



Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Criminal Procedure. Specifically, we’ll be talking about a few topics related to the prosecution of a criminal trial: burden of proof, presumption, and sufficiency of the evidence. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you can be the best law student and lawyer you can be. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series. Today, we will be diving into Criminal Procedure, discussing what the prosecution must do and must prove in order for a defendant to be found guilty of a crime.

Lee Burgess: The first bit might be familiar to you if you’re a fan of crime dramas. In order for the prosecution to secure a conviction in a criminal case, they have to convince the jury the defendant is guilty, beyond a reasonable doubt. We hear this key phrase all the time on television, in podcasts, and in popular culture. I just watched The Lincoln Lawyer on Netflix, and I think they said it multiple times in every episode. Pretty much everyone in America knows the defendant must be guilty beyond a reasonable doubt. But what does that actually mean?

Lee Burgess: When we talk about “beyond a reasonable doubt”, we’re talking about the burden of proof. Burden of proof is an important concept in all types of litigation, not just criminal law. Who has to prove what, and how high is the bar that they must clear to win their case? That burden is not stagnant – it can shift throughout the trial. One party may have the burden to prove certain elements, while the other party may have the burden to prove other elements. And sometimes, if the party with the burden meets that burden, the burden shifts to the other party.

Lee Burgess: Now, zooming back into criminal trials, the burden of proof in a criminal case is on the prosecution. The prosecution must prove every element of a crime beyond a reasonable doubt. Did you catch that? The prosecution has to convince the jury, beyond a reasonable doubt, of every single element of a crime in order to secure a conviction. Because the repercussions of a conviction are so enormous, our legal system provides protections and presumptions in favor of the defendant. We’ve decided that the government cannot take someone’s liberty or otherwise criminally penalize them unless they prove it’s warranted. Because of this, the burden of proof cannot be shifted to the defendant. On the other hand, the defendant may have the burden to prove any affirmative defenses they might raise. For example, if the prosecution is bringing



an assault case against a defendant, the prosecution must prove every element of assault beyond a reasonable doubt. But if the defendant wants to argue that he only acted to protect his children, the defendant has the burden to prove they acted in defense of others.

Lee Burgess: Let's see how burden of proof and shifting burdens plays out by looking at a sample question adapted from the [February 2008 California bar exam](#). First, I'll note that, in order to fully understand criminal procedure, you'll need to have a good grasp of substantive criminal law. The question we're about to discuss involves [homicide](#), so if you aren't familiar with the elements of homicide, take some time to review those now. On to the question:

Lee Burgess: "Doug's neighborhood was overrun by two gangs: the Greens and the Purples. Dominic, one of the Greens, tried to recruit Doug to join his gang. When Doug refused, Dominic said he couldn't be responsible for Doug's safety. After threatening Doug for several weeks, Dominic backed Doug into an alley, showed him a knife, and said: 'Think carefully about your decision. Your deadline is coming fast.' Doug was terrified. He began carrying a gun for protection. A week later, Doug saw Dominic walking with his hand under his jacket. Afraid that Dominic might be about to stab him, Doug shot and killed Dominic. Doug was arrested and put in jail. While in jail, Doug received a visitor who identified himself as Philip, a member of the Purples. Philip said the Purples wanted to help Doug and had hired him a lawyer. Philip said the lawyer wanted Doug to tell Philip exactly how the killing had occurred so the lawyer could help Doug. Doug told Philip that he had shot Dominic to end the harassment. Doug later learned that Philip was actually an undercover officer who had been shared everything Doug had told him with the police and the prosecution. The prosecution decides to bring a first-degree murder charge against Doug. Who bears the burden to prove such a charge? What affirmative defenses might Doug raise, and who would bear the burden to prove such a defense?"

