

Affirmative Defences: Where “Never” Breaks Down

- Laudan [?]: “*in the criminal law, ‘never’ almost never really means never*”
- An **affirmative defence**: the defendant concedes the act but argues the law excludes punishment for it. Standard categories include:
 - *Self-defence*; *insanity* or involuntary intoxication; *consent* (e.g. surgery); *law enforcement*; *diplomatic immunity*; expiry of the *statute of limitations*
- In many US state jurisdictions, the defendant must prove the affirmative defence on the **balance of probabilities** (> 50%)
- Some go further: Delaware, Georgia, and Oregon require insanity to be proven **BARD**, a requirement the U.S. Supreme Court has upheld
- So the burden has *shifted to the defendant*, and the standard he must meet often *exceeds* reasonable doubt about his guilt

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Laudan’s Verdict

- Two materially innocent defendants, same crime, same consequences of wrongful conviction, but radically different protections
- What principled difference justifies the discrepant cost-of-error judgements?
- Laudan: there isn’t one. If self-defence really clears Smith of wrongdoing, he is as innocent as Jones, and the cost of wrongful conviction must be the same regardless of *which kind* of innocence is at stake
- Verdict: “**babbling incoherence; even worse, it is unjust**” [?]
- The PI angle makes this sharper: for Jones, the PI does its full work. The prosecution must prove guilt BARD. For Smith, the PI is **effectively suspended**. He must prove his own innocence on PoE

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Jones and Smith: Two Defendants, Two Standards

- Jones and Smith are both on trial for first-degree murder:
 - **Jones** offers an *alibi* (denies the act): needs only to raise a reasonable doubt that he was there
 - **Smith** pleads *self-defence* (concedes the act): must prove on POE that he acted to defend himself
- Two messages from the same system, same crime:
 - Jones’s trial (BARD logic): *far better to acquit the guilty than to convict the innocent*. In trials like this, most innocent defendants are acquitted
 - Smith’s trial (POE logic): *convicting the innocent and acquitting the guilty are equally undesirable*. In trials like this, about half of innocent self-defenders are convicted

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References

- [] Larry Laudan. *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*. Cambridge University Press, Cambridge, 2006. doi: 10.1017/CBO9780511617515.

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