was convicted of three counts of murder. The defendant claimed he acted in self-defense. The jury instruction given during the defendant's trial stated that the prosecution had the burden of disproving self-defense. However, the instruction did not state that the prosecution's burden of disproving self-defense was *beyond a reasonable doubt*. Did the Supreme Court of South Carolina uphold the defendant's conviction for the murders? The case is available at this link: http://scholar.google.com/scholar_case?case=1066148868024499763&hl=en&as_sdt=2&as_vis=1&oi=scholar.
3. Read *Hoagland v. State*, 240 P.3d 1043 (2010). In *Hoagland*, the defendant wanted to assert a **necessity** defense to the crime of driving while under the influence. The Nevada Legislature had never addressed or mentioned a necessity defense. Did the Supreme Court of Nevada allow the defendant to present the necessity defense? The case is available at this link: http://scholar.google.com/scholar_case?case=8002120339805439441&q=Hoagland+v.+State&hl=en&as_sdt=2,5&as_ylo=2009.

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