Lee Burgess: What do you think? What burdens of proof do you see at play here? Let's start with an easy one. Who bears the burden to prove Doug committed murder? Like we discussed earlier – the government, or the prosecution does. And remember, that means they must prove each element of murder beyond a reasonable doubt. Does Doug bear any burden regarding the murder charge? No. The government bears the full burden to prove Doug committed murder and should be convicted.

Lee Burgess: But what about the second question? What defenses might Doug raise, and who bears the burden to prove affirmative defenses? This question gives us a pretty good softball here. Doug was clearly afraid of Dominic, given his history of threats and brandishing a weapon. The question tells us Doug started carrying a gun because of Dominic, and when he shot him, he believed Dominic was about to stab him. These facts are a pretty clear indication that the exam writers want us to discuss self-defense! So, who has to prove the self-defense claim? Doug



does. Remember, though the burden of proof regarding the criminal charge can never be shifted to the defendant, the defendant may have the burden of proving any affirmative defenses, like self-defense. So, if the prosecution is successful in proving all elements of murder beyond a reasonable doubt, the burden shifts to Doug to prove he acted in self-defense and should therefore not be convicted of murder.

Lee Burgess: But how do we know whether the prosecution has met its burden? This is where sufficiency of the evidence comes into play. The judge and jury both have a role in determining whether the prosecution presented enough evidence to prove each element beyond a reasonable doubt, and accordingly, to convict the defendant of the crime charged.

Lee Burgess: Let's take a closer look at the roles the judge, or court, and jury must play here. The rule for the court regarding sufficiency of the evidence is this: a court must enter a judgment of acquittal if the evidence is insufficient to sustain a conviction; that is, when a reasonable jury would not find that each element was proven beyond a reasonable doubt. Note that this happens before the jury has time to deliberate. The court is, in essence, stepping in after all the evidence has been presented by the prosecution and saying, "This isn't enough. No reasonable jury would convict based on what you've presented here. I'm not even going to let the issue get to the jury."

Lee Burgess: In practice, the defendant moves for a judgment of acquittal, and they can do so either at the close of the prosecution's case-in-chief or after the close of all the evidence – so, after the prosecution presents its case or they can wait until they have presented their case as well. Note that this isn't a decision about whether the defendant has a good affirmative defense. That question will be for the jury. This is about whether the prosecution presented enough evidence to carry its burden in the first place.

Lee Burgess: Now, using what you now know about sufficiency of the evidence, let's again take a look at the prior example. Presuming the prosecution presents evidence of all the facts in the hypothetical, do you think they've carried their burden? Put another way, is there sufficient evidence to convict Doug beyond a reasonable doubt, or is there a good argument that the court should enter a judgement of acquittal for Doug?

Lee Burgess: In case you didn't immediately memorize the question, let's review what evidence the prosecution has:

- Dominic, a gang member, tried to recruit Doug to join his gang.
- When Doug refused, Dominic said he couldn't be responsible for Doug's safety.



- After threatening Doug for several weeks, Dominic backed Doug into an alley, showed him a knife, and said: “Think carefully about your decision. Your deadline is coming fast.”
- Doug began carrying a gun for protection.
- A week later, Doug saw Dominic walking with his hand under his jacket.
- Doug shot and killed Dominic.
- Doug told Philip, an undercover cop, that he had shot Dominic to end the harassment.

Lee Burgess: Can the prosecution carry its burden and present sufficient evidence to prove Doug committed first-degree murder? Remember, in order to determine whether the evidence was sufficient, you’ll need to know the substantive criminal law and the elements the prosecution must prove beyond a reasonable doubt.

