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### Burden of Proof

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## BURDEN OF PROOF

Although the Constitution does not mention burden of proof, certain principles are widely accepted as having constitutional status. The first and most significant of these is the rule that in a criminal case the government must prove its case “beyond a REASONABLE DOUBT.” This is the universal COMMON LAW rule, and was said by the Supreme Court in *IN RE WINSHIP* (1970) to be an element of DUE PROCESS. This standard is commonly contrasted with proof “by a preponderance of the evidence” or “by clear and convincing evidence.” The standard of proof is in practice not easily susceptible to further clarification or elaboration.

To what matters does the burden apply? The *Winship* Court said it extended to “every fact necessary to constitute the crime with which [a defendant] is charged.” The government must prove its case beyond a reasonable doubt. But suppose the defendant raises a defense of ALIBI, insanity, duress, or diplomatic immunity? With respect to such defenses the usual rule is that the defendant may be required to produce some evidence supporting his claim; if he does not, that defense will not be considered

by the jury. By what standard should the jury be instructed to evaluate such a defense? Should they deny the defense unless they are persuaded by a preponderance of the evidence that the defendant has established it? Or does the “burden of persuasion” on the issue raised by the defendant remain on the government, so that the jury must acquit unless persuaded beyond a reasonable doubt that the defense falls? On this complicated question there is no settled view. The answer should probably vary with the kind of defense: alibi, for example, is not really an affirmative defense but a denial of facts charged. Such a defense as diplomatic immunity, however, might be regarded as one upon which the defendant should bear the burden of proof.

The foregoing structure is complicated by the existence of “presumptions,” that is, legislative or judicial statements to the effect that if one fact is proved—say, possession of marijuana—another fact essential to conviction may be “presumed”—say, that the marijuana was illegally imported. The Supreme Court has held such a legislative presumption valid when the proved fact makes the ultimate fact more likely than not.

The burden of proof beyond a reasonable doubt is a critical element of due process. Like the requirements that laws be public and their prohibitions comprehensible and prospective, that trials be public and by jury, and that the defendant have counsel, the burden of proof limits the power of the government to impose arbitrary or oppressive punishments. It reinforces the rights of the defendant not to be a witness against himself nor to take the stand, for it imposes upon the government the task of proving its whole case on its own. A lower standard of proof would pressure defendants to involve themselves in the process of their own condemnation.

In civil cases, the rule is simply stated: the legislature may decide upon the burden of proof as it wishes, usually choosing the “preponderance of the evidence” test. In specialized proceedings, such as motions to suppress evidence for criminal trials, special rules have evolved. (See STANDARDS OF REVIEW.)

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### Bibliography

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