Lee Burgess: Murder is the unlawful killing of another human being with malice aforethought. It requires actus reus; in this case Doug’s act of shooting Dominic. It also requires causation, both actual and proximate. Actual cause is easily satisfied because “but for” Doug’s act of shooting Dominic, Dominic would not have died. Proximate cause is also easily satisfied, because there is no other intervening event or cause of Dominic’s death apart from Doug shooting him. Malice is satisfied under one of four theories:

1. Intent to kill
2. Intent to commit great bodily injury
3. Wanton and willful disregard of human life (“depraved heart killing”); or
4. The felony murder rule

Lee Burgess: It’s likely that the prosecution can prove Doug had an intent to kill, or at least commit great bodily injury, because he started carrying a gun for his protection, and later pointed the gun at and shot Dominic. He then admitted he shot him to “end the harassment”. There is likely sufficient evidence for wanton and willful disregard as well, because the use of a gun against another human being shows a conscious disregard for human life.

Lee Burgess: Murder in the first degree is the intentional and deliberate killing of another human being. It requires deliberation, but deliberation can happen in a very short period of time. In this case, Dominic had “terrified” Doug, and Doug began carrying a gun for protection. Doug carried this gun for an entire week before he saw Dominic. In obtaining the gun, or taking it from its storage place, putting it on his person, and carrying it around for an entire week, Doug acted intentionally and deliberately. When he saw Dominic, he then pulled out the gun and shot and killed Dominic. These facts, especially the passing of an entire week, are probably sufficient to show that Doug was intentional and deliberate in his use of the gun to kill Dominic. There is no evidence he tried to scare



Dominic with the gun. When he felt threatened, he immediately drew his gun and shot it at Dominic.

Lee Burgess: Based on the information we have, the prosecution likely has sufficient evidence to carry their burden of proof. The defense, of course, is always permitted to – and should – argue that they didn’t meet their burden and file for a judgment of acquittal. But for the court to grant it, they need to find that no reasonable jury would convict based on the evidence presented, and I don’t think we can say that here. But keep in mind, not all evidence is admissible at trial. If the prosecution is unable to introduce certain evidence at trial, they may be unable to carry their burden.

Lee Burgess: Let’s switch gears a bit now and talk about the jury. After each side has presented its case in court and all appropriate motions have been made and decided, the case is submitted to the jury. Before the jury leaves the courtroom to start its deliberations, the judge takes some time to instruct the jury. Jury instructions are a very important part of a criminal trial, as the judge lays out what the jury may and may not consider, and what the elements of the charged crimes are.

Lee Burgess: Presumptions play an important role in jury instructions. The flip side of the prosecution’s burden to prove a case beyond a reasonable doubt is the presumption of innocence. That is, in all criminal trials, a defendant is presumed innocent until proven guilty.

Lee Burgess: There are two types of presumptions for jury instructions: rebuttable and irrebuttable. A rebuttable presumption is one that may be disputed or overcome by additional evidence. Rebuttable presumptions only violate the defendant’s constitutional rights, specifically the [Due Process Clause](#), if it shifts the burden of proof to the defendant. Irrebuttable presumptions, on the other hand, are presumptions that cannot be disputed or overcome. Irrebuttable presumptions are a per se violation of the Due Process Clause.

Lee Burgess: In short, some presumptions are permissible, and some are unconstitutional. Any presumption that cannot be disproven or overcome is unconstitutional. Any presumption that shifts the burden of proof to the defendant does away with the presumption of innocence and is unconstitutional.

Lee Burgess: So, what might this look like? Jury instructions with an unconstitutional presumption might say something like, “If you find the defendant had a gun, you can presume he intended to use it” or, “If you find the witness was at the scene of the crime, you can presume they saw the crime occur and who committed it.” Now, these are pretty brazen instructions, and hopefully no judge will ever use them! But as a general rule, watch out for any type of instruction that makes the prosecution’s burden easier to prove.



Lee Burgess: A permissible presumption, on the other hand, might be, “While we were hearing evidence, you were told that the government and the defendant agreed that if John Smith were called as a witness, he would testify that he bought a car from Mr. Crutchfield on June 23, 2020. You can presume that would be Mr. Smith’s testimony if he were called as a witness, and you will consider that to be his testimony as if he were in court and testifying here.” That presumption doesn’t help the prosecution or make their burden any lighter; it just helps the jury know how to treat a certain stipulation in a case.

Lee Burgess: Let’s take a look at another hypo together to get a better sense of presumptions in jury instructions:

Lee Burgess: “Harriet was on her porch when Don walked up, pointed a gun at her, and said, ‘You’re coming with me!’ Believing it was a toy gun, Harriet said, ‘Go home’, and Don left. While walking home, Don had to pass through a police checkpoint for contraband. Officer Otis patted down Don’s clothing, found the gun, confiscated it, and released Don. Later, Officer Otis checked the serial number and located the registered owner, who said the gun had been stolen from him. A month later, Officer Otis arrested Don for possession of stolen property, i.e. the gun. After examining some traffic cam footage, Don was also charged with attempted kidnapping against Harriet. Both the prosecution and Don presented their cases at trial. Harriet was unable to testify at trial, but both parties agreed to admit her written statement in lieu of testimony. Her statement stated that she was not afraid of Don, but if she had known he had a real gun, she would have been frightened, especially since she had received some suspicious phone calls where a male voice mumbled something about ransom. Before the charges went to the jury, the judge read jury instructions for all charges. Among other things, he stated that,

1. The jury could presume Harriet’s written testimony would be the same as her oral testimony, had she testified in court.
2. If the jury found that the gun was stolen from its registered owner, they could presume Don stole it; and
3. If the jury found Harriet’s testimony to be credible, they could presume someone meant to kidnap her, though they could not presume the attempted kidnapper was Don.

Lee Burgess: Analyze all three jury instructions and determine whether they are proper or violate Don’s due process rights under the Constitution.”

Lee Burgess: So, what do you think? Are the presumptions rebuttable or irrebuttable? Are they proper? Let’s go one-by-one. First, the instruction that the jury could presume Harriet’s oral testimony would match her written testimony. That presumption is sort of irrebuttable, right? Because the judge is telling the jury to presume something directly with no way to overcome it. But this one is a bit tricky. Because the presumption is about an evidentiary agreement by the



parties, the Due Process Clause is not implicated. The judge does not tell the jury to assume what Harriet says is true. He merely instructs them that her testimony is her testimony. The jury can believe or disregard all or part of it – no power is taken from them.

Lee Burgess: Next, the instruction that if the jury found the gun to be stolen from its registered owner, they could presume Don stole it. A red flag should jump out at you right away. Any time the instruction permits the jury to presume something about the defendant, your due process antenna should be on alert. Think about what the judge is saying here, and the logical leap he is asking the jury to make. If the gun is stolen, Don stole it. The prosecution is no longer required to carry their burden to prove beyond a reasonable doubt that Don is the one guilty of stealing the gun. He's lost his presumption of innocence, so this instruction is unconstitutional.

Lee Burgess: Finally, and a little more nuanced, the instruction that if the jury found Harriet's testimony to be credible, they could presume someone meant to kidnap her, though they could not presume the attempted kidnapper was Don. This one doesn't directly implicate Don's constitutional rights. The judge is not telling the jury to presume anything against him. But think about the flip side. How does this instruction impact the prosecution and their burden? With this presumption, the prosecution no longer has to prove beyond a reasonable doubt that someone intended to kidnap Harriet. All Harriet said in her testimony was that a mysterious voice called her, talking about ransom. The jury is free to infer from her testimony that the caller meant to kidnap her, but to instruct the jury to presume that is true runs afoul of the Due Process Clause.

Lee Burgess: Alright, that's all we have time for today. Thank you for parsing through some criminal procedure with me, and I hope you feel more confident in your ability to analyze burdens, presumptions, and sufficiency of the evidence. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at [lee@lawschooltoolbox.com](mailto:lee@lawschooltoolbox.com) or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com). Or you can always contact us via our website [contact form](#) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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[California Bar Examination – Essay Questions and Selected Answers, July 2010](#)

[Podcast Episode 248: Listen and Learn – Introduction to Homicide](#)



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